The \textit{sui generis} and intellectual property protection of expressions of folklore in Africa

Enyinna Sodienye Nwauche

22364595

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Promoter: Professor Doctor Andries van der Merwe
(North-West University)

Co-Promoter: Professor Doctor Sunelle Geyer
(University of South Africa)

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Abstract

This thesis articulates an optimum framework for the protection of expressions of folklore in Africa using a number of African countries – South Africa, Kenya, Ghana and Nigeria as case studies. This thesis argues that the existing *sui generis* and intellectual property rights protection in African countries are grossly inadequate in protecting expressions of folklore in these countries.

An optimum framework for the protection of expressions of folklore would constitute a combination of the positive and negative protective model elaborated and implemented through a human and people's rights framework that recognises that communities that produce expressions of folklore should own and control how their intellectual property is protected.

While a positive protective model explores how intellectual property rights such as copyright, trademarks, designs and performances may protect expressions of folklore through the endowment of such rights on communities, negative protective models examine how state and national competent authorities protect expressions of folklore on behalf of communities.

An optimum framework for the protection of expressions of folklore recognises that regional and international perspectives are critical for the protection of folklore in third party countries and expressions of folklore that occur in contiguous countries. A regional perspective is important for Africa countries because of two regional intellectual property organisations in Africa (ARIPO – African Regional Intellectual Property Organisation) and OAPI (African Intellectual Property Organisation) that have established minimum standards for the protection of expressions of folklore. Norm setting and standards in international organisations such as WIPO (World Intellectual Property Organisation); UNESCO (United Nations Educational Cultural and Scientific Organisation); and the WTO
(World Trade Organisation) significantly impact the protection of expressions of folklore in Africa.

A human and peoples' rights framework explores how national and regional legal systems in Africa recognise entitlements of communities in the protection of the expressions of folklore they produce. In this regard, the normative framework of communities in terms of their customary law is also explored.

**Keywords:**

Expressions of folklore; intellectual property rights; communities; *sui generis,* Kenya; Nigeria; Ghana; South Africa; African Regional Intellectual Property Organisation (ARIPO); human rights; peoples' rights; indigenous people; communities; customary law; World Intellectual Property Organisation (WIPO).
**Opsomming**

Hierdie proefskrif bespreek ‘n optimale raamwerk vir die beskerming van uitdrukings van volkskunde in Afrika, met die gebruik van ‘n aantal Afrikalande – Suid-Afrika, Kenia, Ghana en Nigerië as gevalleneudies. Die proefskrif voer aan dat die bestaande sui generis en intellektueelgoedereregtebeskerming in Afrikalande grof onvoldoende is om uitdrukkings van volkskunde in hierdie lande te beskerm.

‘n Optimale raamwerk vir die beskerming van uitdrukkings van volkskunde sal ‘n kombinasie van die positiewe en negatiewe beskermingsmodelle wees, uitgebrei en geïmplementeer deur ‘n mense- en volkeregtelike raamwerk wat reflekteer dat gemeenskappe wat uitdrukkings van volkskunde skep die eienaars van die intellektuele eiendom daarin behoort te wees en die beskerming daarvan behoort te beheer beheer.

Onderwyl ‘n positiewe beskermingsmodel ondersoek hoe intellektueel-goedereregte soos auteurs-, handelsmerk-, model- en uitvoeringsregte as uitdrukkings van volkskunde kan beskerm deur die toestaan van sodanige regte aan gemeenskappe, ondersoek negatiewe beskermingsmodelle hoe staats- en nasionaal bevoegde instansies uitdrukkings van volkskunde namens gemeenskappe beskerm.

‘n Optimale raamwerk vir die beskerming van uitdrukkings van volkskunde erken dat streeks- en internasionale perspektiewe krities is vir die beskerming van volkskunde in derdeparty lande, asook uitdrukkings van volkskunde wat in naburige lande voorkom. ‘n Streekperspektief is belangrik vir Afrikalande weens twee intellektuele eiendom streeksorganisasies in Afrika: ARIP - die Afrika Streeksintelletueelgoedere-organisasie, en OAPI - die Afrika Intellektueelgoedere-organisasie, wat minimum standaarde vir die beskerming van uitdrukkings van volkskunde gestel het. Die daarstelling van norme en standaarde in internasionale organisasies soos WIPO – die Wêreld Intellektueelgoedere-organisasie; UNESCO - Verenigde Nasies Opvoedkundige- Kultuur- en Wetenskapsorganisasie; en die WTO - Wêreldhandelsorganisasie het ‘n beduidende impak op die beskerming van uitdrukkings van volkskunde in Afrika.

‘n Mense- en volkeregtelike raamwerk ondersoek hoe nasionale- en streeksregstelsels in Afrika gemeenskappe se aansprake erken wat betref beskerming van die uitdrukkings van volkskunde wat hulle skep. In hierdie verband word die normatiewe raamwerk van gemeenskappe in terme van hul gewoontereg ook ondersoek.
Sleutelwoorde:
Uitdrukkings van volkskunde; volkskunde; intellektueelgoedere-regte; gemeenskappe; *sui generis*; Kenia; Negerië; Ghana; Suide-Afrika; Afrika Streeksintellektueelgoedere-Organisasie (ARIPO); menseregte; volkereg; inheemse volke; gewoontereg; Wêreld Intellektueelgoedere-organisasie (WIPO).

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Dedicated

to

my wife of inestimable value, Sokeibelemaye

and

my children

Tamunotonte, Chukwuemeka and Chibuikem
The research for this thesis was completed on 30 December 2014. The thesis reflects the legal position at that date.
CHAPTER 1

INTRODUCTION

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CHAPTER 1

INTRODUCTION

1.1 Rationale and background

"Expressions of folklore" is defined in the World Intellectual Property Organisation (WIPO) document *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*¹ (hereafter *WIPO Legal Options*) as follows:

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

- verbal expressions, such as:
  - stories, epics, legends, poetry, riddles and other narratives;
  - words, signs, names, and symbols;
  - musical expressions, such as songs and instrumental music;
  - expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and
- tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:
  (a) the products of creative intellectual activity, including individual and communal creativity;
  (b) characteristic of a community's cultural and social identity and cultural heritage; and
  (c) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

The nature of expressions of folklore as evident in the definition above is central to the difficulty and controversy in designing a suitable regime for their protection. Decades of *sui generis* and intellectual property law protection in African countries does not seem to have protected expressions of folklore effectively. Two seemingly opposing factors impede the formation of an effective protection regime in Africa:

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¹ WIPO/GRTKF/IC/9/4 of 9 January 2006, a 1(i). This document contains a set of policy options and legal mechanisms for the protection of traditional cultural expressions. In this thesis, the term "expressions of folklore" is used interchangeably with "folklore".
the need to harness expressions of folklore in the development and enhancement of national and local cultural industries; and the protection of expressions of folklore from undue misappropriation. While African states have been actively engaged in the *sui generis* protection of expressions of folklore, the same cannot be said of the protection of folklore by intellectual property law. First I review the *sui generis* protection of expressions of folklore. This is followed by an analysis of the protection of expressions of folklore under intellectual property law.

In the early seventies of the previous century the importance of expressions of folklore as the basis of cultural identity and as a source of creativity and wealth-creation became clear to, amongst others, African countries. In addition, the incipient digital revolution which facilitated and enhanced the improper exploitation of expressions of folklore on a massive scale, brought home the reality of the need for some form of protection. The inability of the *Berne Convention for the Protection of Literary and Artistic Works* (1971) to deal effectively with the protection of expressions of folklore, led to further calls in this regard. The protection of expressions of folklore was first discussed in 1967 during the Stockholm Revision Conference of the *Berne Convention*. That conference adopted article 15(4) as a summary of the work of a committee charged with overseeing the possibility of including the protection of folklore in the treaty. Article 15(4) did not mention folklore by name, but required designation by the relevant national authority of the state of which the maker of the work appeared from available evidence to be a national, before protection would be accorded to unpublished works. Further steps were advocated for the development of a protection regime.

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2 Brown *Who owns native culture?* 1; Janke *Minding Culture* 12.
3 See Von Lewinski "Adequate protection of folklore" 207-226.
4 Hereafter *Berne Convention* 828 UNTS 221.
5 A 15(4) of the *Berne Convention* provides as follows: "(a) In the case of unpublished works where the identity of the author is unknown but where there is any ground to presume that he is a national of a country of the Union, it shall be a matter of legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union, (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning authority thus designated. The Director General shall at once communicate this decision to all other countries of the Union."
In 1976 a Committee of Governmental Experts representing WIPO and the United Nations Educational Scientific and Cultural Organisation (UNESCO) adopted the *Tunis Model Law on Copyright for Developing Countries 1976* which dealt with folklore as part of a copyright-protection regime. There is little doubt that the provisions of the *Berne Convention* and the *Tunis Model Law* influenced the earliest legislation enacted by African countries to protect expressions of folklore through copyright legislation. Even at this stage the protection granted to expressions of folklore recognised folklore as part of the cultural heritage of the nation and required authorisation before it could be fixed or performed by foreigners. Because it was not well elaborated, this protection proved inadequate – to say the least. Even though protection was written into the copyright legislation of these African countries, there is no convincing evidence of any serious attempt to use the principles of copyright or intellectual property law protection for the benefit of expressions of folklore. Perhaps this was due to the obstacles to such protection which include the questions of originality, fixation and duration.

Another milestone in the search for a *sui generis* protection regime for folklore occurred in 1985 when UNESCO and WIPO adopted the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Forms of Prejudicial Actions 1985*. This influential document recommends a *sui generis* protection of expressions of folklore and, amongst others, provides for: principles of protection; the scope of subject matter; the manner of obtaining authorisation; the exceptions to and limitations on authorisation; the moral rights attached to copyright; civil and criminal sanctions; the designation of the competent authority to administer copyright; and the protection of expressions of folklore of foreign countries.

The *Model Provisions* have influenced the protection of expressions of folklore in African states in two ways. Many African states have located the protection of

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6 Hereafter the *Tunis Model Law.*
7 Examples include the Kenyan *Copyright Act*, 1975; the Senegalese *Copyright Act 73-52 of 1973*; Burundi's *Copyright Act*, 1978.
9 Hereafter *The Model Provisions.*
expressions of folklore in second-generation African copyright legislation. For example, in Cameroon section 5(1) of the Law on Copyright and Neighbouring Rights 2000 (hereafter Cameroonian Law), states that folklore shall be classed with and protected as national cultural heritage. Section 4(2) of Ghana’s Copyright Act 690 of 2005 (hereafter CA Ghana), provides that rights of folklore are vested in the President for the people of the Republic, while section 17 provides that they exist in perpetuity. Sections 59 to 64 establish a National Folklore Board to administer, monitor, and register expressions of folklore. Section 49(d) of the Kenyan Copyright Act 12 of 2001 (hereafter CA Kenya), authorises the Minister responsible for copyright and neighbouring rights to make regulations prescribing the terms and conditions governing the use of folklore for anyone other than a national public entity and for non-commercial purposes. In Nigeria, section 28 of the Copyright Act C28 of 2004 (hereafter CA Nigeria), vests the regulation of exploitation of expressions of folklore in the Nigerian Copyright Commission. In Malawi, section 24 of the Copyright Act 9 of 1989, vests copyright in expressions of folklore in the government on behalf of and for the benefit of the people of Malawi, while in Mozambique, article 31 of the Law Approving Copyright and Repealing the Code of Copyright 4 of 2001 (hereafter Mozambique Law) provides that ownership of copyright in works of folklore shall vest in the state which shall exercise its rights through the Council of Ministers.

Available evidence points to negligible recourse to the protection offered by the sui generis provisions within the African copyright and neighbouring rights' legislative environment. One reason is that embedding folklore protection within copyright protection ties the success of the former to copyright protection. For example, the designation of the national copyright authority as the competent authority to protect folklore invariably ties the latter to the competence and capacity of that office. The diverse demands for attention placed on under resourced and ineffective national copyright offices by other equally important copyright issues – piracy, for example – leave many of these offices incapable, and often unwilling, to enforce provisions on the protection of folklore. Since the communities are not involved, directly or indirectly, in the protection of their expressions of folklore, the result to date has
been that existing protection of expressions of folklore has been observed mainly in its breach. Yet there are features of the Tunis Model Law that appear to hold the potential to enhance the effectiveness of expressions of folklore.\(^{10}\)

A further reason appears to be the weak articulation of national heritage laws and the protection of expressions of folklore. In this regard, enough attention has not been paid to how South Africa’s numerous pieces of heritage legislation (for example: the National Heritage Council Act 11 of 1999; the National Heritage Resources Act 25 of 1999 (hereafter SA NHRA); the South African Geographical Names Council Act 118 of 1998; and the National Council for Library and Information Services Act 6 of 2001) impact on the protection of expressions of folklore.


The critical engagement of intellectual property law in the protection of expressions of folklore is not a significant feature in many African countries even though there are legislative provisions in this regard. For example, trademark legislation contains provisions on certification marks that may be adapted to protect folklore. Examples can be found in sections 40 and 40A of the Kenyan Trade Marks Act 506 2012 (hereafter TMA Kenya); sections 42 and 43 of the South African Trade Marks Act 194 of 1993 (hereafter SA TMA) as amended by the Intellectual Property Laws Amendment Act 28 of 2013 (hereafter IPLAA 2013); section 36 of the Ghana Trade Marks Act 664 of 2004 (hereafter Ghana TMA); and section 43 of the Nigerian

\(^{10}\) See Nwauche 2005 SCRIPT-ed 263.
Another example is the recognition of traditional words and signs in the public domain that can lead to a denial or cancellation of trade mark registration. Even in design law, the possibility exists that in the definition of prior publication, traditional designs can be relied on to assess compliance with this registration requirement. In this regard examples include sections 84 and 86 of the Kenyan *Industrial Property Act* 3 of 2001 (hereafter *Kenya IPA*); section 14 of the South African *Designs Act* 195 of 1993 (hereafter *SADA*); section 2(2)d of the *Textile Designs (Registration) Act*, 1973, of Ghana; and section 13(2) of the Nigerian *Patent and Designs Act* P2 of 2004 (hereafter *NPDA*). Yet another example is the protection offered to public performances of expressions of folklore as neighbouring rights. Again there are examples in section 4(1) of *CA Ghana*, and the South African *Performance Protection Act* 11 of 1967 (hereafter *SA PPA*), which define "literary and artistic works" to include expressions of folklore.\(^{11}\)

In addition, African states can adapt intellectual property rights or develop new intellectual property rights to enhance protection of expressions of folklore. The effectiveness of intellectual property protection is influenced by how national judiciaries interpret intellectual property rights legislation, the level of awareness of the possibilities presented by intellectual property, the ability of folklore-bearing communities easily to approach the courts, and the inherent contestations of the scope of the available rights.\(^{12}\) In most cases there is a need for substantial amendment of the enabling legislation and common-law principles to tailor these rights to protect expressions of folklore effectively. How this can be done presents a creative challenge which is to some extent already being explored in South Africa through *IPLAA 2013*. In other African countries where no such amendment is ongoing, a wide range of intellectual property and related rights exist which may be used in this regard. How this can be achieved presents an interesting challenge.

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\(^{11}\) See in this regard Visser 2002 *SA Merc LJ* 656; Visser 2002 *Fordham Intell Prop Media & Ent LJ* 753-803.

\(^{12}\) Ametagatcher 2002 *Copyright Bulletin* 33.
It appears that another reason why both the existing *sui generis* protection and protection through intellectual property law are ineffective in Africa, is the inappropriate recognition of customary norms for the protection of expressions of folklore. The agency of customary law underscores the customary and traditional context of the creation of expressions of folklore. Unfortunately, the nature and content of customary law is often steeped in controversy. Furthermore, the importance of customary law must be understood within and defined by the right to culture and other human rights.

Such human rights affirm that as a creator, a community is entitled to the protection offered by the rights to property and culture in conjunction with other rights such as the right to privacy, the right to dignity, and the right to equality available in national constitutions such as the *Constitution of the Republic of South Africa, 1996*, (hereafter the *South African Constitution*) and the *African Charter on Human and Peoples’ Rights*, 1986 (hereafter the *African Charter*).13

A human rights protection paradigm can either stand alone or be part of the protection offered under *sui generis* protection or by intellectual property law protection. Serious thought ought to go into elaborating a human rights regime for expressions of folklore for the additional reason that the development of customary international law for the protection of indigenous peoples is taking on concrete form through the adoption of the *United Nations Declaration of the Rights of Indigenous Peoples, 2007* (hereafter *DRIP*).14 In this regard it is significant to note that while there may be ethnic groups that qualify as indigenous peoples in Africa, many other African communities who do not so qualify also deserve protection of their expressions of folklore.15 The protection of expressions of folklore has a significant regional and continental dimension in Africa. First, Africa’s artificial national boundaries – the product of colonial expediency – find ethnic communities straddling two or more countries. A good example is the *San* Community found in Botswana, Namibia and South Africa; the *Yoruba* found in Benin, Togo and Nigeria; and the

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13 1982 (21) *ILM* 580.
Fulani found in Nigeria, Niger, Benin, Togo and Ghana. If effective protection of expressions of folklore recognises communities as worthy beneficiaries, there must be an understanding of how a national legal system will recognise and protect folklore of foreign kith and kin in order to maintain the cultural integrity of the expressions of folklore. In this context the involvement of continental and regional economic communities such as the African Economic Community (AEC), the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), and the East African Economic Community (EAC) in the protection of culture should bring home the reality that free movement of cultural goods within these communities requires, at very least, regional understandings in an area where protection rests essentially on exclusivity, protectionism, and national measures.


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16 OAPI was established on 13 September 1962 pursuant to the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property in Libreville. This Agreement was revised in Bangui in 1977 by the Agreement Relating to the Creation of an African Intellectual Property Organisation and came into effect on 8 February 1982. Negotiations to revise the Bangui Agreement started in 1994 and culminated in the Agreement Revising the Bangui Agreement of March 2 1977 on the Creation of an African Intellectual Property Organisation 1999 (hereafter Revised Bangui Agreement) which came into force on 28 February 2002. OAPI is made up of the following countries: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Cote d' Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal and Togo.

17 The organisation was known as ESARIP at inception. In 1985 the name of the organisation was changed to African Regional Industrial Property Organisation (ARIPO). In 2002, the mandate of the organisation was changed to include copyright so necessitating the change of name. The organisation is made up of the following countries: Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, Tanzania, Zambia and Zimbabwe. These countries are hereafter referred to as the ARIPO countries and their relationship is governed by the Agreement for the Creation of the African Regional Intellectual Property Organisation 1976 (hereafter Lusaka Agreement). In addition, some of the mandate of the organisation is
These organisations are also competent to deal with issues of copyright and expressions of folklore in member states. In particular, ARIPO recently adopted the *Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions*, 2010. Through their normative frameworks, both organisations illustrate one way in which a continental and regional understanding of the protection of expressions of folklore has emerged.

At the international level it must be remembered that because most African states are members of the WTO 1994, they are committed to national treatment standards and the removal of tariff and non-tariff measures which inhibit the free flow of cultural goods which are often based on expressions of folklore. To what extent, it may be asked, can African countries justify the protection of folklore within their respective territories when such legislation may be based on protectionist measures? In this regard the UNESCO *Convention for the Protection and Promotion of Cultural Diversity* 2007 (hereafter *CCD*) which recommends measures of national protection must be examined to understand how African countries can benefit from its provisions in the protection of their expressions of folklore. It should also be considered how this affects the obligations they have undertaken within the multilateral regime of the WTO. How the UNESCO and the WTO instruments will relate to the proposed WIPO *Treaty on an Enhanced Protection of Expressions of

Hereafter the *Swakopmund Protocol*. On 9 August 2010, ARIPO and its member states held a Diplomatic Conference at the coastal town of Swakopmund in Namibia for the adoption of the *Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*. The Protocol was adopted by the member states and signed by nine (9) states which presented their credentials at the Conference. The nine (9) member states are: Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia and Zimbabwe. The Protocol is known as the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*. The Protocol will enter into force when six (6) member states of the Organisation either deposit instruments of ratification or instruments of accession. The nine (9) states that signed the Protocol will be required to deposit instruments of ratification, whilst those that did not sign will have to deposit instruments of accession. Accession to the Protocol by such states shall entail acceptance of the agreement on the creation of the African Regional Intellectual Property Organisation. Other than the member states, the Protocol is open to any state that is a member of the African Union or United Nations Economic Commission for Africa.

The WTO is established by the *Agreement Establishing the World Trade Organisation* 1994 (33) *ILM* 1144.

2440 UNTS 311.
Folklore, is a further challenge worth examining. The international protection of expressions of folklore is important for the minimum standards of protection that would be available in foreign states signatory to documents embodying such protection. Nationals of foreign states would otherwise be able to expropriate and use expressions of folklore without permission.

1.2 Problem statement

The problem which this thesis addresses is the inability of African countries to effectively protect their expressions of folklore.

1.3 Central research question

How can existing and proposed protection regimes in selected African countries be used to develop an optimal framework for the protection of expressions of folklore?

1.3.1 Aims of thesis

The aims of the thesis are to:

(a) Critically define the nature and extent of expressions of folklore.

(b) Identify, by means of an overview, the different models for the protection of expressions of folklore.

(c) Identify the key issues and challenges facing the protection of expressions of folklore in the African context and which underpin any protective framework of these expressions.

(d) Critically identify and examine the role of communities in the protection of expressions of folklore in Nigeria, Ghana, Kenya and South Africa.

(e) Critically examine the role of African states and competent national authorities in the protection of expressions of folklore through intellectual property rights.
(f) Evaluate models of regional and international expressions, agreements and understandings for the protection of expressions of folklore and how they affect African countries.

(g) Examine the impact of human and peoples’ rights in the protection of expressions of folklore.

(h) Suggest and develop an optimum framework for the protection of expressions of folklore in Africa.

1.4 **Point of departure, assumptions and hypothesis**

1.4.1 **Point of departure**

African countries protect expressions of folklore inadequately by *sui generis* and intellectual property laws.

1.4.2 **Assumptions**

1.4.2.1 The nature of expressions of folklore demand a balance between the need to harness expressions of folklore in the development and enhancement of national cultural industries on the one hand, and the protection of expressions of folklore from undue misappropriation, on the other.

1.4.2.2 The importance of preserving expressions of folklore as the basis of cultural identity and as a source of creativity and wealth creation, is obvious to African countries, and this has been exacerbated by the digital revolution.

1.4.2.3 The *Berne Convention* has failed in dealing effectively with the protection of expressions of folklore.
1.4.2.4 Early African copyright legislation designed to protect expressions of folklore was based on the *Tunis Model Law* and has largely proved inadequate.

1.4.2.5 Many African countries have adopted copyright legislation based on the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* that offers *sui generis* protection for expressions of folklore.

1.4.2.6 There is no significant evidence of success in the critical engagement of intellectual property law in the protection of expressions of folklore.

1.4.2.7 Available evidence points to negligible recourse to the protection offered by the *sui generis* provisions by the African copyright and neighbouring rights legislation environment due to infrastructural problems, weak articulation of the impact of national heritage laws on the protection of expressions of folklore, and the absence of complementary non-proprietary approaches.

1.4.2.8 The possibility of using intellectual property law to protect expressions of folklore is promising but demands substantial amendment of intellectual property legislation. This is currently being explored by a number of African countries.

1.4.2.9 The inappropriate recognition of African customary norms for the protection of expressions of folklore is partially responsible for the inadequate protection of expressions of folklore.

1.4.2.10 As creators of expressions of folklore, communities are entitled to the protection offered by human rights such as the right to property and the right to culture, in conjunction with other rights such as the rights to privacy, dignity and equality.
1.4.2.11 The protection of expressions of folklore has a significant regional and continental dimension in Africa.

1.4.2.12 Regional economic groupings in Africa (ECOWAS, SADC, EAC, COMESA) need to respond to the challenges of folklore-bearing communities found in two or more countries within the groupings.

1.4.2.13 The nature of the response of African regional intellectual property organisations (ARIPO and OAPI) to their mandate for the protection of expressions of folklore must be critically examined.

1.4.2.14 African countries need to align their protection of folklore within the context of the existing international framework (the WTO and UNESCO’s CCD, as well as the proposed WIPO Treaty on Enhanced Protection of Expressions of Folklore).

1.4.3 Theoretical framework

The theoretical framework that guides this thesis is constituted by two models for the protection of expressions of folklore. The first is the positive model for protection of expressions of folklore through the recognition of and endowment of rights on communities to protect their expressions of folklore. The other model is the negative protection of expressions of folklore which recognises the capacity of communities to prevent the misappropriation of their expressions of folklore by preventing acquisition of rights over their expressions of folklore without their permission.

1.4.4 Hypothesis

The optimal framework for the protection of expressions of folklore in African countries is a protective system that combines a negative and positive protection model which is mediated and clarified within a human rights framework, other non-proprietary perspectives, and an international dimension that recognises and affirms group entitlement to communal intellectual creations and ensures that knowledge
and information contained in expressions of folklore are available to the creative enterprise.

1.5 **Research methodology**

The thesis comprises an analytical and literature review of international conventions and agreements, as well as the jurisprudence of the selected African countries including relevant statutes, cases, textbooks, journal articles and electronic material. The choice of desk research and qualitative analysis is based on the fact that it facilitates the aim of the thesis which is an articulation of an optimal framework from existing and proposed regimes of protection which are already known. A quantitative research methodology is inappropriate for this thesis since new data would not be of any use in achieving its objective.

It is important to circumscribe the geographical scope of the proposed research as it is neither practicable nor necessary to examine all African countries. Africa is differentiated by multiple pluralities. An obvious one is language in that, in addition to the numerous indigenous languages differentiating many ethnic communities, English, French and Portuguese are spoken in different African countries. Another is the legal system. In line with Africa’s colonial heritage the continent is also made up of states that have either a common-law or a civil-law system. To reflect Africa’s peculiarities I have selected the following countries: Nigeria, Ghana, South Africa, and Kenya. Use is therefore made of the legal comparative method. In this regard, while Nigeria, Ghana and Kenya follow a common-law tradition, South Africa operates under a mixed legal system of Roman-Dutch law and common law. All four countries have common features in that they recognise customary law and operate within a constitutional framework with a bill of rights.

1.6 **Outline of thesis**

Chapter 1 of the thesis is an introduction which sets the context for the rest of the thesis by sketching a background embodying a central research question; the
objectives of the thesis; the research methodology used; and an outline of the thesis.

Chapter 2 focuses on different models and mechanisms for the protection of expressions of folklore, concentrating principally on the difference between the negative and the positive protection of expressions of folklore. Each protection mechanism is addressed by setting out the advantages, the shortcomings, and examples inherent to the specific system.

Chapter 3 examines the protection of expressions of folklore in Africa through the paradigm of the positive and negative protection of expressions of folklore. In addition, the key issues and challenges facing the protection of expressions of folklore in Africa are explored, and selected expressions of folklore – such as indigenous textiles, Rooibos tea, and traditional literary dramatic and musical works as the basis of the African film industry – are examined in detail.

Chapter 4 examines the negative (sui generis) protection of expressions of folklore critically through a consideration of existing protection of these expressions in extant copyright and neighbouring rights legislation in Nigeria, Ghana, Kenya and South Africa.

In Chapter 5 the positive protection of expressions of folklore through a critical examination of how intellectual property rights can be used in their protection is undertaken. In this regard significant sections of Chapter 5 are devoted to an examination of the effect of South Africa's IPLAA 2013, which protects traditional works, terms, expressions, designs, and performances through extant intellectual property legislation.

Chapter 6 considers regional protection and international perspectives on the protection of expressions of folklore in Africa in response to the spatial occurrence of expressions of folklore in contiguous states, and the importance of minimum standards for the protection of expressions of folklore in many states to ensure that no state is a haven for the misappropriation of expressions of folklore.
Chapter 7 examines how a human rights protective model can assist in the protection of expressions of folklore; while in Chapter 8 communal rights in their protection is examined. Here I specifically explore the plausibility of a peoples' right in the protection of expressions of folklore.

Chapter 9 articulates a plausible framework for the protection of expressions of folklore.

Chapter 10 concludes the thesis by examining the hypothesis and suggesting the way forward in the light of the extent to which the countries considered in this thesis have implemented the optimum framework.
CHAPTER 2

AN OVERVIEW OF THE PROTECTION OF EXPRESSIONS OF FOLKLORE

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CHAPTER 2

AN OVERVIEW OF THE PROTECTION OF EXPRESSIONS OF FOLKLORE

2.1 Introduction

This chapter provides an overview of the protection of expressions of folklore by examining the different protection models. This is preceded by a consideration of different definitions of expressions of folklore as well as the difference between folklore and traditional knowledge. This chapter is structured as a foundation for the rest of the thesis by engaging in a broad overview of different models for the protection of expressions of folklore.

2.2 Definition of expressions of folklore

Although the subject matter of this thesis has been variously termed "traditional cultural expressions" and "intangible cultural heritage", amongst other terms, I have elected to use the term "expressions of folklore" or simply "folklore". But what does folklore mean? Let us now consider selected national and international definitions.

To begin with, the definition preferred by UNESCO, and used in the *Tunis Model Law* and the *Model Provisions* is fitting as these two definitions strongly influence the

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21 This is the phrase used by the World Intellectual Property Organisation (WIPO). See, for example, "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles" WIPO/GRTKF/IC/12/4(c). (Accessed 6 December 2007.)

22 This is a term favoured by UNESCO. See for example the 2003 UNESCO *Convention on the Safeguarding of Intangible Cultural Heritage* 2003 (hereafter *CCH*) 2368 UNTS 3, which defines intangible cultural heritage in article 2(1) as the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities groups and in some case, individuals recognise as part of their cultural heritage. This intangible cultural heritage transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature, and their history and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. Specific examples of intangible cultural heritage are given in article 2(2) as manifesting in the following domains: (a) oral traditions and expressions including language as a vehicle of intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; and (e) traditional craftsmanship.

23 See a 15(4) of the *Berne Convention* and the *Tunis Model Law*. 
definition of expressions of folklore in the countries under examination. The *Model Provisions* are essentially a *sui generis* system of protection which has strongly influenced legislation protecting expressions of folklore in developing countries. It is regarded as *sui generis* because it is a model of protection envisaged outside of the normal intellectual property rights protection found, for example, in copyright legislation.24

Section 2 of the *Model Provisions* defines expressions of folklore as

...productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community, in particular: (i) verbal expressions, such as folk tales, folk poetry and riddles; (ii) musical expressions, such as folk songs and instrumental music; (iii) expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and (iv) tangible expressions, such as: (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodworking, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; (b) musical instruments; (c) architectural forms.

Section 76 of *CA Ghana* defines an expression of folklore as

... the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes Kente and Adinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore.25

This definition is similar to the definition of expressions of folklore in the earlier 1985 *TA Ghana* save that it specifically mentions two types of Ghanaian traditional textile design – the *Kente* and *Adinkra*.26

Section 28(5) of *CA Nigeria* defines folklore as:

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24 See, for example, *CA Nigeria* and *CA Kenya*.
25 Hereafter Ghanaian definition.
26 The equivalent in the repealed *Copyright Act* 110 of 1985 (hereafter *1985 CA Ghana*), defines folklore as: "[A]ll literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore."
A group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means including folklore, folk poetry and folk riddles; Folk songs and instrumental folk music; folklore dances and folk plays; production of folk arts in particular, drawings, paintings, carving, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewelry, handicrafts, costumes, and indigenous textiles. 

Section 2 of CA Kenya, defines folklore as:

'Folklore' means a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya and includes (a) folktales, folk poetry and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; and (d) the production of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metalware, jewellery, handicrafts, costumes and indigenous textiles.

A brief comparison of the Ghanaian, Nigerian and Kenyan definitions reveals that, first, even though the three definitions are heavily influenced by the Model Provisions there are differences. For example, the Ghanaian definition explicitly refers to "ethnic communities" which suggests that these are communities organised around consanguinity. While there is some reference to a "group" in the Nigerian definition, there is no definition of this term. There is little reference to the group in the Kenyan definition. Secondly, only the Ghanaian definition contains a reference to a "scientific expression". The Kenyan and Nigerian definitions are clearly within the realm of literary, artistic, dramatic or musical expressions. Thirdly, the Ghanaian definition does not contain a list of expressions of folklore save for a reference to Kente and Adinkra. All the other definitions adopt the examples put forward in paragraph 2 of the Model Provisions. Fourthly, there is no mention of "architectural forms" in the Kenyan, Ghanaian or Nigerian definitions suggesting that architectural forms may not qualify as an expressions of folklore.

Since the definition of expressions of folklore has been heavily influenced by the Model Provisions, it may be of some assistance to understand the rationale for the definition of expressions of folklore this Model Law. A commentary is attached to the Model Provisions which is helpful in this regard. It would appear that the

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27 Hereafter Nigerian definition.
28 Hereafter Kenyan definition.
definition of expressions of folklore turns on four phrases: "traditional artistic heritage"; "characteristic elements"; "community and individuals"; and "reflecting the traditional artistic expectations of such a community". The commentary to the *Model Provisions* explains the rationale for the use of these terms.

According to the commentary, "traditional artistic heritage" is part of the national cultural heritage and is to be distinguished from other forms of heritage such as traditional beliefs, scientific views, substance of legends, or mere practical traditions which are also part of the cultural heritage. Furthermore, the artistic heritage of communities is a more restricted body of traditional values than the entire traditional artistic heritage of the nation. The *Model Provisions* conceive of artistic heritage as any "traditional heritage appealing to the aesthetic sense of man".

With respect to the fact that a community or group is implicit in the notion of "expression of folklore", the commentary to the *Model Provisions* states that:

> The notion of expressions of folklore of a community covers both the expressions originating in the community concerned and those originating elsewhere but having been adopted further developed or maintained through generations by that community. It is irrelevant whether an actual expression, consisting of characteristic elements of the traditional artistic heritage, has been developed by the collective creativity of a community or by an individual reflecting the traditional artistic expectations of the community.

It is noteworthy that the commentary does not refer to an individual who has real, implied, or apparent authority of the community to produce the expressions of folklore. Thus an outsider who produces the expressions of folklore that reflects the traditional artistic expectations of the community could be taken to have produced an expressions of folklore for that community.

The phrase "characteristic elements" of traditional artistic heritage is stated by the commentary to mean "in a given context that the element must be generally

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29 See para 34 of *The Model Provisions*.
30 See para 33 of *The Model Provisions*.
31 See para 34 of *The Model Provisions*.
recognized as representing a distinct traditional heritage of a community". The use of the term "generally recognised" as the standard of authenticity appears to be a compromise in that some members of the Working Group which produced the commentary, preferred the consensus of the community as the standard to be used in determining the authenticity of expressions of folklore. The commentary points out that consensus would require "further provisions on how such a consensus would have to be verified and at what point it should exist". "Characteristic elements" according to the commentary, implies the requirement of authenticity and "consensus" even if consensus is to be assumed. It would appear that the commentary does not adequately address how the expressions of folklore of a community can be identified. There, however, appears to be a hint that the process of identification should rely on widespread acceptance by the community rather than on the process of authentication by the community concerned.

Even though no existing legislation expressly defines expressions of folklore in South Africa, an indication of what may be considered to be expressions of folklore can be found in the SA NHRA, which in section 2(2) defines "living heritage" as

...the intangible aspects of inherited culture, and may include—(a) cultural tradition; (b) oral history; (c) performance; (d) ritual; (e) popular memory; (f) skills and techniques; (g) indigenous knowledge systems; and (h) the holistic approach to nature, society and social relationships.

It appears from this definition that expressions of folklore as understood in Ghana, Kenya and Nigeria do not differ significantly from the South African definition. The definition in the SA NHRA clearly considers expressions of folklore as part of South Africa’s cultural heritage. This is reinforced by the provisions of section 3 of the Act.

33 See para 36 of The Model Provisions.
34 See para 36 of The Model Provisions.
36 (1) For the purposes of this Act, those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities. (2) Without limiting the generality of subsection (1), the national estate may include — (a) places, buildings, structures and equipment of cultural significance; (b) places to which oral traditions are attached or which are associated with living heritage; (c) historical settlements and townscapes; (d) landscapes and natural features of cultural
Our attention now turns to international definitions of expressions of folklore. The *Swakopmund Protocol* to which Ghana and Kenya are state parties, defines expressions of folklore as

... any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: i. verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols; ii. musical expressions, such as but not limited to songs and instrumental music; iii. expressions by movement, such as but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form; and iv. tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms.

The definition in the *Swakopmund Protocol* appears to have been significantly influenced by the WIPO *Legal Options*, which defines expressions of folklore as follows:

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significance; (e) geological sites of scientific or cultural importance; (f) archaeological sites; (g) graves and burial grounds, including—(i) ancestral graves; (ii) royal graves and graves of traditional leaders; (iii) graves of victims of conflict; (iv) graves of individuals designated by the Minister by notice in the Gazette; (v) historical graves and cemeteries; and (vi) other human remains which are not covered in terms of the *Human Tissue Act, 1983* (Act No. 65 of 1983); (h) sites of significance relating to the history of slavery in South Africa; (i) movable objects, including—(i) objects recovered from the soil or waters of South Africa, including archaeological and palaeontological objects and material, meteorites and rare geological specimens; (ii) objects to which oral traditions are attached or which are associated with living heritage; (iii) ethnographic art and objects; (iv) military objects; (v) objects of decorative or fine art; (vi) objects of scientific or technological interest; and (vii) books, records, documents, photographic positives and negatives, graphic, film or video material or sound recordings, excluding those that are public records as defined in section 1(xiv) of the National Archives of South Africa Act, 1996 (Act No 43 of 1996). (3) Without limiting the generality of subsections (1) and (2), a place or object is to be considered part of the national estate if it has cultural significance or other special value because of—(a) its importance in the community, or pattern of South Africa’s history; (b) its possession of uncommon, rare or endangered aspects of South Africa’s natural or cultural heritage; (c) its potential to yield information that will contribute to an understanding of South Africa’s natural or cultural heritage; (d) its importance in demonstrating the principal characteristics of a particular class of South Africa’s natural or cultural places or objects; (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group; (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period; (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons; (h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and (i) sites of significance relating to the history of slavery in South Africa.

See WIPO *Legal Options*.
Traditional cultural expressions or expressions of folklore are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols; (ii) musical expressions, such as songs and instrumental music; (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and, (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments, and architectural forms, which are: (a) the products of creative intellectual activity, including individual and communal creativity; (b) characteristic of a community's cultural and social identity and cultural heritage; and (c) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

The influence of the WIPO Policy Options on the Swakopmund Protocol appears to revolve around the enumeration of the different forms of expressions of folklore. However, a key part of the WIPO Policy Options is absent in the Swakopmund Protocol, and this is the manner in which the former emphasises the importance of the community in creating, maintaining, using, or developing expressions of folklore as part of its social and cultural identity, as well as the fact that the creative activity must be that of the community or its representative. While the lack of reference to communities in the Swakopmund Protocol is readily discernible, whether this was deliberate is an issue which will become clear in due course.

It is important to note that the Swakopmund Protocol differs in some ways from the Ghanaian and Kenyan definitions. First, while the former admits of "architectural forms", this does not appear in the latter even though as we noted "architectural forms" may well qualify as "scientific expression" as used in the Ghanaian definition. Secondly, the phrase "traditional culture and knowledge" in the Swakopmund Protocol does not appear in the Kenyan and Ghanaian definitions.

In sum, it should not be surprising that there is no standard definition. It can be contended, however, that there are certain commonalities in the definitions considered above, for example, that a fitting definition of an expression of folklore is
that it must refer to the artistic, literary, musical, and sacred manifestations of communal culture.

2.3 Expressions of folklore and traditional knowledge

In what follows I evaluate the difference between "traditional knowledge" and "expressions of folklore". The distinction between the two terms appears to be taken as a given. This relates directly to the fact that folklore is regarded as representative of the arts and so is usually seen to differ from traditional knowledge which is regarded as pertaining to the sciences. It is generally accepted that while traditional knowledge concerns technical and scientific knowledge held by communities, "folklore", as stated, refers to the arts. This distinction is confirmed by a number of statutory definitions of traditional knowledge. For example, article 2(1) of the Swakopmund Protocol defines traditional knowledge as follows:

... 'traditional knowledge' shall refer to any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.

An example of the technical conception of traditional knowledge is evident in South Africa where the National Environmental Management: Bio-Diversity Management Act 10 of 2004, is, inter alia in Chapter 6, aimed at regulating bio-prospecting involving indigenous biological resources.  

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38 WIPO defines traditional knowledge thus: "Intellectual activity in a traditional context and includes knowhow, skills, innovations, practices and learning that form part of the traditional knowledge systems and knowledge embodying traditional lifestyles of indigenous and local communities or contained in codified knowledge systems passed between generations as continuously developed following any changes in the environment geographical conditions and other factors. It is not limited to any specific technical field and may include agricultural, environmental and medicinal knowledge and any traditional knowledge associated with cultural expressions and genetic resources". See "The Protection of Traditional Knowledge: Revised Objectives and Principles" WIPO/GRTKF/IC/18/5 (10 January 2011). See also Drahos and Frankel Indigenous peoples’ innovation 1-13; Gibson 2004 EIPR 280.


40 Section 80(2) of that Act defines indigenous biological resources as including: (i) any resource consisting of living or dead animal, plant or other organism; or any genetic material of such
It is also important to bear in mind that the communities who create "traditional knowledge" and "expressions of folklore" may not be aware of the doctrinal difference between the two terms.\textsuperscript{41} This should not be surprising since it would appear self-evident that the two terms are related in substantive and procedural terms.\textsuperscript{42} For example, the same persons in a community may be responsible for both what we term "expressions of folklore" and "traditional knowledge". Furthermore, it is also a fact that the oral tradition encompassing and transmitting traditional scientific knowledge is an expression of folklore. For example, section 30(A) of the South African \textit{Patents Act} requires that every applicant who lodges an application for a patent accompanied by a complete specification shall, before acceptance of the application, lodge with the Registrar a statement in the prescribed manner stating whether or not the invention for which protection is sought is based on or derived from an indigenous biological resource, genetic resource, or traditional knowledge or use. It is likely that the relevant knowledge will be transmitted through generations by oral tradition which would qualify as expressions of folklore.

The related nature of "expressions of folklore" and "traditional knowledge" has been captured in certain legislative frameworks. For example, article 68 of the Revised \textit{Bangui Agreement} defines expressions of folklore in a way that contemplates both "expressions of folklore" and "traditional knowledge".\textsuperscript{43}

\textsuperscript{41} See Posey "Can cultural rights protect traditional cultural knowledge and biodiversity?" 43.
\textsuperscript{42} See O'Faircheallaigh 2008 \textit{Dev & Change} 25, 27.
\textsuperscript{43} (1) Folklore means the literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation. (2) The following, in particular, shall be included in that definition: (a) literary works of all kinds, whether in oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles; (b) artistic styles and productions: (i) dances, (ii) musical productions of all kinds, (iii) dramatic, dramatico-musical, choreographic and pantomime productions, (iv) styles and productions of fine art and decorative art by any process, (v) architectural styles; (c) religious traditions and celebrations: (i) rites and rituals, (ii) objects, vestments and places of worship, (iii) initiations; (d) educational traditions: (i) sports, games, (ii) codes of manners and social conventions; (e) scientific knowledge and works: (i) practices and products of medicine and of the pharmacopoeia, (ii) theoretical and practical attainments in the fields of natural science, physics, mathematics and astronomy; (f) technical knowledge and
Of the four countries under consideration, South Africa appears to regard expressions of folklore and traditional knowledge as part of a single system of knowledge in its policy orientation.\textsuperscript{44} This has been described as an "indigenous knowledge system" and has been defined by Mukuka as:

\begin{quote}
    a collection of societal systems represented by the totality of products, skills, technologies, processes and systems developed and adapted by cohesive traditional communities, and produced applied practiced and preserved over generations to ensure their long-term persistence, sanctity and progress within their natural social and economic environments.\textsuperscript{45}
\end{quote}

A different perspective of the differentiation between folklore and traditional knowledge, is that different regimes have been designed for their protection. This development essentially follows the parallel development of copyright, on the one hand, and patents, on the other. Even though expressions of folklore also implicate other intellectual property rights such as trademarks and designs, there is little doubt that expressions of folklore are closely related to content that can be the object of copyright protection.

From a practical point of view, the distinction between "expressions of folklore" and "traditional knowledge" is not of great significance because it is not only the intrinsic quality of either of these subject matters that affects the manner in which they are sought to be protected. Indeed, they face similar challenges of an appropriate protective framework. The choice is often between the use of intellectual property laws or a \textit{sui generis} model of protection, and whether and how to permit the communities which created either of these knowledge systems, to be involved in their control and management. In fact, the separate development of the protective framework of these knowledge systems has influenced each system as lessons are learned from the experience of protecting each knowledge system. It is important to note that in its work, the WIPO has adopted separate tracks for protecting traditional knowledge expressions of folklore and genetic resources.

\begin{footnotes}
\item[45] See Mukuka \textit{Indigenous knowledge systems} 17.
\end{footnotes}
In this thesis I follow the separate treatment development and protection of expressions of folklore and traditional knowledge as this allows for a conceptually clearer evaluation and articulation of an effective protection of expressions of folklore.

2.4 Different models for the protection of expressions of folklore

It is generally agreed that there are two broad approaches to the protection of expressions of folklore: positive protection and negative protection. By positive protection is meant all types of protection by which rights are granted to communities who produce an "expression of folklore" to allow them exclusively to protect their folklore. Negative protection, on the other hand, refers to protection models by which communities are able to prevent third parties from acquiring rights over their expressions of folklore without their permission, usually through the instrumentality of governments and national institutions. It is important to bear in mind that this distinction is not watertight and as the discussion below will reveal, many countries and regions adopt a mix of these forms of protection.

2.4.1 Positive protection

As stated above, the essence of positive protection lies in the fact that communities become the primary and exclusive agents for the protection of their expressions of folklore through an endowment of rights that empower them in this regard. The endowment of the rights can take place through the enactment of legislation conferring this right or declaring the communities bearers of the right. Accordingly, a property model which grants communities exclusive rights would qualify under this approach for protection, as would equitable rights to remuneration which enable communities to extract compensation from third parties who use their expressions of folklore. The recognition that communities are entitled to group human rights

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46 See WIPO "Overview of Activities and Outcomes of the Intergovernmental Committee" WIPO/GRTKF/IC/5/12 (2 April 2003).
47 See Carpenter, Katyal and Riley 2009 Yale Law Journal 1022. See also Cross 2010 PELJ 12-47.
would also fall into this class of protection. A more detailed consideration of the positive protection of expressions of folklore follows.

2.4.1.1 Use of a property model: The protection of expressions of folklore by intellectual property rights

If intellectual property rights are a means of maximising economic benefits from individual creative outputs, it should not be surprising that communities and their governments find the idea that they can use expressions of folklore occurring in their communities as a means of developing local products and entrepreneurship, creating jobs, and generally enhancing economic development through poverty alleviation, very seductive. Many states have gone down this path and currently protect expressions of folklore through intellectual property law. What has become evident from the way in which these states have extended intellectual property rights protection to expressions of folklore, is that they have proceeded by changing the general principles of intellectual property rights protection. This is a point that is fully explored in the rest of this thesis.

The protection of expressions of folklore by intellectual property law has always been significantly attractive given the fact that intellectual property rights and expressions of folklore cover the same subject matter even though in different contexts. For example, the definition of "intellectual property rights" of the Convention Establishing the World Intellectual Property Organisation, 1967 reflects this similarity when it defines intellectual property rights as

literary, artistic and scientific works; performance by performing artists, phonograms and broadcasts; inventions in all fields of endeavour; scientific discoveries; industrial designs; trademarks service marks, and commercial names and designations, protection against unfair competition and all other rights resulting from intellectual activity in the industrial scientific literary or artistic fields.

It is clear from this definition and from preceding discussion, that expressions of folklore are similar to many intellectual property rights. Any proposal to protect

expressions of folklore by intellectual property rights would involve considerable amendments to any enabling legislation governing the intellectual property rights. The reason is that generally intellectual property rights have been significantly nurtured with no thought for the protection of traditional knowledge in general and expressions of folklore in particular. This assertion will become evident in due course. That said, it will also become clear that the ability of intellectual property rights to be adapted to the protection of expressions of folklore differs. For example, while the protection of expressions of folklore by geographical indications may be easier to achieve than the protection of traditional literary, dramatic and artistic works by copyright.

What follows is a further detailed examination of the intellectual property rights which have been used in certain national and regional jurisdictions to protect expressions of folklore.

2.4.1.1.1 Conventional intellectual property rights

(a) Copyright and neighbouring rights

Copyright protection is granted by national legislation in the nature of a number of exclusive rights such as reproduction, translation, transmission, and communication with regard to literary, dramatic, artistic musical works. Copyright endows the owner with these exclusive rights to control access to the work. Copyright protection is also available for a number of media by which the works mentioned above are preserved such as sound recordings, cinematograph films, television, and sound broadcasts. These rights are known as neighbouring rights, and include protection offered to performers of appropriate works and generally recognise investment in the media.

One of the first indications of the possibility of protecting expressions of folklore through intellectual property rights was articulated in article 15(4) of the Berne Convention. However, many developing countries for whose benefit article 15(4) was adopted, have not used the provision because of the difficulties in its
implementation.\textsuperscript{50} These difficulties include the manner in which the competent national authority is to discharge this function, as well as the requirement of national legislation setting out the modalities for the discharge of the responsibilities of the competent national authority. It should be noted that the envisaged protection did not specifically authorise protection by copyright even if this would appear feasible.

A number of international treaties together make up a legislative framework for the protection of neighbouring rights. These include the \textit{International Convention on the Protection of Performers, Producers of Phonogram and Broadcasters, 1961},\textsuperscript{51} (hereafter Rome Convention); the WIPO \textit{Performances and Phonograms Treaty, 1997},\textsuperscript{52} and the \textit{Beijing Treaty on Audiovisual Performances, 2012}.\textsuperscript{53} Whatever doubt existed as to the possibility of the \textit{Rome Convention} providing protection to performers of expressions of folklore\textsuperscript{54} was resolved by the \textit{WPPT}. Article 2 of the \textit{WPPT} defines performers to include "actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary and artistic works or expressions of folklore". The performers' rights include moral rights;\textsuperscript{55} exclusive rights of fixation, reproduction, public communication, distribution, or rental;\textsuperscript{56} and a right to remuneration in cases where the interpretation is recorded on a phonogram that is published for commercial gain.\textsuperscript{57} It should be noted that the protection contemplated by the \textit{WPPT} is restricted to intangible expressions of folklore such as musical expressions and expressions of action. Tangible expressions of folklore such as drawings, sculpture, and textiles are not covered. Furthermore, the protection provided by the \textit{WPPT} is restricted to individual performers of the expressions of folklore. Where the performers are members of the community, the protection of performers' rights becomes an indirect

\textsuperscript{50} See Lucas-Schloetter "Folklore" 339.
\textsuperscript{51} 496 UNTS 43.
\textsuperscript{52} Hereafter the \textit{WPPT} (1997) (36) \textit{ILM} 76.
\textsuperscript{53} Hereafter the \textit{Beijing Treaty} Doc No AVP/DC/20. See a discussion of the role of the \textit{Beijing Treaty} in Adewopo 2013 \textit{WIPO Journal} 206-219.
\textsuperscript{54} This was essentially because there was no mention of expressions of folklore. It is thought that since literary and artistic work are mentioned, this could be a basis for national legislation to extend the protection to performers of expressions of folklore.
\textsuperscript{55} See a 5 of the \textit{WPPT}.
\textsuperscript{56} See a 6-10 of the \textit{WPPT}.
\textsuperscript{57} A 15 of the \textit{WPPT}.
way of protecting the expressions of folklore, more especially where these individuals are representative of the community in one respect or the other.

The *Beijing Treaty* also contemplates the protection of audio-visual performers of expressions of folklore since the term "performer" is defined to include expressions of folklore in article 2 of the Treaty.

One of the fundamental attributes of copyright protection is the lack of registration for copyright in that protection commences from the time the work is created. However, some jurisdictions require registration as the basis of evidence and not for the validity of the work.\(^{58}\) The absence of registration as the basis of copyright protection may in some ways be favourable to the use of copyright to protect expressions of folklore because many expressions of folklore become entitled to copyright protection as from the creation of the relevant work.

It is generally accepted that for a work to be protected by copyright it must be an original work.\(^{59}\) There are different standards and understandings of the originality of a work even though it is agreed that some measure of labour, skill and judgment must be apparent in the work for which copyright protection is sought.\(^{60}\) It would appear that copyright does not require a high standard of aesthetic merit, but that the work must be a product of the creative output of the person seeking copyright protection.\(^{61}\) Therefore, the standard will vary depending on the circumstances.\(^{62}\) Since expressions of folklore are based on the cumulative work of a community drawing on traditions and other expressions, there are doubts as to whether expressions of folklore can be original in terms of copyright protection. It has been pointed out that each expression of folklore that seeks copyright protection is a

\(^{58}\) See, for example, s 35 of *CA Ghana*, which requires the Registrar of Copyright to maintain a register of works for the purposes of record, publicity, and for evidentiary purposes. In this regard ss 1-4 of the Copyright Regulations 2010 set out a procedure for the registration of a copyright or related work.

\(^{59}\) See generally Rahmatian 2013 *JIC*4.

\(^{60}\) See *University of London Press Ltd v University Tutorial Press Ltd* 1916 2 Ch 601, 608.

\(^{61}\) See *Macmillan & Co v Cooper* (1923) 93 LJPC 113.

\(^{62}\) See the South African case of *Haupt T/A Softcopy v Brewers Marketing Intelligence* 2006 4 SA 458 (SCA). See also Muswaka 2011 *PELJ* 211-232; Judge and Gervais 2009 *Cardozo Arts and Ent LJ* 375.
product of skill, labour and judgment even though they have been based on traditions and well-known themes.\textsuperscript{63}

The nature of the grant of copyright in many jurisdictions is to vest certain copyrights in the person who has expended effort or money to produce the work and who is recognised as the copyright owner. Using copyright to protect expressions of folklore would, therefore, demand that the copyright is vested in identifiable persons or groups of persons. While this will usually be a community or its representative, the challenge of identifying an appropriate community and its representatives is ever present.\textsuperscript{64}

Copyright protects expressions and not ideas.\textsuperscript{65} One of the manifestations of this principle is that a work must be in a material form to receive copyright protection.\textsuperscript{66} Accordingly, many manifestations of copyright legislation require that the work is fixed in a definite medium of expression now known or later to be known. Therefore, if a work is oral it cannot receive copyright protection. Accordingly, since many expressions of folklore are in oral or ephemeral form it is doubtful whether they can be protected by copyright. It is the oral nature of expressions of folklore that has been the principal facilitator of misappropriation of folklore. Third parties, including members of the community without appropriate authority who are the first persons to reduce the "expression of folklore" into a written form, thereby acquire the copyright in the work since the expressions of folklore from which the material work is obtained is not eligible for copyright protection. It seems difficult for copyright protection to be extended to the protection of expressions of folklore except once it has been reduced to material form. This would include recording the expressions of folklore in a database. One way in which this requirement has been overcome is to regard the performance of the "expression of folklore" and the recording of such performance as meeting the requirement of materiality.

\textsuperscript{63} See Milpurruru v Indofurn 1995 30 IPR 209. See also Sand 2002 \textit{U Queensland LJ} 188.
\textsuperscript{64} See Bowrey 2006 \textit{Macquarie LJ} 65-95. See also Yumbulu v Reserve Bank Australia 1991 21 IPR 481 and John Bulun Bulun v R&T Textiles Ltd 1998 41 IPR 513. See also Janke \textit{Minding culture}.
\textsuperscript{65} See Samuels 1989 \textit{Tenn L Rev} 321.
\textsuperscript{66} See Cohen 2007 \textit{UC Davis L Rev} 1151.
The hurdle of materiality is not the only issue arising from the dichotomy between ideas and expressions in traditional artistic, dramatic and musical works. A relevant issue is the degree of the manifestation of an idea in an expression required to establish a connection that determines the expression as an expression of folklore. For example, it is not clear whether any degree of individual skill or labour in an expression is relevant in this regard. Copyright protection could require a distinction between subsequent expressions of the idea behind an expression of folklore.

The point made above emerges from the interface between the individual creators and communal ownership. Assuming there are settled rules on the ownership of works created by custodians of a community art form, it is important to understand when the creative output of an individual is an individual creation and when it is communal. Is the fact of the custodianship so fundamental that all individually produced aspects of "traditional knowledge", such as songs produced by a community songwriter, belong to the community. Using the example of the Ghanaian Kente cloth, it is important to ask whether an individual can hold copyright to a Kente cloth.

In order to resolve the tension between individual creators and communal ownership, a number of principles are important in a balancing exercise necessary to resolve the tension. First, communities must be eligible to be recognised as creators. The community must be recognised as a legal entity distinct from its members, even if it must operate through human agency. Secondly, attention must be paid to the customary laws which have been developed by communities to protect and promote the use and reproduction of expressions of folklore. Thirdly, there must be some recognition of the rights acquired by members of the community as citizens of states to participate in their culture, and what this means.

A fundamental challenge in protecting expressions of folklore by copyright is the duration of protection because copyright protection is a limited monopoly which exists for a definite period – generally the lifetime of the copyright holder and

67 See Yumbulul v Reserve Bank of Australia Ltd 1921 21 IPR 482, 490; see also Bulun Bulun v R&T Textiles Pty 1998 41 IPR 513 and Bowrey 2006 Macquarie LJ 65-95.
seventy years thereafter. One of the reasons why a limited monopoly is granted is that the copyright in the work enters into the public domain\textsuperscript{68} once the period of protection lapses. To bring expressions of folklore within the purview of copyright protection, the duration of protection offered to folklore may have to be limited. Even though it is of course possible that an infinite duration may be available for expressions of folklore, it must be borne in mind that the limited duration copyright is one of the mechanisms for ensuring that the knowledge contained in works is available for societal growth through innovation and creativity. The challenge, therefore, is to resolve the need for perpetual protection for expressions of folklore and to ensure a non-absolute protective framework so that knowledge important for creativity and innovation is not locked up.

Using copyright to protect expressions of folklore has been embraced in a number of states and regions. The regional agreements using copyright to protect folklore will be examined first, before a number of national legislative frameworks are considered. In this regard the following regional agreements have used copyright in the protection of expressions of folklore. The first is the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Folklore\textsuperscript{69} The second is Annex VII to the Revised Bangui Agreement which protects expressions of folklore by copyright; while the third is the Swakopmund Protocol.

With respect to national legislation a number of states protect expressions of folklore by copyright. These include the Copyright and Related Act, 2000, of the Republic of Vanuatu (hereafter \textit{CA Vanuatu}) in the South Pacific\textsuperscript{70} which protects expressions of indigenous culture by copyright. In the discussions that follow, the \textit{CA Vanuatu} is used to illustrate national copyright legislation protecting expressions of folklore, while Annex VII to the Revised Bangui Agreement and the PRF are used to illustrate regional frameworks for the protection of expression of folklore.

\textsuperscript{68} See generally Boyle \textit{The public domain}.

\textsuperscript{69} See Secretariat of the Pacific Community, Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002). (Hereafter \textit{PRF}).

Copyright and Related Rights Act 2000 of Vanuatu

The CA Vanuatu is based on the PRF. The CA Vanuatu extends copyright protection to "expressions of indigenous culture" which are defined as follows:

[...] 

Section 5(3) of the CA Vanuatu reflects some flexibility in the usual requirement of materiality and originality as a feature of copyright protection by stating that works are protected by the sole fact of their creation, and irrespective of their mode or form of expression, content, quality or purpose. This important requirement ensures oral expressions of indigenous culture are protected.

The copyright in an "expression of indigenous culture" is declared by section 42(2)a of the CA Vanuatu to vest in what the term describes as "custom owners" of the expression. Recognising that the identification of "custom owners" may be a difficult task, section 42(4) of the CA Vanuatu provides that where there is a dispute over ownership, the National Cultural Council or the National Council of Chiefs may institute proceedings under section 34 for the enforcement of copyright as if it were the owner of the copyright or other right, and that any damages awarded to the National Cultural Council or the National Council of Chiefs must be used for indigenous cultural development.

There are number of permitted uses of "expressions of indigenous culture". An individual may use any "expressions of indigenous culture" for personal use; use short excerpts for reporting current events to the extent justified by the need to

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71 See Forsyth 2003 Journal of South Pacific Law 1-21. See also Forsyth "Do you want it gift wrapped?" 191.
72 S 3.
74 See s 41(2) of CA Vanuatu.
provide current information, and in face to face teaching. This is in addition to the permitted uses for copyright in Part 3 of the Act.

Copyright protection for "expressions of indigenous culture" would appear to be indefinite because there is no indication of a term of the period of copyright for expressions of indigenous culture in section 20 of the *CA Vanuatu*.

(aii)  *Revised Bangui Agreement*

Article 5 of Annex VII of the *Revised Bangui Agreement* extends copyright protection to expressions of folklore which are defined to mean:

... [T]he production of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community, and includes folk tales, folk poetry, folk songs and instrumental music, folk dancing and entertainments as also the artistic expressions of rites and productions of folk art.\(^\text{75}\)

The protection of expressions of folklore, like other works, is "independent of the mode or form of expression, of the quality and of the purpose of the work".\(^\text{76}\) There is apparently no time limit to the protection offered to expressions of folklore which sets out the moral and economic rights of an author.

It is important to note the context of the definition of expressions of folklore is limited to "literary or artistic" works. This is important as Annex VII also mandates OAPI states to protect and promote their cultural heritage which is defined to include "folklore". Article 68 of Annex VII to the *Revised Bangui Agreement* defines "folklore" in more expansive terms to include the literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation.\(^\text{77}\) Article 72 states

\(^{75}\) See a 2 of Annex VII of the *Revised Bangui Agreement*.

\(^{76}\) A 5(2) of Annex VII.

\(^{77}\) Specifically they include: (a) literary works of all kinds, whether in oral or written form, stories, legends proverbs, epics, chronicles, myths, riddles; (b) artistic styles and productions (i) dances, (ii) musical productions of all kinds, (iii) dramatic, dramatico-musical, choreographic and pantomime productions, (iv) styles and productions of fine art and decorative art by any process, (v) architectural styles; (c) religious traditions and celebrations (i) rites and rituals, (ii)
that the protection safeguarding and promotion of cultural heritage, including folklore, is the responsibility of the state. Article 73 prohibits a number of acts that result in destruction, exploitation, sale, disposal of, or illegal transfer of any or a part of property that makes up the cultural heritage. Furthermore, except with prior authorisation, it is prohibited to engage in the publication, reproduction, and distribution of copies of any cultural property which forms part of the national cultural heritage. It is also not permitted to engage in the recitation, public performance, any transmission by wire or by wireless means, and any other form of communication to the public of any cultural asset which is considered part of the national cultural heritage.

The foregoing national and regional examples suggest that copyright can be used to protect expressions of folklore but that this may necessitate fundamental changes to principles of copyright law.

(b) **Trademarks**

A trade mark is a letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent used or intended to be used for the purposes of distinguishing the goods and services in the course of trade of various persons, from the goods and services used or intended to be used by another person in the course of trade. Trademarks distinguish goods and services of one undertaking from those of another; convey information about goods or a service and, therefore, assist in establishing the quality and reputation of goods or services; and advertise goods and service.

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78 See, for example, s 3 of **SA TMA.**
It is therefore possible that a trademark comprising traditional terms and expressions can be used without the permission and consent of a community. This would imply that with appropriate permission and consent, a traditional term and expression may be used by a third party. It is, therefore, important for communities to be able to prevent the registration of traditional signs and expressions that, for the simple fact of unauthorised use, are derogatory, offensive or disparaging.

On the other hand, there appears to be no obstacle to communities and/or their representatives registering trademarks to be used in trading and distinguishing their goods and services. It goes without saying that any traditional terms and expressions that they use would be subject to conventional trademark examination by a trade mark office just like any other trade mark application.

Communities can also register certification and collective trademarks if recognised by trademark legislation. Certification trademarks are generally marks used to distinguish certain goods and services that possess certain characteristics, such as mode of manufacture. Examples of certification marks include the toi iho certification mark used to market Maori art and crafts. The use of the mark is certified by the registered owner of the mark or representative associations. Usually rules are filed with the application for the registration of the mark which sets out how such a mark should be used. Communities can register certification marks that will enable them to certify the authenticity of goods and/or a service as to its origin.

Collective trademarks, on the other hand, are trademarks used to differentiate goods and services of members of an association from the goods and services of non-members. A registered member of an association can use a collective trademark. A community can therefore register a collective trademark which can be used by members of the community involved in that trade or service.

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80 See Von Lewinski "Adequate protection of folklore" 207.
81 See Frankel " 'Ka Mate Ka Mate' and the protection of traditional knowledge" 193-214.
82 See Arguemendo "Collective Trademarks and Biocultural Heritage" 6.
83 See Graber and Lal "Indigenous cultural heritage and fair trade" 95.
(c) Geographical indications

Even though there is no generally accepted definition of "geographical indications", it will suffice to adopt the definition in article 22(1) of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). A geographical indication is defined as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin". Geographical indications occur because of a unique physical quality of an area or a unique human input in producing goods or a service. If the human input has occurred over generations, it is likely to qualify as an expression of folklore. Examples of geographical indications include Parmesan cheese and Champagne.

The importance of geographical indications for the purposes of this thesis is that the countries of study are, as WTO members, under an obligation to comply with article 22(2) of TRIPS which provides that:

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

WTO members are therefore obliged to provide protection to prevent the use of geographical indications which mislead the public. Every state determines the legal means suitable to it in protecting geographical indications in accordance with its legal tradition and the historical and economic conditions of the jurisdiction concerned.

84 TRIPS is Annex IC to the Marrakesh Agreement Establishing the World Trade Organisation 1994 (33) ILM 81.
85 See Gangjee 2012 WIPO Journal 92.
86 See Zografos "Geographical indications and socio-economic development" 3.
In terms of article 22(2)(b) of TRIPS, unfair competition is defined by article 10bis(2) of the Paris Convention on Industrial Property, 1883, (Paris Convention)\(^{87}\) to mean "any act of competition" contrary to honest practices in industrial or commercial matters. Member states are also required to comply with article 22(3).\(^{88}\) Article 22(4) of TRIPS provides for protection against true but misleading geographical indications which falsely represents to the public that the goods originate in another territory. Additional protection for wines and spirits are required by article 23(1) and (2) of TRIPS.\(^{89}\)

It is to be noted that the TRIPS Agreement does not specify the nature of the legal means by which to provide protection for geographical indications. It has been acknowledged that a number of legal means (including laws of unfair competition, passing off, registered geographical indications, protected appellations of origin, collective and certification marks, and other administrative schemes of protection including labels of origin) have been used to protect geographical indications.\(^{90}\) It is this apparently open-ended potential that invests geographical indication protection with considerable potential for the protection of expressions of folklore.

The importance of geographical indications as an intellectual property right lies in the fact that the owners of the right are able to use the qualities, characteristics, or the reputation of a product, to maximise profits for their goods. Geographical

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\(^{87}\) As last revised in Stockholm 14 July 1967 and as amended on 28 September 1979; 828 UNTS 305.

\(^{88}\) "A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin."

\(^{89}\) 1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if a member’s legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

indications create a monopoly in the indication which could lead to higher prices for the relevant goods.91 Tangible expressions of folklore – such as artistic productions, carvings, sculptures, pottery, terracotta, mosaic, metal ware, textiles, woodwork, jewellery, baskets, needlework, glassware, carpets, costumes, musical equipment, architectural forms, foods, wines, and spirits – can be protected as geographical indications since they are goods, and are communally produced in accordance with the culture, traditions, knowledge, and skill of a community.92 It is the community that produces the expressions of folklore which have a certain quality or characteristic which, in turn, gives rise to a certain quality or reputation which identifies an expression of folklore as a geographical indication. The processes and procedures used by a community in creating goods may have been passed down through oral tradition over generations as part of the culture of a community, and it is this tradition that links geographical indications and expressions of folklore. The "expression of folklore" is therefore an embodiment of the generational knowledge of a community. Consequently, an indication could be a traditional term expression, or the name of the community. In each of the three possibilities the indication points to a geographic origin which is the community. It is therefore open to a community to seek to protect this indication – as an expression of folklore – that is emblematic of its culture in the course of trade. This will enable the community to prevent third parties from using that indication in the course of trade and also enable the community to derive economic benefits from the trade in the relevant goods. Therefore, so long as a geographical indication in the form of a traditional term or expression is able to identify goods and services in a distinctive manner, it is capable of indefinite protection.

In determining the legal means by which to protect expressions of folklore by geographical indications, it is important to remember that communities who produce expressions of folklore desire perpetual protection, and are often not in a position to undertake registration procedures as a condition for the grant of geographical

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91 See Botha www.tralac.org.
92 See Zografos "Geographical indications and socio-economic development" 6-7. See also Pannizon "Traditional Knowledge and Geographical Indications" 1-35; Gervais 2008 ILSA J Int'l & Comp L 551-567.
indication protection. It is customary to use certification trademarks and collective trademarks to protect geographical indications. It is also possible, as indicated above, to issue a certificate recognising geographical indication.

However, using collective and certification marks as a means of protecting geographical indications requires a registration of the mark. In addition, the protection provided is of limited duration, albeit renewable. It would appear attractive if the legal means to protect geographical indications does not require registration and provides perpetual protection. It is also important that the means of preventing potential geographical indications from being registered as trademarks, is recognised.

Reviewing the protection offered by geographical indications, Zografos concludes that:

Despite some limitations, when compared to other intellectual property rights, geographical indications are extremely relevant to the holders of indigenous knowledge, and more generally to developing countries. Whereas other categories of intellectual property rights, such as patents and copyrights are predominantly owned by industrialised countries, which spend significant resources on research, development and marketing, geographical indications have the potential to be more evenly owned, and even subsistence-based communities, with low levels of technology, have the opportunity to promote and benefit from their traditional products and know-how.\(^3\)

It is therefore not surprising that a number of developing countries have enacted legislation governing geographical indication protection. In India, the *Geographical Indications of Goods (Registration and Protection) Act* 48 of 1999 came into effect in 2003. In Mexico, geographical indications are protected by the *Law on the Promotion and Protection of Industrial Property*, 1991. Finally, Annex VI of the *Revised Bangui Agreement* of the OAPI countries establishes a registration system for geographical indications.

The downside of geographical indications protection for expressions of folklore is that the underlying knowledge supporting a geographical indication is not protected.

\(^3\) See Zografos "Geographical Indications and Socio Economic Development" 2008 3-10; but see Frankel 2011 *Prometheus* 253.
This makes it possible that even with geographical indication protection, the knowledge behind the practice may be appropriated by third parties.94

(d) *Designs*

A design can be defined generally as a combination of lines and colour, a three dimensional form, or a material which gives a special appearance to an industrial product or handicraft and serves a pattern for the product.95 Of particular importance to communities, are designs of indigenous handmade textiles and the possibility that they can be protected by design legislation. Design protection is usually effected by a registration process, and a fundamental condition is that the design must be new, original, and capable of industrial application. It is therefore how national legislation defines what is new and original that will determine whether communal designs can be protected under most design legislation. However, since design legislation defines a new and original design as being significantly different from known and existing designs, it is difficult for old communal designs, which have long existed to be registered.96 This means that recent communal designs could qualify. The requirement of industrial application can be overcome if there is a specific provision that use of a handicraft or textile would suffice and would cover communal craft and handmade products. A good example of such legislation is the Ghanaian *Industrial Designs Act* 660 of 2003 (hereafter *DA Ghana*), which recognises handicraft and textile designs of handmade textiles in Ghana. Accordingly, handicrafts and designs of handmade textiles in Ghana are registrable under the *DA Ghana*.97

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94 See Johnsson "The branding of traditional cultural expressions" 147-163.
95 See, for example, ss 1 and 5 of the *Designs Act of South Africa* 1993.
97 See ss 1 and 2 of *SADA*. 
2.4.1.1.2 Use of a property model: Sui generis intellectual property rights

In this category would fall legislation that creates collective, exclusive rights that are similar to intellectual property rights by vesting folklore either in the state, in communities, or in some government establishment rather than in individuals.

(a) Panama

In Panama, Law Number 20 on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples 26 of 2000, establishes a special regime of intellectual property for the collective knowledge of indigenous people and for the protection and defence of their cultural heritage and traditional knowledge. Indigenous peoples in Panama are entitled to apply for collective rights to their expressions of folklore. The items suitable for protection include traditional forms of dress, musical instruments, music, dances or performances, oral and written expressions that are part of their traditions and make up their historical, cosmological, and cultural expression.

Article 4 provides that requests for registration are to be made by the Congresses or traditional indigenous authorities to the Directorate General of the Registration of Industrial Property (DIGEPRI). On registration, which is free, the collective right shall neither lapse nor have a fixed duration. The right to use and market...
the arts, crafts and other cultural expressions are governed by the rules for use approved and registered by the indigenous peoples who can grant exclusive rights of reproduction.\textsuperscript{103} Indigenous peoples are also entitled to certification marks on their products.\textsuperscript{104} Ultimately, indigenous people are given the right to grant licences.\textsuperscript{105} The exclusive rights are fortified by the grant of civil and criminal penalties for violations of the right.\textsuperscript{106}

(b) United Arab Emirates

Article 31 of the \textit{Federal Law for the Protection of Intellectual Works and Copyright} 40 of 1992 of the United Arab Emirates\textsuperscript{107} provides that the folklore of the community of the United Arab Emirates is considered the public property of the state. Article 32 provides that the state, represented by the Ministry of Information and Culture, will act to protect the national folklore by all legal means and methods and exercise the author's rights against distortion, modification and commercial exploitation.

(c) Philippines

The \textit{Indigenous Peoples Act} 8371 of 1997, was adopted to recognise, protect and promote the rights of indigenous cultural communities.\textsuperscript{108} This Act recognises the

\textsuperscript{103} A 15 of the Act
\textsuperscript{104} See a 10 if of the Act.
\textsuperscript{105} See a 20 of the Act which provides that the industrial reproduction of traditional dresses and other collective rights is prohibited unless authorised by the Ministry of Commerce and Industry, with the prior express consent of indigenous general congresses and councils.
\textsuperscript{106} See arts 17, 19 and 21.
\textsuperscript{107} Available at www.fmhs.uaeac.ae/cmd/UAE%20Copyright.htm.
\textsuperscript{108} S 3(h) of the Act defines "Indigenous Cultural Communities/Indigenous Peoples" as referring to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organised community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilised such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonisation, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonisation, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been
rights of ownership and possession of indigenous cultural communities to their ancestral domains. These rights include the right to develop lands and natural resources. Section 29 requires the Philippine state to respect, recognise and protect the rights of indigenous cultural communities to preserve and protect their culture tradition and institutions. Section 32 of the Act recognises the community intellectual rights of indigenous cultural communities. It provides that the state shall, "...preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs". Furthermore, section 34 of the Act provides that indigenous cultural communities:

[A]re entitled to the recognition of the full ownership and control end protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

(d) Pacific regional framework for the protection of traditional knowledge and expressions of culture

In 2002 member states of the Pacific Community adopted the PRF. The PRF is a model law which is a guide for member states who may adopt and/or adapt it in establishing national frameworks for the protection of expressions of folklore. The policy objective of the PRF is to

...protect the rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior and informed consent and benefit-sharing. The model law also reflects the policy that it should complement and not undermine intellectual property rights.

109 See s 7 of the Act.
110 The PRF uses the term "traditional cultural rights".
111 See the Explanatory Memorandum.
This is achieved by creating

...new rights in traditional knowledge and expressions of culture which previously might have been regarded, for the purposes of intellectual property law, as part of the public domain. The rights created by the model law essentially fall into two categories: traditional cultural rights and moral rights. The existence of these rights do not depend upon registration or other formalities.\(^{112}\)

The traditional cultural rights envisaged by the \textit{PRF} grant traditional owners\(^{113}\) exclusive rights\(^{114}\) of a non-customary nature, irrespective of whether they are of a non-commercial or commercial nature, over expressions of culture.\(^{115}\) The moral rights of traditional owners are the right of attribution; the right against false attribution; and the right against derogatory treatment in respect of the expressions of culture.

The \textit{PRF} envisages that a prospective user can approach a Cultural Authority or the traditional owners directly for prior and informed consent to the use of the expressions of culture. This consent must be reduced to an "authorised user

\(^{112}\) See the Explanatory Memorandum.

\(^{113}\) "Traditional Owners" are defined by the \textit{PRF} as " ... (a) the group, clan or community of people; or (b) the individual who is recognized by a group, clan or community of people as the individual; in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community."

\(^{114}\) A 7(2) of the \textit{PRF} defines the exclusive rights of a holder of a traditional cultural right as the right to grant prior and informed consent to: (a) reproduce the traditional knowledge or expressions of culture; (b) publish the traditional knowledge or expressions of culture; (c) perform or display the traditional knowledge or expressions of culture in public; (d) broadcast the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication; (e) translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture; (f) fix the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording; (g) make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expressions of culture; (h) create derivative works; (i) make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom; (j) use the traditional knowledge or expressions of culture in any other material form; if such use is a non-commercial use (whether or not of a commercial nature).

\(^{115}\) A 4 of the \textit{PRF} defines "expressions of culture" as any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and, without limiting the preceding words, includes: (a) names, stories, chants, riddles, histories and songs in oral narratives; and (b) art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles; and (c) music, dances, theatre, literature, ceremonies, ritual performances and cultural practices; and (d) the delineated forms, parts and details of designs and visual compositions; and (e) architectural forms.
agreement“. If a derivative work is created from such authorisation, intellectual property rights vest in the creator. If, however, the derivative work is used for commercial purposes, the user must to share the benefits of the intellectual property rights with the traditional owners, acknowledge the source of the expressions of culture, and respect other moral rights. The PRF provides a number of civil and criminal sanctions for breach of traditional cultural rights.

2.4.1.2 Use of an equitable compensation model to protect expressions of folklore

Equitable compensation models are a liability regime whereby third parties are free to use expressions of folklore but become liable to pay some compensation for the use. The ability of a community to monitor the use of its expressions of folklore will certainly be difficult, if not impossible. The use of a collecting society is therefore very well suited to such a task.\(^{116}\)

2.4.1.3 Use of human rights to protect expressions of folklore

The idea that communities can be bearers of rights is not one that sits well within the liberal conception of human rights in many states. In many ways it is an acknowledgment that communities can and should be rights-bearers that significantly defines the challenges facing the protection of expressions of folklore.

By the end of the 1960s when the question of the protection of expressions of folklore had become a matter of international concern, considerable effort was expended in reconciling the protection of expressions of folklore by the individualistic intellectual property system, while in many of the newly independent states, especially in Africa, the quest encouraged a particular reading of the protection of expressions of folklore as part of the protection of the national cultural heritage. In

\(^{116}\) See Dutfield and Suthersanen *Global intellectual property law* 346: "A private collective management institution could be established, which would monitor use of traditional knowledge, issue licences to users, and distribute fees to rights holders in proportion to the extent to which their knowledge was used by others. They could also collect and distribute royalties where commercial applications are developed by users and the licence require such benefits to the holders." See generally Drahos 2000 *EIPR* 245; Graber 2012 *WIPO Journal* 36.
many states expressions of folklore were vested in the state or its institutions. Since
the importance of the human rights of communities was not sufficiently recognised
for a considerable period it appears that the possibility of human rights protecting
expression of folklore was a footnote to the different models for the protection of
expressions of folklore. It was the least important.

As noted elsewhere, three recent events have propelled the human rights of
communities who protect expressions of folklore to the front burner.\(^{117}\) The first is
an increased understanding of the right to culture in national constitutions and the
recognition that customary law is a manifestation of the right to culture. The second
is an expanded understanding of the substantive content of the article 15(1) of the
*International Covenant for Economic Social and Cultural Rights*, 1966 (*ICESCR*) as
part of the right to culture;\(^ {118}\) while the third is the recognition of the rights of
indigenous peoples marked significantly by the *DRIP*.

Since human rights are largely territorial it is the protection of the right to culture in
national constitutions that is significantly critical in securing the enforcement of
expressions of folklore. While in Latin America many national constitutions recognise
the right to culture explicitly,\(^ {119}\) the same cannot be said of African states – save for
Kenya\(^ {120}\) – even though all African states recognise and protect customary law.
However, when it comes to African states, it must be pointed out that the *African
Charter* recognises a number of peoples’ rights, which certainly includes the right to
culture. The right to culture can be interpreted from an individual or a collective
perspective. It would appear that the protection of the right to culture has been for
African states the right of individuals to participate in their culture.\(^ {121}\) Accordingly,

\(^{117}\) See Nwauche 2010 *PELJ* 49-91; Haugen 2005 *J World Intellec Prop* 445; Helfer 2006 *UC
Davis L Rev* 971.

\(^{118}\) 993 UNTS 3. The *ICESCR* is considered part of the International Bill of Rights. With regard to
the right to culture see Steiner 2006 www.wipo.int/edocs/mdocs/tek/.../ip///wipo_unhcr_ip_pnl_98_2.pdf.

\(^{119}\) See, for example, a 171 of the Bolivian Constitution; a 231 of the Brazilian Constitution; and a
119 of the *Venezuelan Constitution*.

\(^{120}\) See s 11 of the *Kenyan Constitution*.

\(^{121}\) See, for example, ss 30 and 31 of the *Constitution of the Republic of South Africa*, 1996,
(hereafter the *SA Constitution*).
the right to culture would have been a difficult juridical basis for the protection of expressions of folklore had it not been for the recognition of customary law.

2.4.1.3.1 Right to culture including customary law

Where peoples' rights are not recognised in a national constitution it is through the medium of customary law that they find expression. The fact of colonialism in Africa and Asia and that of conquest in Canada and Australia, for example, has led to the recognition by states of legal orders such as customary law which is distinct from state or official law. It is appropriate to think of customary law as part of the right to culture if culture is conceived as meaning "the values, attitudes, beliefs, orientations, institutions and underlying assumptions prevalent among people in a society". It is easy to imagine that customary law is part of a community's normative framework and therefore part of its culture. Enforcing a customary law is therefore an indirect enforcement of the right to culture. The relevance of human rights appears in its collective dimension where members of a community in concert with others seek to enforce a right to their culture which indirectly protects the expressions of the folklore of that community.

2.4.1.3.2 Other human rights capable of protecting expressions of folklore

Even though the right to culture would appear to cover the whole spectrum of the life of communities, it would appear that a number of specific human rights are also relevant for the protection of expressions of folklore of communities. These rights include the right to privacy, the right to equality, the right to life, and the right to religion.

2.4.2 Negative protection

By defensive protection is meant all the mechanisms by which access to expressions of folklore is restricted, including access which may result in the expressions of folklore.
folklore becoming the intellectual property right of a third party. It also encompasses mechanisms that enable the recognition of the interests of the communities that produce the expressions of folklore. The means by which defensive protection of expressions of folklore could be realised include the use of moral rights and the principles of unfair competition. Defensive protection does not envisage the exercise of exclusive rights the way an intellectual property owner would. Rather, defensive protection envisages third party use of expressions of folklore but with the consent of the state and/or community.

2.4.2.1 Grant of permission to use expressions of folklore

The dominant framework for the protection of expressions of folklore consists of enabling powers granted to states and national competent authorities to grant permission to third parties to use expressions of folklore.

2.4.2.2 Moral rights

The protection of communal moral rights is a good example of defensive protection. Generally, with respect to copyright protection, moral rights which are independent of copyright protection enable an author to protect a work in a non-economic manner. Moral rights include the right to receive clear and reasonable attribution for the work; the right not to be falsely attributed; and the right to integrity which enables an author to prevent distortion and preserve the context of a work. Moral rights are often considered fit only for individuals and not for communities. However, it is increasingly clear that moral rights address some of the fundamental concerns of communities in the protection of expressions of folklore. These concerns include the disclosure of secret and sacred knowledge in settings that are considered profane and unsuitable. Other examples of the distortion of expressions of folklore would include the use by corporations of traditional terms and expressions. Communities could also be concerned about proper attribution and the

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124 See a 6bis of the Berne Convention.
autonomy to decide whether they are to remain anonymous, and about later treatment of expressions of folklore and whether the community will be consulted before alteration and development. It is interesting to note that the Australian government introduced a *Copyright Amendment (Indigenous Communal Moral Rights) Bill* which never became law. It may well be that some communities are only concerned with their recognition and the acknowledgement that they are the creators of the expressions of folklore. The national legislation of African states considered in the next chapter protect the moral rights of communities.

### 2.4.2.3 Unfair competition

The concept of unfair competition offers some potential in the protection of expressions of folklore since this principle can in certain respects protect the expressions of folklore of communities engaged in the commercial exploitation of their expressions of folklore. The *Paris Convention* defines unfair competition as "any act of competition in breach of honest practices in industrial or commercial affairs". Paragraph 3 thereof further provides the specific acts that must be prohibited. An aspect of unfair competition relevant to the protection of expressions of folklore is the protection of confidential information. Article 39 of the *TRIPS Agreement* provides the framework for the protection of undisclosed information, and mandates states to equip natural and legal persons with the opportunity of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner

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126 The use of "Washington Redskins" is a controversy between a North American Indian Group (The Oneida Indian Nation) and the Washington Redskins Football Club. See Goddard 2005 *European Review of Native American Studies* 1. On 18 June 2014, the United States Patent and Trademark Office cancelled federal trademark registrations for the name "Washington Redskins" ruling that the name is disparaging to Native Americans and cannot be subject to federal trademark protection. See Amanda Blackhorse et al v Pro Football Inc Cancellation No 92046185 (United States Patent and Trademark Office Trademark Trial and Appeal Board).


128 A 10 bis(2).

129 "1. All acts of such a nature as to create confusion by any means whatever with the establishment the goods or the industrial or commercial activities of a competitor; 2. False allegations in the course of trade of such a nature as to discredit the establishment the goods or the industrial or commercial activities of a competitor and 3. Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods."
contrary to honest commercial practices so long as such information is secret, has commercial value because it is secret, and has been subject to reasonable steps under the circumstances by the person lawfully in control of the information, to keep it secret.

In common-law countries, the action for breach of confidence, and the action for privacy in civil-law countries, can be powerful weapons for the protection of expressions of folklore – especially those expressions that are secret, sacred, and confidential. With respect to the delict of breach of confidence in common-law countries, the utility of this remedy lies in the requirement that the information must have been obtained in a relationship that raises an obligation of confidentiality that is critical and there is, therefore, no need for an express agreement of confidentiality between the community and the third party. In addition, the information sought to be protected does not need to qualify for protection as an intellectual property right. In the Australian case of Foster v Mountford a publication "Nomads of the Australian Desert" was prohibited from publication because it was held that the author had breached the confidence in which sacred and secret information of the Pitjantjatjara people was obtained.

2.4.2.4 Use of opposition procedures in the grant of intellectual property rights

In all instances of the grant of intellectual property rights such as trademarks and designs, the possibility that communities are able to oppose the grant of such rights is a good example of defensive protection. Their opposition may ultimately ensure that the intended intellectual property right is not registered. The statutory

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130 In the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.

131 See Tong 2010 PELJ 159-180.


requirement of the consent of communities to the use of their expressions of folklore is one credible means of ensuring significant opposition to the grant of intellectual property rights to third parties. For example, the ability of a community to oppose the registration of a trademark would depend on the presence of provisions in the trademark legislation that enable a challenge to be mounted to the registration of a trademark on grounds that it does not distinguish the goods and services of the trader; that the trademark is contrary to law and public policy; and that the trademark is likely to deceive, cause confusion, or offend communities in the country. It is plausible that a traditional term and expression would qualify under some if not all of the aforementioned headings. The procedure to be adopted in enabling an effective challenge to the registration of trademarks, would be to establish a panel to evaluate whether a proposed trademark is identical, similar, or so or too closely resembles a traditional term or expression, to qualify for registration. This appears to have been followed by the New Zealand Trademark Commissioner who is required to establish a Maori Trade Mark Advisory Committee whose function is to advise the Commissioner on whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Maori people.

2.4.2.5 Heritage legislation

Heritage legislation protects expressions of folklore as part of national culture by identifying listing and regulating access to cultural property designated as national heritage. National heritage is typically identified, firstly, as tangible such as historical sites; geological features; war and conflict sites; burial sites; scenic and tourist sites; and aesthetic buildings, and, secondly, as intangible cultural heritage such as arts, craft, and music which in some cases qualify as expressions of folklore. In many cases the tangible and intangible heritage are intertwined and inseparable. A denial of access to tangible heritage affects access to intangible heritage. Heritage

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136 See s 177 of the New Zealand *Trade Mark Act* 49 of 2002.
137 In terms of s 178 of the New Zealand *Trade Mark Act* 49 of 2002.
legislations furthermore establish institutions with a mandate to identify, preserve, protect, and promote national heritage. Dealings with national heritage are prohibited except with the consent of national heritage institutions. In this way, expressions of folklore that form part of a national heritage can be protected. Examples of national cultural heritage legislation include the *National Cultural Heritage Act* 10066 of 2009, of the Philippines; the Lithuanian *Law on the Principles of State Protection of Ethnic Cultures* VIII-1328 of 1999; and the *Historical and Cultural Preservation Act* of Palau 19 of 1995.

### 2.5 Conclusion

A broad overview of the principal models for the protection of expressions of folklore using positive and negative protection mechanisms has been the principal aim of this chapter which began by considering definitions of expressions of folklore to get a sense of the subject matter of the thesis. The distinction between expressions of folklore and traditional knowledge was pointed out, before an overview of positive and negative forms of protection was undertaken. The broad contours of protection raised and discussed in this chapter are discussed in greater detail in the rest of the thesis though a consideration of the protection of expressions of folklore in the countries of study. The next chapter is also foundational in that it considers broad issues of the protection of expressions of folklore by African states as a context to the discussion in Chapters 4, 5 and 6 of the protection of expressions of folklore in the countries of study.
CHAPTER 3

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CHAPTER 3

THE PROTECTION OF EXPRESSIONS OF FOLKLORE IN AFRICA

3.1 Introduction

This chapter examines the protection of expressions of folklore in Africa. It builds on the previous chapter which considered models for the protection of expressions of folklore and provided a context for the discussions that ensues. The chapter begins by examining examples of negative and positive protection of expressions of folklore, in a number of African countries, excluding those countries of study – Nigeria, South Africa, Kenya and Ghana – as they are considered in greater detail in the rest of the chapter and thesis. In the third section of this chapter key issues and challenges in the protection of expressions of folklore are considered. Finally, part four considers examples of expressions of folklore by first profiling folklore resources in the countries of study, and then undertaking a detailed examination of selected specific expressions of folklore such as indigenous textiles, Rooibos tea, and the contribution of expressions of folklore to the African film industry.

3.2 Overview of the protection of expressions of folklore in Africa

The conceptual models of negative and positive protection of expressions of folklore considered in Chapter 2 are a useful means of giving meaning to the models of protection of folklore in Africa. This is because African states fall roughly into those two categories.

The first category consists of states who assert ownership in expressions of folklore. This group of states does not generally seek to exploit expressions of folklore but restricts access to expressions of folklore as part of a general mission of identifying, preserving, and protecting folklore as part of their national cultural heritage. In particular, they are able – at least in principle – to restrict how derivative works stemming from expressions of folklore, morph into intellectual property rights. The
other states recognise the rights of communities through traditional intellectual property rights or *sui generis* intellectual property rights.

### 3.2.1 Negative protection of expressions of folklore: Vesting ownership in expressions of folklore in the state

As stated above, a number of African states assert ownership in expressions of folklore as a basis for the negative protection they accord to expressions of folklore. The *Cameroonian Law* provides that folklore originally belongs to the "national cultural heritage".\(^{138}\) Ivorian copyright legislation vests the right to authorise the exploitation of folklore in a public collecting society established pursuant to section 62 of the Law.\(^{139}\) This society is placed under the authority of the Department of Cultural Affairs which arguably makes the state the owner of the expressions of folklore. Egypt considers national folklore part of the national domain which also arguably makes the state the owner of expressions of folklore.\(^{140}\) So does Liberia, even if it is because the authorisation for the use of expressions of folklore is to be given by the Minister of Information.\(^{141}\) Mozambique also owns the copyright in works of folklore,\(^{142}\) and Tunisia is no different because section 7 of the *Law on Literary and Artistic Property* states that "folklore forms part of the national heritage".\(^{143}\) Tanzania also vests the expressions of folklore – even if indirectly – in the state,\(^{144}\) while the People’s Republic of Congo provides that folklore shall belong to the national heritage.\(^{145}\) The permission for the adaptation of folklore or use of elements of folklore is to be obtained from a professional body of authors established pursuant to article 68 making the state the owner of the expressions of folklore.\(^{146}\)

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\(^{138}\) S 5(1).

\(^{139}\) *Law on the Protection of Intellectual Works and the Right of Authors Performers and Phonogram and Videogram Producers*, 95-564 pf1996, (hereafter the *Ivorian Law*).

\(^{140}\) See s 2.31(5) of Liberian *Copyright Act*, 1997, (hereafter the *Liberian Law*).

\(^{141}\) See the *Mozambique Law*.

\(^{142}\) 94-36 of 1994 (hereafter the *Tunisian Law*).

\(^{143}\) See s 29 of the Tanzania *Copyright and Neighboring Rights Act*, 7 of 1999, (hereafter the *Tanzanian Law*).

\(^{144}\) A 15 of the PRC *Law on Copyright and Neighboring Rights*, 24/82 of 1982 (hereafter the *PRC Law*).

\(^{145}\) A 68 of the *PRC Law*. 

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3.2.1.1 Conditions for the authorisation of use of expressions of folklore by the state

There are different conditions for obtaining the permission of the state by third parties to use expressions of folklore. For example, the Cameroon Law requires that the reproduction, direct or indirect fixation for profit-making purposes of expressions of folklore, shall be subject to prior authorisation from the agency in charge of culture.\textsuperscript{147} Making profit is also a condition requiring authorisation for the exploitation of folklore under section 8 of the Ivorian Law. Section 2.31 of the Liberian Law permits the Minister of Information to authorise the use of expressions of folklore when such acts are made with gainful intent and outside their temporary or customary context. Section 7 of the Tunisian Law requires that "any transcription of folklore with a view to exploitation for profit shall require authorization from the Ministry responsible for culture against payment of a fee". In Tanzania authorisation for use expressions of folklore is to be sought from the National Arts Council.\textsuperscript{148}

3.2.1.2 Use put to funds raised from folklore authorisation

The funds generated by folklore authorisation in these African states are generally designated for public use. For example, the Cameroon Law provides that funds received from folklore licensing shall be deposited in a cultural policy support fund.\textsuperscript{149} Section 8 of the Ivorian Law provides likewise. In Tunisia the authorisation fees are for the benefit of the welfare fund of the Copyright Protection Agency. In Tanzania the fees to be collected are used for the purpose of promoting or safeguarding national culture.\textsuperscript{150}

\textsuperscript{147} Such authorisation is subject to the authorisation of the appropriate government department, in return for payment of royalties. The royalties shall be fixed by statutory instrument following the conditions applicable in each of the categories of creation considered.

\textsuperscript{148} Ss 28(a) and 29 of the Tanzanian Law.

\textsuperscript{149} S 5(4).

\textsuperscript{150} See s 28(b) of the Tanzanian Law.
3.2.2 Positive protection: African states that recognise intellectual property rights as a means of protecting expressions of folklore

A number of African states recognise intellectual property rights as a means of protecting expressions of folklore. In many cases individual renditions of expressions of folklore that meet the requirements for copyright protection are protected. Some of these states – Botswana, for example – recognise the copyright of ordinary citizens in respect of derivative works originating from expressions of folklore. However, in principle nothing stops communities and state agencies from claiming copyright or other intellectual property rights over expressions of folklore.

This section of the chapter addresses how certain African states have sought to protect expressions of folklore through traditional intellectual property rights such as copyright.

In Botswana, section 3 of the Copyright and Neighbouring Rights Act\textsuperscript{151} defines literary and artistic works as original intellectual creations in the literary and artistic domain and this includes oral works and stage productions of expressions of folklore. Section 4 also provides that derivative works such as collections of expressions of folklore, are protected by copyright provided that they are original by reason of the selection, coordination, or arrangement of their content. In addition, section 6(1) of the Botswana Law provides that work is protected by the sole fact of its creation and irrespective of its mode of expression, as well as of its content, quality or purpose.\textsuperscript{152} Professor Kiggundu argues that:

\begin{quote}
Botswana’s approach to protecting folklore, which is inclusive of many types of works but requires originality, results in a law that largely focuses on the needs of its musicians, artists, writers, dancers and other creators. The originality requirement preserves the freedom of artists to draw and build on their cultural traditions with few restrictions.\textsuperscript{153}
\end{quote}

\begin{footnotes}
\item[151] 8 of 2000 (hereafter the Botswana Law).
\item[152] See, in addition, s 6(1) of the Botswana Law.
\end{footnotes}
He continues that "...the choice to leave traditional non-original folklore in the public domain represents a choice in favour of modern creators and cultural evolution".\textsuperscript{154}

It is clear that the expressions of folklore developed by the different ethnic communities in Botswana, is considered by Kiggundu as not being original and therefore not eligible for the protection under the Botswana Law. There is, therefore, no protection for expressions of folklore unless it is proven that the expression is original. If the threshold of originality indicated by section 6 of the Act is low because quality is not a measure of originality, then it is plausible that an ethnic community could create an original expression of folklore eligible for protection. If that were to be the case, then by the terms of the Act, the derivative works based on the expressions of folklore will certainly be subject to the copyright of these communities. It would appear that regarding the "traditional" expressions of folklore as part of the public domain, releases the works necessary for individual creativity. It is difficult to locate any real protection of expressions of folklore if this interpretation is correct.

In many other African states, derivative works based on expressions of folklore can be protected as copyright. Section 4(1) of the Cameroonian Law protects original folklore-inspired works and collections of works which express folklore under copyright, including encyclopaedias, anthologies, and compiled data which are reproduced either on machine-readable mediums or any other form. The Ivorian Law lists works of folklore as part of original works to be protected by copyright. Section 7(1) of the Ivorian Law also protects works derived from folklore irrespective of the protection offered original works of folklore. Again, article 12 of the PRC Law recognises works derived from expressions of folklore as original works. In states recognising derivate works based on expressions of folklore as capable of copyright protection, there is a real danger that recognition of copyright for such derivative works will largely render the state ownership of expressions of folklore meaningless.

\textsuperscript{154} Kiggundu 2011 WIPO Journal 149.
A number of African states recognise the state as entitled to *sui generis* intellectual property rights in order to protect expressions of folklore. For example, article 142 of the *Egyptian Law* considers national folklore as part of the national domain, and mandates the competent ministry to exercise the author's economic and moral rights to protect and support such folklore.

Mozambique also protects expressions of folklore by copyright\(^{155}\) in much the same way as Egypt because article 31 of the *Mozambiquan Law* provides that the Council of Ministers shall exercise the rights of the state.

Zimbabwe has also created a unique *sui generis* form of copyright to protect expressions of folklore in its *Copyright and Neighboring Rights Act, 2000*.\(^{156}\) Essentially the Act allows the President and appropriate local authorities to reserve\(^{157}\) the exclusive right to the restrictions available to the owner of the copyright in literary, artistic or musical works.\(^{158}\) The President is authorised to make this reservation in respect of a work of folklore the form or content of which is embodied in the traditions of all communities within Zimbabwe; while a local authority can reserve a work of folklore whose form or content is embodied in the traditions of any community a substantial number of whose members reside in the area of the local authority.

### 3.2.3 States that protect performers' rights

One of the intellectual property rights used to protect expressions of folklore in a number of African states is performers' rights. Consequently, while the Ugandan *Copyright and Neighbouring Rights Act* 19 of 2006 (hereafter *Ugandan Law*) does not protect expressions of folklore, its section 22 protects the rights of performers of expressions of folklore. Article 43 of the *Mozambique Law* grants performers an exclusive right to authorise certain acts. It would also appear that section 17(d) of

\(^{155}\) See s 81 of the *Zimbabwe Law*.

\(^{156}\) *Mozambique Law*. 11 of 2000 (hereafter *Zimbabwe Law*).

\(^{157}\) See s 81 of the *Zimbabwe Law*.

\(^{158}\) *Zimbabwe Law* ss 17 and 18. These restricted acts are the traditional rights of a copyright owner which include reproduction, publishing, public performance and broadcasting.
the *Zimbabwean Law* permits the President or a local authority to protect the rights of performers of expressions of folklore in the appropriate community.

### 3.2.4 States that protect moral rights of communities

The moral right of communities to their expressions of folklore is protected in a number of African states. For example, section 2.31(4) of the *Liberian Law* requires the indication of the source of any identifiable expression of folklore in an appropriate manner and in conformity with fair practice, by mentioning the community and/or geographic place from where the expression used has been derived. In section 27, the *Tanzanian Law* also protects the moral rights of the community and/or geographic place from where the expression is obtained. In the same light section 27 of the *Copyright Act, 1989*, of Malawi requires the source of expressions of folklore to be acknowledged.

### 3.3 Key issues and challenges in the protection of expressions of folklore in Africa

This chapter now turns to an evaluation of the substantial issues and challenges of the protection of expressions of folklore in African states. In illustrating these issues and challenges examples are drawn from South Africa, Kenya, Nigeria, Ghana and other African countries as appropriate.

#### 3.3.1 Expressions of folklore as an aspect of culture: The context of traditional culture and knowledge

In this section attention is drawn to the fact that in the definition of the countries of study expressions of folklore\(^{159}\) are identified as elements of the cultural heritage of the community and the relevant state. While the Ghanaian definition does not allude to this point,\(^{160}\) the Nigerian definition speaks of expressions of folklore as

\(^{159}\) See Chapter 2.2.

\(^{160}\) See s 76 of *CA Ghana.*
constituting part of the "cultural and social identity" of the community. The Kenyan definition refers to expressions of culture as part of the "traditional cultural heritage", while the *Swakopmund Protocol* expressly refers to "traditional culture and knowledge" as a context for identifying expressions of folklore. It is therefore important to examine what is meant by "traditional culture". It would appear that understanding the meaning of culture is important so that it will be easier to identify what is meant by "traditional culture".

O'Keeffe states that the word culture refers to three distinct but overlapping and equally valid concepts which are

1. 'culture' in the classic highbrow sense, meaning the traditional canon of art, literature, music, theatre, architecture and so on;
2. 'culture' in a more pluralist sense, meaning all those products and manifestations of creative and expressive ideas a definition which encompasses not only 'high' culture but also more mass phenomena such as commercial television and radio, the popular press, contemporary or folk music, handicrafts and organized sports; and
3. 'culture' in the anthropological sense, meaning not simply the products or artefacts of creativity and expression (as envisaged in the first two definitions) but rather, a society's underlying and characteristic pattern of thought – its 'way of life' from which these and all social manifestations spring.

The third meaning of culture as signifying a way of life appears to be a more holistic definition and provides a meaningful context for expressions of folklore. The use of the word "traditional" appears to imply that there is a "modern" culture. The question is what is "traditional" and what constitutes "modern" African culture. Given Africa's unique colonial past, it is tempting to regard pre-colonial Africa as a fitting period during which the culture of communities in Africa can be regarded as "traditional". A relevant question is whether there are expressions of folklore that have survived in that pre-colonial form to the present day. To argue that there are such expressions of folklore in their pristine pre-colonial context is to discount the monumental changes that colonialism brought to Africa. If colonialism significantly

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161 See s 28(5) of *CA Nigeria*.
162 See s 2 of *CA Kenya*.
163 See a 2 of the *Swakopmund Protocol*.
164 See O'Keeffe 1998 *ICLQ* 904.
changed the way of life of African communities, it is difficult to determine exactly what is imagined as being "traditional". Does it refer to the period before many African communities began to have contact with European traders before the slave trade? Closely allied to this imagining of the traditional appears to be a belief that expressions of folklore must be of antique quality and have been handed down from generation to generation. However, there is no indication of an appropriate age for expressions of folklore which will qualify them as traditional.

Perhaps traditional culture is considered only in relation to present-day African communities existing in rural areas, as opposed to members of ethnic communities who live in urban areas in African states. This form of differentiation ignores the diverse nature of African cities where, for example, urban ethnic communities mimic the social practices and norms of their rural counterparts. To urge, therefore, that it is a rural setting that should serve as the authentic context of expressions of folklore may be to stretch the requirement of "traditional" too far. To illustrate the point being made the example of the Kente and Adinkra traditional textiles specifically mentioned as examples of folklore in the Ghanaian definition of expressions of folklore is apposite and illustrates the dynamism of culture and the difficulty of determining what constitutes "traditional culture". A number of questions are appropriate in guiding our inquiry. Would industrially-produced Kente and Adinkra cloth qualify as being of traditional character or must qualifying Kente and Adinkra be those produced on traditional looms? In other words, assuming the Akan groups in Ghana who are the creators of the Kente cloth decide to produce the cloth in modern textile mills, will they lose the benefit of the protection of expressions of folklore? Assuming further, that over the years makers of Kente cloth have infused the styles of other ethnic communities into the production of the Kente cloth, is it enough that the cloth is described as Kente? How is the cultural influence of other ethnic communities accounted for? The difficulty in answering this question lies in the fact that the Ghana Copyright Act does not define what Kente and Adinkra

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166 See generally Boateng "Square pegs in round holes" 61-74.
167 See generally Dutfield Protecting traditional knowledge and folklore.
textiles are. This assumes that it is easy to define such a cultural product with some specificity.

To use another illustration let us assume that a community decides to store a folksong in a digital medium. Does this medium change the character of the folklore because it is no longer oral?

These questions illustrate the extreme difficulty in using the context of traditional culture. It may well be that the context of traditional culture is not suited to determining expressions of folklore. It may be better to refer simply to the culture of communities which implicitly recognises that culture is a dynamic term and also that communities are the determinants of what constitutes their culture.

The fluid nature of culture and of expressions of folklore requires principles that can assist any protective framework to identify and record expressions of folklore. While it seems easy to imagine that the representatives of the relevant community should be able to identify what is an authentic expression of their folklore. There is, it would appear, also an inevitable need for databases and archives for an effective regime of protection. It can be asserted tentatively that the largely ineffective protection of expressions of folklore in African states can be traced partly to the lack of extensive databases of the expressions of folklore.

\[3.3.2 \text{ Communities in African states and expressions of folklore}\]

The fact that communities and individuals are at the heart of the protection of expressions of folklore presents a unique challenge in determining the appropriate protection model. Even though it is rightly recognised that communities produce expressions of folklore, the fact that individuals are an agency in their production raises questions because of the human rights of individuals. An appropriate protection model must therefore confront the tension between the group rights of communities and the rights of individuals who produce the expressions of folklore and members of the communities.
The nature and extent of the recognition of communities as the owners of expressions of folklore in any given state largely defines the framework for the protection of folklore. This is so whether expressions of folklore are regarded as a cultural heritage, an economic resource, or both. Since the expressions of folklore exist irrespective of the status of communities, a diminished recognition of communities inevitably results in an increased participation and appropriation by individuals of the expressions of folklore. This is evident in the way individuals have, in many African states, used copyright and other intellectual property rights to appropriate folklore. This happens even in states where derivative works based on expressions of folklore are eligible for copyright and design protection.

The implications of recognising communities as owners of expressions of folklore are complex and problematic. For example, a state needs to reconcile the desire to enhance national cultural heritage and the need to recognise communities as owners of folklore which diminishes this national goal. Communities like culture are fluid because they interact with other communities often making it difficult correctly to identify communities and expressions of folklore. Other questions are also appropriate and include the possibility of the development of a national culture through widespread appropriation of the culture of a specific community with the result that what is regarded as an expression of a particular community is in reality a manifestation of national culture. A further issue is whether a legal system should defer to a community's determination of an expression of folklore or establish an objective criteria?

One credible way to ensure that communities enjoy the moral and materials benefits of folklore endowment, is to recognise them as the owners of expressions of folklore. As the protective regime for the expressions of folklore developed, it would appear that a choice emerged either to recognise communities as owners of expressions of folklore, or to regard expressions of folklore as part of the national cultural heritage in which case they would be effectively controlled, if not owned, by the relevant state. Where expressions of folklore are considered as part of the national cultural heritage it is not surprising that the ownership of communities is
not emphasised. In the existing protection of folklore it is evident that communities are not regarded as its owners.

It would appear that as a result of recent insights and developments in the human rights field, there is an ongoing and deserved shift towards increasing recognition of communities as owners of expressions of folklore. This paradigm shift is important for a number of reasons. Firstly, this type of protection would also recognise the right of communities to object to the registration, maintenance, and enforcement of intellectual property rights that embody their expressions of folklore – especially in intellectual property rights such as trademarks and designs which must be registered as a condition for their validity. In this regard communities would be able to object to the validity of copyright which reflects their expressions of folklore. Secondly, such a protective regime would enable the communities to exploit their expressions of folklore by engaging in their commercial exploitation. This type of protection will encourage communities to deploy intellectual property rights by seeking to register rights in their name.

In confronting the challenges facing communities and expressions of folklore, a good starting point to ask is whether the countries of study recognise communities. This question is important because if a particular legal system does not recognise communities, it will be difficult to protect their expressions of folklore effectively.

One way of interrogating the recognition of communities is to enquire whether the Bills of Rights of national constitutions recognise individuals and communities as right-bearing entities. Many African states do not accord communities this recognition in that they make no provision for group rights. On the other hand, some African states recognise communities indirectly as a vehicle for the enjoyment of individual rights. Consequently, certain national constitutions provide that individuals can maintain or join religious, cultural and linguistic communities in furtherance of the promotion and protection of their religion, language and culture. This is the import of sections 30 and 31 of the South African Constitution. In
Christian Education SA v Minister of Education of the Government of SA\(^{168}\) the nature of the right granted in section 31 is explained by Sachs J:

> The rights protected by section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism... the protection of diversity is not affected through giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language).\(^{169}\)

Other examples of the indirect recognition of communities include the recognition of customary law and of traditional leadership. The Constitution of the Republic of Ghana, 1992, (hereafter Ghanaian Constitution) specifically recognises customary law. This position is strengthened by the definition of expressions of folklore in the CA Ghana, which speaks of "ethnic communities". The Constitution of the Federal Republic of Nigeria, 1999, (hereafter Nigerian Constitution) indirectly recognises the existence of Islamic and customary law through the recognition of judicial structures for the application of customary law. These judicial structures include customary and area courts which are mandated to apply customary law.\(^{170}\)

Of all African states it would appear that only Kenya and South Africa have a constitutionally sanctioned idea of a community, even though, at first blush, it would appear to refer only to ethnic communities. The question that immediately arises is whether non-ethnic communities can own expressions of folklore? With respect to Kenya it should be pointed out that section 63(1) the Constitution of Kenya, 2010, (hereafter Kenyan Constitution) recognises that "community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest". It can therefore be concluded, at the least, that ethnic cultural communities exist in Kenya. Whether other communities are contemplated is unclear.

\(^{168}\) Christian Education 1999 2 SA 83 (CC) (hereafter Christian Education).

\(^{169}\) Christian Education 1999 2 SA 83 (CC), para 23.

\(^{170}\) See, for example, ss 244, 245, 275 and 280 of the Nigerian Constitution.
The *South African Constitution* also recognises communities under sections 30 and 31. However, it would seem that ethnic communities are preferred. Section 211(2) of the *South African Constitution* specifically recognises a traditional authority that observes a system of customary law. Section 212 requires national legislation that provides a role for traditional leadership as an institution at the local level on matters affecting local communities. Pursuant to this constitutional imperative, the *Traditional Leadership & Governance Framework Act* 41 of 2003, (hereafter *TLGA*) was enacted. Section 2 of the Act provides that a "community may be recognized as a traditional community if it is subject to a system of traditional leadership in terms of that community's customs and observes a system of customary law". It is clear that the defining feature of a traditional community is customary law. Customary law in South Africa is not defined in the *TLGA* but appears to be customary law linked only to ethnic communities. The *Recognition of Customary Marriages Act* 120 of 1998, however defines customary law as "customs and usages traditionally observed among indigenous African peoples and which form part of the culture of those peoples". As this Act was adopted pursuant to section 15(3) of the *South African Constitution*, it may be regarded as further evidence that the Constitution regards customary law as applying to an ethnic community.

This association of customary law with an ethnic community has also been recognised by the South African judiciary in cases involving customary law. For example, in *Elizabeth Gumede v President South Africa and Others*¹⁷¹ Moseneke DCJ questioned whether "people other than indigenous African people may be bound by customary law"¹⁷² implying, albeit wrongly, that only African communities can be bound by customary law and therefore subject to the protection of the *South African Constitution*. This interpretation would not be entirely feasible if it is remembered that sections 30 and 31 specifically recognise linguistic, religious and cultural communities, suggesting that these communities can also have their customary law. Therefore, with respect to Kenya and South Africa, it is clear that non-ethnic

communities are contemplated in the respective constitutions and that these communities may well be capable of producing expressions of folklore.

The definition of expressions of folklore in the *CA Ghana* makes it clear that only ethnic communities can create expressions of folklore. However, in view of the definitions of communities in the South African and Kenya Constitutions, the question needs to be asked whether religious and linguistic communities can also produce their own expressions of folklore? In this regard can a Christian, Islamic or traditional African religious community seek to protect what it considers as its folklore on the basis that it qualifies as a community and that the expression has been handed down from one generation to another? The first reaction is that such a claim by a religious community will not succeed. On deeper reflection, however, it will become clear that this conclusion could well be successful. It needs to be said, however, that a distinction must be made between religiously-inspired expressions of folklore, and expressions of folklore created by a religious community. This distinction is important because there are many ethnic communities in Africa whose lives are intricately dependent on their relationship with a supernatural being. Langa CJ recognised the close relationship between religion and culture when he said in *MEC Education v Pillay:*

> Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.

Many of the norms of customary law in Africa have developed in a religious context to the point where it can be asserted that a practice or process which is termed cultural may in fact be religious. Accordingly, a religious community would be on

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173 2008 1 SA 474 (CC).
174 2008 1 SA 47 (CC) para 47.
175 See Amoah and Bennett 2008 *AHR LJ* 357-375; Rautenbach "Umkhosi Ukweshwama" 63-89 where the author discusses whether the Zulu festival of 'First Fruits' is a religious or cultural festival.
the same footing as an ethnic community in seeking to protect its expressions of folklore.

The recognition in the South African Constitution of certain religions and the encouragement of languages that underpin certain religions, may form a basis for urging that the expressions of folklore of these religious communities should be considered as worthy of protection. For example, the South African Pan Language Board is urged to promote and ensure respect for languages used for religious purposes such as Arabic, Hebrew and Sanskrit. This may be interpreted to include protecting the expressions of folklore that emanate from these communities. Since these languages are foreign to South Africa, and may involve communities of persons who are not South African, the question raised by the recognition of languages used for religious purposes is whether communities made up of foreigners organised on the basis of either ethnicity or religion, will receive the protection that is due to other ethnic and language communities. Therefore, should a Jewish community in South Africa made up of Jews of different nationalities be entitled to the protection of its expressions of folklore? Again with respect to Ghana, the answer may well be in the negative given that the definition of expressions of folklore is restricted to ethnic communities. The prospects of the protection of expressions of folklore of foreign ethnic communities emphasises the need for an international understanding of the protection of expressions of folklore.

Because of the normative effect of the African Charter – an African regional human rights instrument to which most African states are party – on national legal systems in Africa, it is important to examine its approach to the protection of expressions of folklore. It follows that the nature of communities recognised by the African Charter will have considerable legal effect for countries like Nigeria and Ghana which conceive only of ethnic communities. It is clear that the African Charter recognises communities as rights-bearers because it recognises the following peoples' rights: the equality of all peoples; right to existence; right freely to dispose of their

177 A 19: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."
wealth and natural resources; right to their economic social and cultural development; right to national and international peace and security; and right to a generally satisfactory environment.

The nature and extent of these rights were in contention in Centre for Minority Rights Development (on behalf of Endorois Welfare Council) v Kenya The Endorois are a people from Kenya who were evicted from their lands near Lake Bogoria in the seventies and relocated to an area with limited access to water, far removed from their religious sites and unsuited to their pastoral lifestyle. The

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178 A 20: "1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

179 A 21: "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

180 A 22: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

181 A 23: "All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States. 2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter."

182 A 24: "All peoples shall have the right to a general satisfactory environment favorable to their development."

183 App 276/03 46th Ord Sess (hereafter Endorois). It must be acknowledged that the African Commission on Human and Peoples Rights (African Commission) had in a number of other cases dealt with group rights. See Katangese Peoples' Congress v Zaire 2000 AHRLR 72 (ACPHR 1995); and Social and Economic Rights Action Centre (SERAC) & Another v Nigeria 2001 AHRLR 60 (ACHPR 2001); Viljoen International Human Rights Law in Africa 226-28.
African Commission on Human and Peoples' Rights found the Kenyan government's actions to have violated the following provisions of the *African Charter*: article 8 (right to freedom of conscience and religion), article 14 (right to property), and article 17(2) and (3) (right to take part in the cultural life of his/her community and the protection of morals and traditional values of the society). *Endorois* is important not only for its affirmation of the existence of indigenous peoples in Africa, but also for its recognition of peoples' rights even beyond the provision of the *African Charter*. In recognising the right of the Endorois people to their religion, property, culture, wealth, natural resources, and to development, the African Commission affirmed that communities are bearers of rights.

Of importance to our current discussion is the fact that indigenous peoples constitute ethnic communities which suggests that non-ethnic communities are not contemplated by the *African Charter*. This point is explored further after the nature of indigenous communities in Africa has been examined. Specifically, it is important to determine whether all ethnic communities are indigenous people in Africa, or whether there are separate indigenous peoples in Africa. To begin it is important to remember that in *Endorois* the African Commission found that:

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184 The African Commission is established by a 30 of the *African Charter* to promote human and peoples' rights and ensure their protection in Africa.

185 "The African Commission therefore finds against the Respondent State a violation of Article 8 of the *African Charter*. The African Commission is of the view that the Endorois' forced eviction from their ancestral lands by the Respondent State interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion." (*Endorois* para 173).

186 "[T]he African Commission agrees with the Complainants that the Property of the Endorois people has been severely encroached upon and continues to be so encroached upon" (para 238).

From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfill the criterion of distinctiveness. The African Commission agrees that the Endorois consider themselves to be a distinct people sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a 'people', a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one's identity through identification with ancestral lands.\(^{188}\)

The decision of the ACPHR in Endorois is consistent with the \textit{Advisory Opinion} where the ACPHR dealt with the definition of indigenous peoples and concluded that "... it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa".\(^{189}\) These characteristics were listed by the ACHPR as: "(i) Self Identification; (ii) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival; (iii) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model."\(^{190}\)

The African Commission further pointed out that ...

\(... \text{ in Africa, the term indigenous populations does not mean "first inhabitants" in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as indigene to the Continent.}\(^{191}\)

\begin{footnotes}
\footnote{Africa, the Hadzabe of Tanzania, and the Ogiek of Kenya. The pastoralists are identified to be the "... Pokot of Kenya and Uganda, the \textit{Barabaig} of Tanzania, the \textit{Maasai} of Kenya and Tanzania, the \textit{Samburu}, \textit{Turkana}, \textit{Rendille}, \textit{Orma} and \textit{Borana} of Kenya and Ethiopia, the \textit{Karamojong} of Uganda, the numerous isolated pastoralist communities in Sudan, Somalia and Ethiopia, to name but a few. West and Central Africa also have pastoralists such as the \textit{Touareg} and \textit{Fulani} of Mali, Burkina-Faso, Niger and the \textit{Mbororo} who are spread over Cameroon and other West African countries". See \textit{Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities}, Doc/OS(XXXIV)1345.\footnote{Para 162.}\footnote{Para 10.}\footnote{Para 12.}\footnote{Para 1.}}
\end{footnotes}
If every African can be regarded as an indigenous person, the concept of indigenous people may be considered instrumental in drawing attention to groups and peoples who for different reasons have not been treated as other groups or enjoyed rights common to all groups. The *Advisory Opinion* recognises this point when it declares that:

In Africa the term indigenous populations or communities is not aimed at protecting the rights of certain category of citizens over and above others. This notion does not create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized.\(^{192}\)

It is clear from the analysis above that all ethnic communities in Africa can be regarded as indigenous communities even if there are some groups who because of their circumstances require greater consideration and description as indigenous peoples.

### 3.3.3 Individual creativity and expressions of folklore in Africa

Since expressions of folklore attributed to communities are produced by individuals, it is appropriate to ask under what circumstances an individual creation will be regarded as belonging to a community. An effective way of answering the question is to understand that ethnic communities in pre-colonial Africa were organised in a communal form and there was really no need to dwell on the individual agency of the production of folklore. The customary law of each community set out patterns of custodial endowment and stewardship. Individuals who bore the responsibility for artistic goods and services worked for the benefit and enjoyment of the community. Over generations other individuals added personal touches, all in the service of the community and the family. Even though they worked for the family and community, individuals were honoured and revered for their talent. Their creativity was attributed in the course of performance of certain works but these communities did

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192 Para 19.
not recognise the power of individuals over artistic matters except they were leaders of the communities who had to act in a representative or fiduciary\textsuperscript{193} capacity.

It would appear that the significance of individual creativity emerged with the introduction of intellectual property rights generally, and copyright protection in particular in colonial Africa. A potential conflict with respect to certain expressions of folklore is the nature, extent, context, and consequence of individual creativity. For example, one question is whether there should be a difference between the creative input of community representatives and that of ordinary members of the community. Another question is at what point, if at all, the creative input of an ordinary individual transforms an expression of folklore into a work that can be protected as an intellectual property right. It is important to note that some African states recognise derivative works based on expressions of folklore as eligible for copyright protection.

A related question is whether nationals of a state and members of a community are entitled to use the expressions of folklore as they wish. The importance of this question lies in the fact that in many African states individuals are accorded the right to the enjoyment of their religion, language and culture. This is even more relevant for members of a community.

Another issue is the lack of uniformity in what constitutes an expression of folklore across gender and age spectra. The ability of "minority" members of a community to engage in their understanding of an expression of folklore remains a challenge for any protective framework. Appropriate questions in this regard include whether such individual interpretation should be recognised in the face of group opposition, and how such a determination should be made. It is also important to question whether the customary laws of such a community should prevail, even if it is a reflection of dominant sections of a community.\textsuperscript{194}

\textsuperscript{193} See Bulun Bulun v R&T Textiles Pty Ltd 1998 41 IPR 513.
The challenge for a state is to strike a balance between access to and protection of expressions of folklore. One may argue that an entitlement to use expressions of folklore is crucial in enhancing individual creativity and innovation in Africa. This is all the more so because expressions of folklore play a key role within the creative regime of many of the countries. The protection of expressions of folklore should, therefore, be seen as a catalyst for creativity and so economic development if individuals are allowed access to these resources.

Available evidence from African countries indicates clearly that Africa’s cultural heritage is the basis of much creativity. This is strikingly evident from the burgeoning African film industry which is based on indigenous cultural motifs. The Nigerian, Ghanaian, Kenyan, and South African film industries all thrive on expressions of folklore.

A protective regime must therefore strike a balance which ensures that nationals of the African states and members of a community are able to enjoy and participate in their culture as recognised by the fundamental human rights provisions in national constitutions, as well as protect the right of communities to their expressions of folklore. To do so a protective regime should deal with how to reconcile the rights of members of a community and of non-community members who are also citizens of the state, with those of foreigners – bearing in mind that African states are obliged to treat foreigners and their citizens alike by virtue of a combination of the National Treatment (NT) and Most Favoured Nation (MFN) principles which are fundamental principles of multilateral intellectual property treaties such as the Berne Convention for the Protection of Artistic and Literary Works, the Paris Convention for Industrial Property, and the Trade Related Aspects of Intellectual Property Rights (TRIPS) of the WTO.

A creative and innovative regime could also encourage the establishment of a liability regime akin to compulsory licensing that would allow individuals to use

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195 See generally, Nwauche "The UNESCO Convention" 248-274.
expressions of folklore subject to the payment of a mandatory fee for the benefit of the community.

In all it is important, as the preceding discussion has shown, that individual rights in the production and use of expressions of folklore are important in the protection of expressions of folklore. Perhaps a distinction could be drawn between nationals of a state and members of a community in that the latter, as the human agency of the production of expressions of folklore, must continue to develop and transform expressions of folklore.

3.3.4 Perpetuity of expressions of folklore

The fact that expressions of folklore are timeless is a fundamental feature which distinguishes this property from individual intellectual property rights such as patents, copyright, and designs which are granted by the state for specific periods. The timelessness of expressions of folklore is involved in the way communities are also timeless – or at least conceived to be. Expressions of folklore are often created and refined incrementally by individuals over generations, and the identification of the individual creator is impossible. Accordingly, in the Ghanaian definition of expressions of folklore mention is made of an unidentified author as a characteristic of an expression of folklore and possibly as a basis of vesting folklore in the President of Ghana for the benefit of Ghanaians. The reliance on an unidentified author is a difficult one to deal with and is capable of being abused. A pertinent question is how to determine that a work is Ghanaian but created by an unidentified author? However, if it is asserted that a work is used by communities in Ghana over a period of time without an idea of how such a work was first created, this would accord with the general nature of expressions of folklore which is its perpetuity. The challenge of the perpetuity of expressions of folklore for legal systems is to determine whether to reflect this fact or to protect expressions of folklore for a limited period. This could result in diminished responsibility. One way to approach the issues of perpetuity of expressions of folklore is to determine whether all or some of these expressions require perpetual protection.
3.3.5 Expressions of folklore are information goods: An appropriate balance between protection of and access to expressions of folklore

Expressions of folklore even though collectively conceived, are 'information goods' because they convey facts, meanings and values that third parties consider important. When members of the public encounter an expression of folklore they learn new things. Amongst other things, this information inspires and enables members of the public to use the information gleaned from expressions of folklore to engage in creative activity. Since a feature of all property systems is the ability of the owner to exclude the rest of the world from the property, except on agreed terms, models of protection for expressions of folklore must address how to express the instrumental capability of determining access to the expression of folklore. Any possibility of restricting access, no matter how benevolent, ensures that inability to negotiate access denies third parties access to the information contained in the expression of folklore. The consequence of a restriction of information on the creative process is well documented.\(^{196}\)

Two extreme possibilities face African states in their development of a protective regime for the protection of expressions of folklore. One extreme is to regard expressions of folklore as part of the public domain.\(^ {197}\) The other extreme is to bar access to expressions of folklore completely or selectively. Neither extreme is desirable, practicable or permissible within a state where property by definition is not absolute. Most constitutional states recognise that property is not absolute but a balance of private and public interests.\(^ {198}\) Expressions of folklore are no different. This balance is important because expressions of folklore are information goods which reflect and constitute the culture of the states where it is recognised as applicable. Individuals and communities rely on expressions of folklore as a basis of further creativity and innovation. A protection regime that ensures that communities

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196 See Boyle 2003 Law and Contemporary Problems 33 which contains a rich literature on the effect of intellectual property rights on the public domain.
197 See Belder "Cultural Expressions" 35-52; Samuelson 2006 Duke LJ 783; Greenleaf and Bond 2013 Australian Intellec Prop J 111-138.
198 See, for example, s 25 of the South African Constitution. See First National Bank of South Africa t/a Wesbank v Commissioner South African Revenue Service 2002 4 SA 768 (CC).
are able to lock up expressions of folklore and restrict access except on their stated terms of access, could lead to a situation in which the stock of creativity is seriously depleted. Unrestricted access to expressions of folklore in certain circumstances is, therefore, in the public interest since such access fosters creativity and innovation. There is no other place where this is more relevant than in Africa where expressions of folklore constitute a potentially rich corpus of creative material.

The fact that expressions of folklore are information goods raises another question: does the protection granted to an expression of folklore assume the distinction between the protection of an idea and its expression? The description of the subject matter of this thesis as an "expression of folklore" assumes that what is protected is an expression and not the idea. This is important as the fact that ideas are not subject to copyright protection ensures that creativity is not foreclosed. However, it must be noted that the distinction between an idea and expression is very narrow. Sometimes the expression encompasses the idea to the extent that there may be nothing else to express. The unique cultural features of many expressions of folklore are such that any other expression of the folklore cannot be an independent creation. Let us return to the Ghanaian identification of Kente and Adinkra as expressions of folklore. Assuming that it is easy to identify Kente and Adinkra as expressions of folklore, it would appear that any arrangement of patterns and colours that are characteristic of these textiles would be an imitation, even if the arrangement is described by a different name. To all intents and purpose, the patterns and colours found in Kente and Adinkra textiles are exclusive, and any such use of the patterns and colours by third parties will be subject to the rights granted to the President of Ghana by the CA Ghana.

Another perspective related to the nature of expressions of folklore as information goods, and the need to balance protection and access, involves the developmental potential of expressions of folklore and an appropriate model of protection. In seeking to protect expressions of folklore by intellectual property rights, it may be said that the goal of protection is the economic development of relevant communities and their nation state. Positive protection is therefore designed as a
reward and an incentive. On the other hand, many models of negative protection seek to preserve the cultural identity and integrity of expressions of folklore – especially where the state or national institutions are endowed with the right to approve third party use of expressions of folklore.

### 3.3.6 Protection of the cultural heritage of African states and prevention of the misappropriation of expressions of folklore

As with most states, the cultural identity of African states is forged through expressions of folklore as a manifestation of the way of life of the peoples who constitute African states. Expressions of folklore are, therefore, an expression of the self-worth of the communities in these states who realise that the authentic representation and utilisation of expressions of folklore is important in maintaining their self-worth and how they are viewed by the public. Consequently, African states have a stake in ensuring that expressions of folklore are properly utilised. The protection of the cultural heritage of a state results in an emphasis of the state as a unit of protection with the responsibility to ensure the cultural purity of expressions of folklore. This narrative recognises that communities who author expressions of folklore are important constituent parts of the state and not only the principal beneficiaries of the protection of expressions of folklore.

The concern with preserving the cultural identity of African and other developing countries was the original intention in protecting expressions of folklore. On a timescale, the concern with the protection of expressions of folklore appears to coincide with the independence of developing countries in the sixties and seventies. It would appear that the time has come for a paradigm shift to a concern with the misappropriation of expressions of folklore which should focus attention on communities rather than the state.
3.3.7 Ensuring that communities that author expressions of folklore enjoy moral and material benefits from the protection of expressions of folklore

It is important to determine whether the goal of the protection of expressions of folklore is a moral or a material benefit, or both. In many cases expressions of folklore such as folk tales and dances have been used as the core of copyrighted works, indigenous designs have become registered designs, while traditional names have been registered as trademarks. While these works have made considerable sums of money for the intellectual property owners, the communities who are really the creators of these works have been largely ignored or inadequately compensated.

Secondly, the expressions of folklore have not been treated with dignity in the original or transformed form in which they are used. For example, the communal authorship of expressions of folklore is not appropriately acknowledged. Another example is the manner, in which some expressions of folklore have been represented is insulting and degrading and have caused communities considerable distress. Yet another example is in respect of secret knowledge of communities which is exposed to the world without appropriate consent. In many instances the moral rights of communities have been breached with impunity.

Thirdly, when expressions of folklore have been appropriated as an intellectual property right the communities maybe denied the right to use their expressions of folklore. A protective model for expressions of folklore should, therefore, ensure that communities enjoy the moral and material benefits deriving from their folklore. It may be useful to understand whether communities would be satisfied only with the protection of their moral rights or would, in addition, insist on the protection of their material benefits.

3.4 Examples of expressions of folklore in Africa: Ghana, Nigeria, Kenya and South Africa

In this section attention turns to a more detailed examination of expressions of folklore. The section begins with a profile of folklore resources in the countries of
study before proceeding to a deeper examination of three examples of expressions of folklore in Ghana, Nigeria, Kenya and South Africa. This exercise is important because it provides a factual reality to some of the issues raised with regard to the nature of expressions of folklore as well as the issues and challenges facing protective systems. In particular, I show how the examples of expressions of folklore are integrated within the economies of the countries of study and the industries that they support. The three examples of folklore chosen for a deeper examination in this section are indigenous textiles – which represent tangible expressions of folklore in Nigeria, Kenya and Ghana; Rooibos tea in South Africa; and the growing African film industry which largely uses expressions of folklore.

3.4.1 Representative sample of expressions of folklore in Kenya, Nigeria, Ghana and South Africa

The profile of expressions of folklore is a representative sample of expressions of folklore in the countries of study.

Kenya has approximately forty-two communities\(^{199}\) making it easy to comprehend the rich expressions of folklore in that country. Of these communities the Maasai have for centuries captivated the world with their distinctive way of life, dances, dress, ornaments, and traditional medicines, while the Kisii have their stone carvings. The Kamba have their wood carvings, bows and arrows, while the Kikuyu have their baskets. While the Giriama have their well-known fables, the Luo and Luhya are noted for their rich music and dances.\(^{200}\) Another expression of folklore is the *Kiondo* – a hand-woven basket – which has been made by the Kikuyu community in Kenya since the 17th century. Because the *Kiondo* is handmade, every basket is unique. Traditionally, a mother weaves a *Kiondo* for her daughter’s wedding. The basket is made of sisal, which gives it strength, and colourful yarn.

\(^{199}\) See Atsali 2011 *Trade Notes 1.*

Examples of South Africa's expressions of folklore include indigenous goats used in the manufacture of dried sausage or cabanossi, cashmere, and goat leather in the Eastern Cape;\textsuperscript{201} Karoo lamb;\textsuperscript{202} Honeybush tea;\textsuperscript{203} expressions of folklore representing the social, sacred and political significance of cattle amongst farming people of South Africa which has been applied in the spatial layout of Iron Age Archaeological sites;\textsuperscript{204} folk songs of the Kamiesberg in the Northern Cape;\textsuperscript{205} rich heritage of rock art in the form of engravings and paintings in the Northern Cape where rock engravings predominate; Zulu traditional men's clothing generally made from cowhide and includes Isinene – front apron which is the front part of a man's clothing; \textit{Ibheshu} – rear apron, knee length for young men and ankle length for older men; \textit{Umqhele} – headband worn by married men; \textit{Amashoba} – cow-tail bands worn on upper arms and below the knee; the attire of Zulu migrants in urban areas of South Africa;\textsuperscript{206} the ceremonial beer pots used to transport Zulu Sorghum beer or \textit{utshwala};\textsuperscript{207} the traditional Zulu drum carved out of wood and finished off with traditional African Zulu patterns; Zulu beadwork such as \textit{ubuhlu} where traditional colours, designs and patterns are woven together with great finesse and skill;\textsuperscript{208} Zulu baskets woven in old traditional patterns using ilala palm and grass and dyed using indigenous plants; and Zulu traditional practices and burial ceremonies.\textsuperscript{209} The folklore of other ethnic groups such as the Xhosa includes traditional knowledge surrounding male initiation.\textsuperscript{210}

\begin{itemize}
\item \textsuperscript{201} See Roets 2004 \textit{SARDQ} 79.
\item \textsuperscript{202} The Karoo Development Foundation is at the forefront of a project to certify Karoo meat. See www.karooeatoforigin.com.
\item \textsuperscript{203} The South African Minister of Trade and Industry issued a GN 988 in \textit{GG} of 4 October 2013 prohibiting the use of the words "honeybush", "heunibos" "honeybush tea" and "heunibos tee" following a request from the South African Honeybush Tea Association for a prohibition on the use of these words in connection with any trade, business, profession or occupation, or in connection with a trademark, mark, or trade description applied to goods other than by association.
\item \textsuperscript{204} See McGregor Museum, Kimberley www.museumsnc.co.za/aboutus/depts/archaeology/pdf/IKS.pdf 3.
\item \textsuperscript{205} See Snel 2011 \textit{South African Museums Association Bulletin} 38-43.
\item \textsuperscript{206} See Ranking-Smith "Beauty in the hard journey" 409.
\item \textsuperscript{207} Armstrong 2008 \textit{Zulu identities: Being Zulu, past and present} 414.
\item \textsuperscript{208} See Winters "The secret of Zulu bead language" 418.
\item \textsuperscript{209} See Ngubane 2004 \textit{Indlinga African Journal of Indigenous Knowledge Systems} 171-177.
\item \textsuperscript{210} See Ntombana 2009 \textit{Indlinga African Journal of Indigenous Knowledge Systems} 73-84.
\end{itemize}
Nigeria is thought to be made up of over 250 ethnic groups. Potential geographical indicators include a number of agricultural products such as cocoa, coffee, tea, rubber, palm oil, and yams. Other possible products include indigenous textiles discussed in the following section. Other expressions of folklore include traditional drama, masks, and masquerades.

Ghana has a population of over 24 million with over 100 ethnic groups. A representative sample of folklore resources in Ghana indicates agricultural and natural products that could qualify as geographical indications under Ghana’s 2003 Geographical Indications Act including cocoa, wood sugar, fruits, wine, coffee, tobacco, textile goods such as Kente and Adinkrah, Pito, Palmwine and bushmeat.

3.4.2 Detailed examination of selected expressions of folklore

3.4.2.1 Indigenous textiles

Ethnic communities in African states have in the course of their development evolved indigenous textiles for sacred and secular uses. To describe these textile forms as indigenous is not to consign them to the past. These textile forms are described as indigenous because of their manner of development and the fact that they continue to be handmade. They exist in the countries of study and as will emerge, have become the pillar of some sectors in the textile industry.

The textile forms addressed in this section are the Kente and Adinkra cloth from Ghana and the Aso-oke Adire and Akwete cloth from Nigeria.

The importance of cloth to Africans is set out by Perani and Wolff:


See Oguamanam and Dagne "Geographical Indication" 77-108.

See Blakeney et al Extending the Protection 9.


See generally Bolland "Clothing from burial caves in Mali 11th - 18th Century".
Everywhere Africans use cloth to dress themselves and things important to them. Cloth, the most important two-dimensional art form in Africa, possesses qualities which encourage a multitude of usages. Being flexible and portable it enfolds, wraps and encloses. Cloth invites decoration and through color and pattern carries a rich symbolic message. As a product of human culture, cloth dresses the body, packages artifacts and defines spaces to impart cultural meaning. The importance of cloth is reflected in commissioning and production practices, in distribution and consumption patterns and the meanings it acquires through use. As a mediator of cultural meaning, cloth has overwhelming significance at the individual, group and societal level...In cultural context cloth serves basic needs as clothing and shelter, defines ethnic identity and social status, articulates sacred and secular boundaries and acts as a measure of value.  

As sacred objects some of these textiles are reserved for religious purposes. In addition a mark of identity in these textiles serve as a means of identifying an ethnic community and its members. They further enable individual members of a community to express their peculiar identity in the style that these indigenous textiles are presented and worn. The identity that indigenous textiles enable is especially important in foreign nations where indigenes of the countries of study and their ancestors who have become nationals of foreign states cling to these textiles as a means of expression and identity. In particular, as a result of the slave trade, a significant number of Africans have become citizens of countries such as the United States, Canada and the United Kingdom. These diasporic Africans have sought to use Africa textiles to create an African identity. African textiles also perform other roles. Josephine Asmah notes that African textiles can be a "means of communication and instruction in a community" in the sense that the styles and designs have acquired different meanings over time.

3.4.2.1.1 Indigenous textiles in Ghana – Kente and Adinkra

Of all African countries, it is significant, as noted above, that Ghana has listed Kente and Adinkra in its CA Ghana, as examples of its expression of folklore.  

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218 See generally Ross and Adedze Wrapped in pridey; Boateng "African textiles and the politics" 212-26.
220 See s 76 of the CA Ghana.
The *Kente* cloth is a hand woven traditional cloth produced on a horizontal loom by the Ewe and Asante ethnic groups which are part of the larger Akan ethnic group in Ghana. Kente is a strip-woven cloth whose distinctive design consists of alternating blocks in the strip cloth so that when the strips are joined together the overall effect is a checkerboard. The loom usually produces four strip cloths which are then sewn together to produce a full cloth.

The *Adinkra* cloth, on the other hand, is a printed cloth that features symbols stencilled on a cloth using a black dye. The dye, made from the bark of the Badie tree, is applied to grid patterns by the means of stamps made from calabash shell, being stamped into the squares of the grid. It is the nature of the grid pattern and the design of the stamps that represent the creativity that different people bring to *Adinkra*.production.

The basis of the protection of the *Kente* and *Adinkra* cloth as part of Ghanaian folklore is the identification and recognition of the creator of the design. In terms of the Ghanaian definition of folklore it would appear that some of the designs which are a product of individual initiative, do not form part of Ghanaian folklore. This means that the more recent designs of the *Kente* and *Adinkra* cloths the designers of which are known, are not regarded as communally created and therefore part of Ghanaian folklore. Therefore, new creations of *Kente* and *Adinkra* cloths can be registered in the Copyright Office and as a design which would be exempted from the corpus of Ghanaian folklore. Accordingly, the *Kente* design known as *Fathia fata Nkrumah* designed to honour the late President Nkrumah, would have been regarded as an individual *Kente* design if it had not been commissioned by the state.

It would appear that *Kente* serves the Asante and Ewe communities in many ways. In many cases the use of *Kente* has a sacred significance. It may be used as a special gift during such rites and ceremonies as child naming, puberty, graduation, marriage and soul-washing. It may also be used as a symbol of respect for the

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221 See Boateng 2006 *Am UJ Gender Soc Pol'y & L* 342.
departed souls during burial rites and ancestral remembrance ceremonies. Its significance as a symbol of prestige, gaiety, and glamour is evident during community celebrations such as festivals and commemoration of historical events, when people proudly wear the best of their Kente cloths to reflect the spirit of the occasion.\(^2\)\(^2\)\(^3\)

The Kente and Adinkrah designs communicate rites of passage such as puberty womanhood and royal celebrations. Professor Boateng asserts that each Kente cloth has a specific meaning; for example Gye Nyame means the "power of God"; while other meanings include "a good mind"; "life-giving leaves"; "is this my reward?" and "because of the anointing".\(^2\)\(^4\)

Even if there was a time that Kente and Adinkra were reserved for royalty\(^2\)\(^5\) or for sacred purposes, it would appear that it is now available to all\(^2\)\(^6\) and used for various purposes. There is a considerable decline in the production of hand woven Kente and Adinkra cloths.\(^2\)\(^7\) This is partly attributable to the machine-prints produced by Ghanaian textile mills, that make use of Kente and Adinkra designs in Ghana as a result of the definition of Ghanaian folklore and the provisions of the Textile Registration Decree.\(^2\)\(^8\)

"Globalisation" in general, and the importation of fabrics from East Asia have severely affected the output of the "indigenous" and "modern" Ghanaian textile industry. Ghana, one of the West African countries with a vibrant textile industry, is gradually joining the league of other nations in the sub-region with collapsed textile and garment manufacturing sub-sectors. From over 40 textile firms that employed more than 25 000 people during the last two decades, the country now has only four textile factories employing less than 4 000 Ghanaians.\(^2\)\(^9\)


\(^{2\)\(^5\)\(^\)}\) See Asmah 2008 International Journal of Cultural Property 274.


\(^{2\)\(^7\)\(^\)}\) See Boateng 2006 Am UJ Gender Soc Pol'y & L 352.

\(^{2\)\(^8\)\(^\)}\) Boateng 2006 Am UJ Gender Soc Pol'y & L 352.

The importation of fabrics from East Asia includes machine-produced wax prints incorporating registered and imitated Kente and Adinkra designs. These fabrics are cheaper because of their industrial base. Even though their quality appears inferior to that of the original Adinkra and Kente cloths, they appear acceptable to Ghanaians who have embraced them widely.\textsuperscript{230} It has also been asserted that the revision of Ghana's folklore to include Kente and Adinkra is partly attributable to the fact that

...imitations of local handmade Adinkra and Kente textiles were being mass-produced by East Asian textile factories without the payment of royalties to Ghana for the use of cloth designs that the country considered to be part of its culture.\textsuperscript{231}

There is no evidence of the payment of royalties by commercial wax-print makers for the use of these Kente and Adinkrah designs.

3.4.2.1.2 Indigenous textiles in Nigeria

There is evidence that weaving of different indigenous textiles by vertical looms preceded the contact of many parts of Southern Nigeria with European traders in the fourteenth and fifteenth centuries.\textsuperscript{232} Contact and trade with European traders led to the demand importation and appropriation of the scarlet wool cloth into the cultures of the Southern Nigerian communities, such as the Benin Kingdom and the different Yoruba Kingdoms.\textsuperscript{233} There was massive importation of European textiles for use in these areas and this did not kill the indigenous textile industry. Kriger concludes that there is evidence of significant export of some indigenous textiles produced by the vertical loom during the seventeenth and eighteenth centuries at the height of the transatlantic trade.\textsuperscript{234}

As regards Akwete cloth, it appears to be agreed that the weaving of the Akwete cloth began in the South Eastern part of Nigeria in the mid-nineteenth century as a response to the emergence of a wealthy middle class of indigenous palm oil traders
in the Southern region of Nigeria. These traders profited from the burgeoning oil palm trade that arose in the wake of the demise of the Atlantic slave trade. The Akwete weavers imitated the European luxury cloth imported by wealthy indigenous oil palm traders by adapting their vertical looms to make cloth characterised by "elaborate brocaded patterns that formerly had been restricted to ceremonial textiles in the Benin and Yoruba Kingdoms". It would appear that some of the weaving designs also incorporated "threads unravelled from foreign cloth". There is evidence that the designs of the Akwete cloth have over time been influenced by designs from the South Western part of Nigeria, from England, and from India. The designs which the weavers came up with enhanced the reputation of Akwete cloth that it was avidly sought after and earned more money than other locally woven cloth. In turn, the increased economic significance of the Akwete cloth attracted other women into the craft and it became a fulltime occupation for women in the area. With time the Akwete cloth became "the most famous highly prized in Igbo society".

The origin of the Akwete cloth is traced to supernatural revelations and it is even asserted that many weavers continue to receive designs in their dreams. The Akwete cloth has cultural, political and religious significance and the weavers "revealed knowledge of their environment and cultural values in their cloth motifs". As in most indigenous textile evolution, certain patterns of the Akwete cloth were regarded as sacred and reserved for religious purposes, while there were other patterns that were a status symbol reserved for royalty and the warrior

See Kriger Cloth in West African History 45.
See Kriger Cloth in West African History 45.
See Kriger Cloth in West African History 46.
See Kriger Cloth in West African History 29.
See Chuku Igbo women and economic transformation 71 where she describes a type of Akwete cloth 'patterned according to the ijebu-ode cloth.' Ijebu Ode is in the south western part of Nigeria. See also Perani and Wolff Cloth, dress and art patronage 73.
See Chuku Igbo women and economic transformation 72 where reference is made to a type of Akwete cloth known as "plangid" which is a bastardisation of 'blanket'.
See Chuku Igbo women and economic transformation 72 where a design called "Jioji" and "Popo"... were named and patterned after the Indian Madras.
See Chuku Igbo women and economic transformation 67.
Chuku Igbo women and economic transformation 67.
See Kriger Cloth in West African History 29.
See Chuku Igbo women and economic transformation 71.
Chuku Igbo women and economic transformation 71.
class. Over time the cloth became available to all without restriction, and it is currently used exclusively for social purposes such as the expression of family wealth, for clothing – especially for women, decoration, rites of passage, burial and other commemorative events.

While a modest tourist industry has sprung up around the Akwete cloth, it would appear that its significance has declined in the face of the onslaught from foreign textiles that have appropriated the designs of the Akwete cloth and the difficulties associated with texture of the Akwete cloth which makes it difficult to use in dress making.

The decline in the use of Akwete cloth for religious purposes is directly linked to its rise in secular use and reputation. In contrast to Akwete cloth, the Ukara Ekpe cloth woven by men is reserved exclusively to the traditional Ekpe Society which is a traditional African religious cult. Perhaps because of its exclusive religious use the Ukara Ekpe has not achieved the popularity of the Akwete cloth.

The Aso-oke cloth is a hand woven cloth from the South Western part of Nigeria especially amongst the Yoruba ethnic communities. Two types of loom are used in the production of Aso-oke. The first is a vertical loom usually used by women, while the other is a horizontal loom usually used by men.

There is evidence that in the evolution of the design and style of Aso-oke, Yoruba weavers borrowed from the designs of European textiles as well as new fibres and industrial dyes. The imported yarn led to a change in the sixties in the structure, visual and textural qualities of the Aso-oke. For example, it is asserted that some of the current Aso-oke designs resemble modern-day Spanish lace.

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246 Chuku Igbo women and economic transformation 71.
247 Chuku Igbo women and economic transformation 72.
248 Chuku Igbo women and economic transformation 73.
The *Aso-oke* cloth is used as basic cloth; as ceremonial cloth for events such as weddings, coronations, birthdays, and funerals and for sacred purposes. Describing the ritual uses to which *Aso-oke* is put in Yoruba, Asakitipi states that:

Yoruba women produce a number of ritual cloths for the use of traditional cults within the society. These cloths may be used for worship, to perform rites, sacrifices or as an object of prayer. Sometimes medicine men or heads of cults, pray on the cloth or add other substances, and subsequently give the cloth to their patients or followers for protection against evil spirits. Women who are having problems with child conception may be given specially woven cloth to wear on their bellies after prayers or incantations have been said over them. Some of these cloths are also woven for the use of masquerades with the belief that once they wear the cloth, the ancestral spirits would possess them. *Egungun* and *Gelede*, two very important masquerades in Yoruba land, are examples of masquerades that use traditional cloth woven by women for covering.

The production of the ritual *Aso-oke* is governed by norms in the form of taboos which require a high standard of physical, spiritual, and moral purity of the weavers. The wearers of such cloth must also maintain a state of physical and spiritual purity involving no sexual contact with the opposite sex, just as menstruating women are not allowed to wear the ritual cloth. The production of *Aso-oke* continues to support local regional and national industries in the South Western part of Nigeria.

In the wake of Nigeria’s economic crises in the eighties, the production of *Aso-oke* rose because of a demand that arose from a desire to substitute it for more expensive foreign textiles.

There is a decline in the use of *Aso-oke* in Yoruba land. One principal cause of this decline is a limitation in the contemporary use of *Aso-oke* because of the technical quality of the cloth. The *Aso-oke* is hard, stiff and heavy and considerably limits the potential for the use of the cloth in contemporary fashion designs. It is, therefore, unable to compete with the factory-printed "African prints" which are lighter and able to reproduce complex motifs including portraits far more economically as a result of its industrial production. Nigerian textile mills, while they

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258 See Olajide, Ajiboye and Joseph 2009 *Journal of Pan African Studies* 64.
259 See Olajide, Ajiboye and Joseph 2009 *Journal of Pan African Studies* 64.
existed, impacted on the growth of indigenous textiles such as *Aso-oke*. The situation has worsened through the importation of foreign textiles into Nigeria, which has not only dealt a blow to the Nigerian textile industries, but has also negatively impacted on indigenous textiles such as *Aso-oke*.

Again Olajide *et al* argue that:

> Since *aso-oke* weavers cannot guarantee prompt mass production for larger consumption, uniformity in design, quality and promptness in product delivery, patrons now shift attention to the factory where such is guaranteed. The tradition of using foreign factory printed textiles mostly *ankara* and lace in place of *aso-oke* in traditional ceremonies as *aso-ebi* contributed mainly to the growth of these modern industries.\(^{261}\)

Scholarly suggestions on measures to stimulate *Aso-oke* production include discovering more creative ways of "adapting *Aso-oke*" to modern use in "social ceremonies",\(^ {262}\) and using *Aso-oke* to make wedding dresses.\(^ {263}\) One author even advocates that the machine produced "African print" can be authenticated by "a new design format derived from the best of indigenous textile traditions in Africa".\(^ {264}\)

### 3.4.2.1.3 Overview of indigenous textiles in Ghana, Nigeria and Kenya

Certain conclusions can be drawn from our analysis of indigenous textiles in the countries of study. The first point is that indigenous textiles are no longer generally used for sacred or ceremonial purposes even if this was the practice in the early periods of their conception. They are all now articles of trade and support local regional and national trade. Secondly, indigenous textiles are handmade products of the vertical loom which are threatened by machine produced imitations using these designs. Accordingly, it is appropriate to ask whether the unique nature of these textiles will be compromised if these communities rely on machine-made textiles. Third, these indigenous textiles have been heavily influenced by foreign textile forms

\(^{260}\) *Aso-ebi* is a uniform worn by friends and family as a mark of solidarity during special occasions.  
\(^{261}\) Olajide, Ajiboye and Joseph 2009 *Journal of Pan African Studies* 64.  
\(^{262}\) Olajide, Ajiboye and Joseph 2009 *Journal of Pan African Studies* 65. See also Olaoye 1989 *Africa Study Monographs* 90.  
\(^{263}\) See Amubode and Adetoro 2001 *The Nigeria Field* 29-34.  
\(^{264}\) See Akinwumi 2008 *Journal of Pan African Studies* 189.
at different points of their history. This means that there should be some caution in asserting that they are completely unique to a particular ethnic group. Fourth, indigenous textiles form the basis of the economic life of many ethnic communities because of the unique cultural styles and reputation developed over the years.

3.4.2.2 Rooibos tea in South Africa

Rooibos tea occurs in the Cedarburg mountains in the Northern Cape of South Africa. This plant was discovered by the Khoi and San people centuries ago as a remedy for a number of ailments because it is high in anti-oxidants and caffeine-free. There are unique physical characteristics of the Cedarburg Mountains that enables Rooibos to thrive. The area has hot dry summers and cooler wetter winters, in addition to high altitudes of between 200 to 1000 metres where Rooibos thrives. The nature of the Rooibos plant has adapted to the unique soils and rock of the area to reach water deep in the soil and survive in otherwise harsh conditions.

The Khoi and San people were the original harvesters of the Rooibos over generations developing traditional knowledge of the methods of planting and harvesting the plant. It was only in 1772 that the Khoi and San introduced Rooibos to a Swedish botanist who took the tea to Europe. It was in 1904 that a Russian immigrant became interested in the Rooibos and began trading in the tea. Rooibos became popular throughout the area, and farmers subsequently recognised its potential and began to cultivate the plant. In reaction to demands for Rooibos, multinational and national farmers began to buy and package Rooibos under their trademarks. Government and private sector regulation has helped to grow the

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265 The same conclusion applies to the ‘Shweshwe’ fabric that is popular in Southern Africa. What has become a distinctively popular fabric among South African ethnic groups such as the Xhosa, Sotho and Zulu has an Asian and European Origin allegedly traceable to German immigrants. See Davie www.mediaclubsouthafrica.com/land-and-people/3556-shweshwe-the-denim-of-south-africa.


267 See Troskie "Geographical Indications at the National Level" who lists five conditions for a successful production of rooibos: (a) It must in the winter rainfall area; (b) The substrate must be a derivative of Table Mountain Sandstone; (c) It must be deep, well drained sandy soils; (d) The ph of the soil must be below 7 and (e) It must be in the Fynbos biome.

268 Troskie "Geographical Indications at the National Level".

269 Troskie "Geographical Indications at the National Level".
industry to a level where it is now estimated that there are over 400 farmers engaged in Rooibos farming.\textsuperscript{270} While 95 per cent of the Rooibos production comes from commercial plantations, five per cent of the production is from local cooperatives which still harvest Rooibos by traditional means using their traditional knowledge.

The considerable economic potential of Rooibos has led to a number of attempts to register Rooibos as a trademark. One was successful in the US in 1994 when Forever Young registered a trademark "Rooibos". Objection was lodged against this registration by the South African Western Cape government who argued that "Rooibos" is a generic term in Afrikaans, and cannot distinguish goods or services. Thus began a lengthy battle which included proceedings when a South African firm tried to register "RooibosRedTea". The litigation ended in a settlement with the withdrawal of the registered and pending trademarks. The result is that "Rooibos" is now a generic term in foreign markets.\textsuperscript{271} Many companies have registered trademarks containing the term "Rooibos".

It is asserted that the need to protect rooibos as a geographical indication is one of the reasons for IPLAA 2013.\textsuperscript{272} The reasons following reasons may be offered for the geographical indication protection sought.

First, it protects the name from usurpation while allowing all those involved in the Rooibos industry in the region – from farmers to exporters – to use it without fear of litigation in foreign markets. Second, a geographical indication comes with specific guidelines for how a product should be produced, and this will ensure that all Rooibos is of the same high quality. Third, it adds value for the producers, and a geographical indication would put greater power in the hands of the producers and

\textsuperscript{270} Troskie "Geographical Indications at the National Level".
\textsuperscript{271} Troskie "Geographical Indications at the National Level".
\textsuperscript{272} See an account of this in Troskie "Geographical Indications at the National Level": "South Africa's Minister of Trade and Industry recognised the importance of geographical indications (GI) and submitted the Intellectual Property Laws Amendment Bill to parliament. If approved, this bill would develop a framework for GIs in South Africa. The protection of Rooibos was one of the main reasons for the proposal of the Bill, and as of early 2011 it was still being considered by the South African parliament."
farmers. Fourth, because the geographical indication links an area to a product, it would be a powerful marketing tool for the region, and could be used to promote other activities such as tourism. Fifth, Rooibos is produced in a fragile ecosystem, and a geographical indication will help protect the unique biodiversity of the region. Lastly, a geographical indication will ensure that Rooibos tea blends are in fact genuine and not diluted, by requiring the product to contain at least 80 per cent Rooibos in order for it be labelled as an official Rooibos product.273

It is interesting to note that the South African government has turned to the *Merchandise Marks Act* 17 of 1941, (hereafter MMA) to protect Rooibos tea274 a fact that is discussed in greater depth later.275

3.4.2.3 Traditional literary, dramatic and musical works as the basis of the African film industry

There is no doubt that it would be controversial to assert that the resurgence in the African film industry is significantly tied to a widespread use, reuse, criticism and inspiration derived from expressions of folklore. The truth, however, is that without the rich expressions of folklore in Africa generally, and in the countries of study specifically, the emergent film industry would not have become a reality. For purposes of this thesis extensive use of expressions of folklore by Africans brings into relief some of the challenges facing the protection of expressions of folklore. Specifically, two issues are pertinent. The first is the nature of access citizens have to expressions of folklore produced by their communities and country; while the second is the manner in which the African film industry has contributed to cultural growth of African states because of the access the industry has to expressions of

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273 Troskie "Geographical Indications at the National Level".
274 In a notice in the GN 911 of 2013 of 6 September 2013, the Minister of Trade and Industry, in terms of the *Merchandise Marks Act*, published the final prohibition on the use of the following words: "Rooibos", "Red bush", "Roobostee", "Rooibos tea", "Rooitee" and "Rooibosch" in connection with any trade, business, profession or occupation, or in connection with a trademark, mark, or trade description applied to goods, other than by SARC members or any other party in accordance with the Rules of Use for Rooibos, published as an annexure to the notice.
275 Chapter 5.2.2.
folks. This reality demonstrates the context in which expressions of folklore could be perceived which is a reality that appears to be ahead of regulatory initiatives.

The Nigerian film Industry – popularly known as "Nollywood" – is based on video films which are "feature films that are shot cheaply on video and sold or rented as video cassettes or video compact discs". Describing the nature of these films, Haynes argues that the films of these industries:

[A]re broadcast on television all over Anglophone Africa and are shown in theatres, small video parlours, and even in rural village. From a commercial point of view, these video films are the great success story of African cinema, the only instance in which the local media environment is dominated by local producers working in direct relationship with African audiences entirely outside the framework of governmental and European assistance and of international film festivals that has structured much of African cinema. From a cultural point of view, the videos are one of the greatest explosions of popular culture the continent has ever seen.

Nollywood is rated third on the strength of output after Hollywood and the Indian film industry. Writing in the WIPO Magazine, Elizabeth March describes the industry as thus:

Nigeria's burgeoning film industry, now considered the world's third largest after Hollywood and India's "Bollywood" is in a league of its own. Dubbed Nollywood, the industry is characterized by its prolific output of ultra-low budget films, shot with digital cameras, produced straight to video/DVD format, and sold directly to customers for two or three dollars. For 15 years, largely ignoring the external cinema world, Nollywood has fuelled an insatiable appetite in Africa's most populous country for homegrown films made by Nigerians about Nigerians. The market is expanding as the popularity of the films spreads across Africa, supplying the needs of local television stations and audiences for low-cost entertainment.

Most Nigerian home videos produced in indigenous languages of Nigeria and in English, are based substantially on expressions of folklore. This is evident in the description of the content of Nigerian home videos. Consequently, one academic author has described some of the content of the Nigerian home video industry as

278 This estimation is based on evidence of the output of Nigerian films through the statistics kept by the Nigerian Video Film and Censors Board. Established by Act 85 of 1993, it is charged with keeping records of film made in Nigeria. Statistics contained in Vols 1 & 2 of the National Film and Video Censors Board Directory indicates that 4425 video films were produced in Nigeria between 1997 and 2003.
"traditional oral performance forms", 280 while another states that one of "...the fascinating thing[s] about Nollywood is the fact that it gives rise to a spectrum of cultural views – Christian, Muslim, traditional and folkloric...". 281 Yet another author states that "...viewed from a national perspective, there are two motivations for Nollywood. One is to do with cultural identity...". 282 It is evident that the reference to culture may well represent a reference to expressions of folklore.

It would appear inevitable that recourse to indigenous languages would lead to content that reflects the culture of the language group because the use of indigenous languages targets a cultural audience. 283 Accordingly, it is not surprising that the industry described as "Nollywood" does not represent a single filmmaking genre, but rather many cultural genres operating as reflections of major cultures in Nigeria and Ghana. Thus three major cultural groups in Nigeria: the Hausa, Yoruba and Igbo all have a film industry that can be said collectively to make up "Nollywood" with the "Igbo" film industry producing home videos in English with sub-titles in Igbo and an Igbo crew and cast. 284 Jonathan Haynes correctly states that half of Nigeria's population are not from any of these three major ethnic groups but from the 250-odd ethnic groups in the country, and that film industries constructed around these minority languages are consolidating. 285 The Nigerian film industry is therefore largely structured along ethnic lines revealing its dependence on ethnic culture as a vehicle and reason for production. 286 It would appear that the use of ethnic cultural forms in the form of expressions of folklore is taken for granted, and that the Nigerian home video revolution is intricately tied to the ethnic cultural motifs it employs in the form of indigenous languages and other cultural forms. It is doubtful if the industry would have been this successful had it recounted the stories of foreign cultures.

280 See Adeoti "Nollywood and Literary" 198-214.
281 See McCall 2007 Film International 94.
282 See Esan 2008 Particip@tions 1-19.
283 See Okome 2007 Postcolonial Text 1.
284 See 2007 WIPO Magazine.
286 As evidence of the perceived influence of the ethnic film industry, the Kano State Government in 2008 shut down the Hausa Video industry in Kano on the ground that it offended Hausa culture and Islam. See ‘Censorship in Kano’. A blog entry at Bahaushe Mai Ban Haushi available at www.Ibrahim-Sheme.blogspot.com.
The Ghanaian film industry is similar to the Nigerian film industry but of a much smaller scale. It is estimated that by the mid-1990s, Ghana was producing a tenth of Nigeria's production of video films.\(^{287}\) Describing the Ghanaian film industry, Jonathan Haynes states that: "Because of its smaller size, video production in Ghana is less differentiated than it is in Nigeria. Filmmaking is overwhelmingly centralized in Accra and is nearly all in English. There have been some films in Twi, notably those of Kofi Yirenkyi, which have a folkloric flavor...".\(^{288}\) Even though many Ghanaian home videos are produced in English, there is little doubt of its rich Ghanaian cultural content even if authenticity is contested.\(^{289}\) Compared to Nigeria and Ghana, the Kenyan film industry is in its infancy.

There is little doubt that the film industries in Nigeria, Ghana and Kenya thrive to a significant extent on ethnic cultural forms including expressions of folklore. These industries have generated employment, created wealth, and significantly contributed to national economic development. An appropriate question is whether these industries have grown because of their producers' unrestricted access to cultural forms. In other words, it is important to ask whether increased protection of expressions of folklore will become a significant obstacle to the growth of the African video film industry. In this regard a further question is whether the payment of access fees for the use of expressions of folklore in films will discourage producers. On one hand it would appear that lack of enforcement of the regulatory framework of the expression of folklore has contributed to the growth of these industries. However, evidence from Nigeria suggests otherwise because Nigerian home video makers have factored in the costs of regulatory oversight of the Nigerian Film and Video Censor Board in their production, and that certain additional costs associated with licensing of folklore may not stifle the industry.\(^{290}\)

\(^{287}\) Haynes 2007 Postcolonial Text 2.
\(^{289}\) See, for example, Meyer 1999 Africa Today 93-114.
\(^{290}\) See generally Ugor 2007 www.birmingham.academia.edu/PaulUgor/Papers/583299/Censorship_and_the_content_of_Nigerian_Video_Films.
A number of challenges and issues arise from the examination of expressions of folklore above. The first is the number of agricultural and natural products that are potentially geographical indications and therefore expressions of folklore. This may well indicate that geographical indications could be the most important means of protecting expressions of folklore in African countries. Secondly, a detailed examination of expressions of folklore reveals considerable foreign influence in the development and elaboration of expressions of folklore with the consequence that the notion of "exclusive" development does not appear feasible. A good question to ask is how are these foreign influences to be accommodated? It is, therefore, a challenge to account for these influences of foreign cultural themes. A plausible mechanism is to ensure that the public has access to expressions of folklore no matter the protective model. Thirdly, the influence of technology in the production techniques and processes of expressions of folklore have not attracted sufficient attention. The appropriate question is whether technological innovations change the character of an expression of folklore, and whether an expression of folklore still retain its "traditional character" if machines produce the expressions? Perhaps if the community were deploying the machine in its production it could be argued that the character of the expression has not changed, and the machine is part of the cultural development of the community. Related to the issue of technology, is the transformation that it brings with an enlargement of the stakeholders in the industry. An appropriate question is whether it would be possible for the community entitled to the protection of geographical indications to include investors who have taken advantage of the commercial potential of the expressions of folklore. As the account of Rooibos tea reveals, there are both commercial and traditional producers of Rooibos in South Africa and both groups evince a sense of entitlement to the

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291 See Waldron "Minority Cultures and the Cosmopolitan Alternative" 109-110: "To put it crudely, we need culture but we do not need cultural integrity...in general, there is something artificial about a commitment to preserve community cultures. Cultures live and grow, change and sometimes wither away: they amalgamate with other cultures, or they adapt themselves to geographical or democratic necessity. To preserve a culture is often to take a 'favored' snapshot of it, and insist that this version must persist at all cost, in its defined purity, irrespective of the surrounding social economic and political circumstances."
product. It is important to wonder whether it is the Khoi and San people who should be entitled to the geographical indication protecting Rooibos, or all the South African producers of Rooibos. This question is important because of a key dimension of the clamour for geographical indication protection which is to enhance domestic production against foreign competition and access to foreign markets.

3.5 Conclusion

This chapter is linked to Chapter 2 and serves further to highlight the unique features of African states and how they have used the conceptual models of positive and negative protection in their frameworks for the protection of expressions of folklore. In addition, the chapter has examined key issues and challenges that define the protection of expressions of folklore. Two examples of a tangible expression of folklore, and two examples of an intangible expression of folklore were also used to provide a deeper context and reality to the protection of expression of folklore. Some of the issues considered in this chapter will be further explored in the following chapter which examines the negative protection of expressions of folklore in Kenya, Nigeria, Ghana and South Africa.
CHAPTER 4

THE NEGATIVE (*SUI GENERIS*) PROTECTION OF EXPRESSIONS OF FOLKLORE IN KENYA, NIGERIA, GHANA AND SOUTH AFRICA

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CHAPTER 4

THE NEGATIVE (SUI GENERIS) PROTECTION OF EXPRESSIONS OF FOLKLORE IN KENYA, NIGERIA, GHANA AND SOUTH AFRICA

4.1 Introduction

This chapter explores the negative protection of expressions of folklore in Ghana, Nigeria, Kenya and South Africa. Chapters 2 and 3 provide a general introduction to the subject on which this and Chapter 5 build to consider the protection of expressions of folklore in the countries of study in particular, and other African countries in general. It will be recalled that the previous chapters identified two broad mechanisms for the protection of expressions of folklore: the negative and the positive.

Negative models for the protection of expressions of folklore do not confer positive rights but rather enable communities and other stakeholders to ensure that third parties do not unlawfully exploit or misuse expressions of folklore. In the main, the defining feature of negative protection is that the use or otherwise of expressions of folklore by third parties is predicated on the consent of and benefit to communities who have a right to the folklore. Another feature of negative protection is that governments and national institutions facilitate the interaction of communities and third parties who seek the consent of communities to use their expressions of folklore.

One goal of negative protection is that communities should reap significant commercial benefits from third party use of their expressions of folklore. Another goal is the protection of the moral rights of communities through measures that ensure the authenticity and integrity of expressions of folklore. These two goals are not mutually exclusive. For example, even where stakeholders do not reap commercial benefits from the expressions of folklore, they have an equally important stake in ensuring that the context and processes of the use of their expressions of folklore are in accordance with their customary and traditional usage. Without this
possibility, many expressions of folklore could be transformed into new forms that bear no resemblance to their original form and cause considerable economic, psychological, and spiritual harm.\textsuperscript{292}

Two important points need to be clarified at the outset. First, in accordance with the objectives of this thesis the experience of Ghana, Nigeria, Kenya and South Africa will be extensively examined. Ghana, Nigeria and Kenya protect expressions of folklore through state ownership of expressions of control and control of third party use. While no such proprietary relationship exists in South Africa as the state is not the owner of and does not control the expressions of folklore, heritage management is the principal means for the protection of expressions of folklore even if this is largely unexplored. Through heritage management, the South African state is legally entitled to authorise third party use of tangible heritage that protects expressions of folklore. Accordingly, the means of protection in the four countries of study is similar to the extent that the state controls access to expressions of folklore.

Secondly, the use of the term "sui generis" as a characterisation of a protection model denotes protection that is not restricted to traditional intellectual property rights. The distinguishing feature of this type of sui generis protection is that communities are not endowed with rights akin to intellectual property rights over their expressions of folklore. Rather, their states own and control access to their expressions of folklore. It is important to remember that this type of protection is also considered sui generis in that it is reflected in the copyright legislation of Kenya, Nigeria and Ghana. This legacy is attributable to the Model Provisions\textsuperscript{293} and has continued up to the present.

This chapter is structured as follows: After this introduction, the "sui generis" models of protection in Ghana, Nigeria, Kenya and South Africa are explored, followed by an overview of the "sui generis" protection of expressions of folklore in the four African states. The chapter ends with relevant conclusions.

\textsuperscript{292} See generally Lucas-Schloetter "Folklore" 339; Gervais 2003 Cardozo J Int'l & Comp L 467.
\textsuperscript{293} See Nwauche 2002 IIC-Int'l Rev Indus Prop & Copyright L 599-605.
4.2 *Sui generis model for the protection of expressions of folklore in Ghana*

4.2.1 *Introduction*

The *sui generis* model for the protection of expressions of folklore in Ghana consists of state ownership and control of expressions of folklore. As stated above, this is a form of negative protection of expressions of folklore because the communities who produce the folklore are not directly involved in this protective mechanism. The objective of this mechanism is to prevent unauthorised access to and use of expressions of folklore.

The *CA Ghana*, contains provisions designed to protect expressions of folklore in Ghana. The first post-independence copyright legislation in Ghana was enacted in 1961 and did not contemplate the protection of expressions of folklore. The subsequent *Copyright Act, 1985*, drew from the WIPO/UNESCO 1982 *Model Provisions*. The provisions of *CA Ghana* will now be considered in greater detail.

4.2.2 *Definition of folklore*

Section 76 of the *CA Ghana* defines an expression of folklore as the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved, and developed by ethnic communities in Ghana, or by an unidentified Ghanaian author, and includes *Kente* and *Adinkra* designs, where the author of the designs is not known, and any similar work designated under the Act to be works of folklore. The *1985 CA Ghana* had previously defined folklore in a similar way. It is the addition of the *Kente* and *Adinkra* designs as examples of expressions of folklore that is the unique addition of *CA Ghana*. With respect to *Kente* and *Adinkra* there appears to be a recognition that there can be both individual and/or communal ownership of these designs. When the *CA Ghana* speaks of the author of the design not being known, it would appear to recognise

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294 Hereafter *1985 CA Ghana*.
295 See Ludewig 2009 *Mich J Pub Affairs* 1. See also Boateng *The copyright thing doesn't work here* 12.
that the design is old and part of the communal process of creativity. On the other hand, one plausible way in which an individual author of a *Kente* or *Adinkra* design would be protected, was for the author to apply for registration under the now repealed *Textile Designs (Registration) Decree* 213 of 1973.\(^{296}\) Under this legislation, a textile design was not registrable if it was substantially made up of well-known traditional motifs.\(^{297}\) Accordingly, a registration under the *Registration of Textiles Act* was one way of proving that a design was not communally owned.

The extensive discussion of the meaning of folklore in Chapter 2\(^{298}\) indicates that the definition expressions of folklore in the *CA Ghana* may be of little practical assistance in the identification of expressions of folklore in Ghana. It was pointed out that the Ghanaian definition was no more than a framework – unlike the Nigerian and Kenyan definitions which listed the contemplated tangible and intangible expressions of folklore. In addition, there is the challenge of the territorial compass of Ghanaian folklore. For example, Amegatcher points out that: "The ethnic communities of Ghana are not all exclusive to Ghana. The country shares many of its folkloric traditions with its neighbours. It is often difficult to prove whether a particular folklore belongs to Ghana exclusively or not."\(^{299}\)

4.2.3 *Ownership of expressions of folklore and term of protection*

In this section I consider the state ownership of expressions of folklore which lies at the heart of the protective mechanism for expressions of folklore in Ghana. While the *1985 CA Ghana* vested ownership of expressions of folklore in the Republic of Ghana, the *CA Ghana* vests such ownership in "the President on behalf of the Republic of Ghana".\(^{300}\) It is not exactly clear whether this change has juridical significance because the President of Ghana exercises the executive power of the Republic of Ghana in such a way that even under the *1985 CA Ghana*, it was really the President in whom ownership vested. It may, of course, be argued that under

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\(^{296}\) Hereafter *Textile Design Act* which was repealed by the *DA Ghana*.

\(^{297}\) See s 2(2)(d) of the Act.

\(^{298}\) Chapter 2.2.

\(^{299}\) Amegatcher 2002 *Copyright Bulletin* 39.

\(^{300}\) S 4 of *CA Ghana*. 

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the 1985 CA Ghana the President of Ghana exercised his powers without restraint, while the inclusion of Ghana in the definition in CA Ghana emphasises that the power is to be exercised for the benefit of the Republic.

Ludewig argues that the effect of the two Copyright Acts is the nationalisation of expressions of folklore in that ownership is not vested in the ethnic communities correctly recognised by section 76 of the CA Ghana as the creators, preservers, and developers of expressions of folklore. Be that as it may, vesting ownership of folklore in the President of the Republic of Ghana must be recognised as designed to further the belief that expressions of folklore are part of the national cultural heritage of Ghana. This may be attributed to the fact that the President of Ghana is the symbolic embodiment of the Republic of Ghana and a bearer of her national identity.

The rights vested in the President on behalf of and in trust for the people of the Republic in respect of folklore under section 4, exist in perpetuity. This means that an expression of folklore can never be part of the public domain which is defined as works with expired terms of protection, works by authors who have relinquished their rights, and works that do not enjoy protection in Ghana.

4.2.4 Third party use of expressions of folklore

Third parties can make use of expressions of folklore in Ghana if they obtain the permission of the National Folklore Board which exercises the rights vested in the President of Ghana. These rights include the right to authorise reproduction, communication to the public by performance, distribution by cable or other means, as well as the adaptation, translation, and other transformation. On the other hand, it is a requirement for the permission of the National Folklore Board for any person to sell, offer, or expose for sale, or otherwise distribute copies of works of

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301 See Blavin cyber.law.harvard.edu/openeconomies/okn/folklore.html.
302 See s 17 of the CA Ghana.
303 Section 38 of the CA Ghana.
304 To fully appreciate the nature and extent of the permit scheme requires a combined reading of ss 4(1) and 44 of the CA Ghana.
305 S 4(1) CA Ghana.
folklore made in or outside of Ghana, or translations, adaptations, or arrangements of folklore made outside of Ghana. A combined reading of the two sections suggests that it is the commercial sale, reproduction, performance, adaptation, translation, or other transformation of folklore that require the permission of the National Folklore Board. Accordingly, if a person intends a non-commercial use of an expression of folklore, the permission of the National Folklore Board is not required.

4.2.5 Free use of expressions of folklore

Some types of expression of folklore can be used without the permission of the National Folklore Board. While section 19 of CA Ghana sets out certain exceptions and limitations to copyright generally, the linkage to expressions of folklore is found in the opening sentence of section 64 of the CA Ghana which provides that any person who wishes to "use folklore other than as permitted under section 19 of this Act...". A review of section 19 of the CA Ghana reveals that the following uses examined below are free, as the permission of the National Folklore Board is not required.

First, section 19(1)(a) of CA Ghana provides that

the use of a literary or artistic work either in the original language or in translation shall not be an infringement of the right of the author in that work and shall not require the consent of the owner of the copyright where the use involves the reproduction, translation, adaptation, arrangement or other transformation of the work for exclusive personal use of a person, if the user is an individual and the work has been made public.

Personal use does not include use ")(a) of a work of architecture in the form of building or other construction; (b) in the form of reprography of a whole or of a substantial part of a book or of musical work in the form of notation; (c) of the
whole or of a substantial part of a database in digital form; and (d) of a computer program."

Secondly, section 19(1)(b) permits the "inclusion with an indication of the source and the name of the author of quotations from the work in another work, including quotations from articles in newspapers or periodicals in the form of press summaries, if the folklore from which the quotations are taken has been made public". The quotations must be compatible with fair practice, and the extent of the quotations must not exceed what is justified for the purpose of the work in which they are used.

Thirdly, under section 19(1)(c) of the CA Ghana, "the utilisation of the folklore by way of illustration in publications, broadcasts of sound or visual recordings for teaching, to the extent justified for the purposes, or ii) the communication for teaching purposes of the folklore, broadcast for use in educational institutions, or (iii) the utilisation of the folklore for professional training or public education, if the work has been made public", is permitted.

Fourthly, section 19(1)(d) of CA Ghana allows the reproduction of the following, " (i) an article published in one or more newspapers or periodicals on current economic, political or religious topics; or (ii) a broadcast on current economic, political or religious topics," where a statement of the source is provided unless the article or broadcast when first published or made was accompanied by an express condition prohibiting its use without consent.

Fifth, the use of folklore for the purpose of news reporting is permitted by section 19 (1)(e) of CA Ghana provided that the use does not extend beyond that justified for the purpose of keeping the public informed of current events.

Sixthly, section 19(1)(f) of CA Ghana provides that "the reproduction or making available of works of art or architecture in an audio-visual work for cinema or television, or in a broadcast by television and the communication to the public if those works, are (i) permanently located in a place where they can be viewed by the
Seventh, the reproduction in the media or the communication to the public of "(i) political speech delivered in public, (ii) speech delivered in public during legal proceedings, or (iii) lecture, address, sermon or other work of a similar nature delivered in public, where the use by reproduction or communication to the public is exclusively for the purpose of reporting fresh events or new information" is permitted by section 19(1)(g) of CA Ghana. The reproduction and the number of copies made in the reproduction are to be limited to what is required in the particular circumstances.

It would appear that the inclusion of the protection of folklore in copyright legislation is the reason why section 19 of the CA Ghana provides for the exceptions and limitations to folklore usage. It is doubtful whether enough thought was given to the relevance of section 19 to expressions of folklore. Perhaps what should define the free use of expressions of folklore is a determination of whether or not such a usage is commercial. The aim of such a determination would be to ensure that those who make use of folklore for non-commercial purposes do not require the permission of the National Folklore Board.

4.2.6 Administration of the protection of expressions of folklore in Ghana

The National Folklore Board is the agency charged with the administration of folklore. The establishment and composition of this Board is provided for by section 59(1) of CA Ghana. In sum, the general management protection and promotion
of expressions of folklore is entrusted to the Board.  

Section 64 of *CA Ghana* establishes a procedure by which anybody wishing to use an expression of folklore in Ghana can obtain permission from the Board. Such a person who intends to use folklore for any purpose other than as permitted use under section 19 of *CA Ghana*, shall apply to the Board for permission in the prescribed form and pay a fee determined by the Board. Section 44(2) of the *CA Ghana* criminalises the commercial sale and distribution of folklore without the permission of the National Folklore Board. A person who contravenes this section commits an offence and is liable on conviction to a fine of not more than one thousand penalty units, and not less than one hundred and fifty penalty units, or to a term of imprisonment of not more than three years, or to both. In the case of a continuing offence the offender is liable to a further fine of not less than twenty-five penalty units for each day during which the offence continues.

It must be stated that the fee for the permission of the National Folklore Board is considered in many quarters as a tax which, it is argued, has an adverse effect on the use of folklore in Ghana because in the regulated utilisation of expressions of folklore there is no distinction between Ghanaians and foreigners. While this distinction is clearly in line with the national treatment standard incumbent on Ghana as a WTO member, there are considerable concerns about how feasible it is to expect Ghanaians to obtain permission to use aspects of their culture.

Professor John Collins, reacting to the provision of what he termed 'a folkloric tax' in the Copyright Bill (which became the *CA Ghana*), said:

> These clauses in the new bill will create a terrible situation for the future well-being of Ghana's culture, which requires a constant dynamic recycling to stay alive in the...

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309 S 63 of *CA Ghana* lists the function of the Board to include to: (a) administer, monitor and register expressions of folklore on behalf of the Republic; (b) maintain a register of expressions of folklore at the Copyright Office; (c) preserve and monitor the use of expressions of folklore in the Republic; (d) provide members of the public with information and advice on matters relating to folklore; (e) promote activities which will increase public awareness on the activities of the Board; and (f) promote activities for the dissemination of expressions of folklore within the Republic and abroad.

310 See Amegatcher 2002 *Copyright Bulletin 36*. 
global village. And in the modern world cultural recycling includes commercial recycling... This tax will act as a disincentive for Ghanaian youth to develop, recycle and commercialise their indigenous roots\textsuperscript{311}

Ludewig argues, for example, that the requirement in the \textit{CA Ghana} that Ghanaians pay for the commercial use of expressions of folklore may be incompatible with obligations undertaken under article 15(3) of the \textit{ICESCR}\textsuperscript{312} and article 1(1) of the \textit{International Covenant on Civil and Political Rights} (1966)\textsuperscript{313}(hereafter \textit{ICCPR}), because use by Ghanaians of expressions of folklore is consistent with the free pursuit of their cultural development as guaranteed by article 1(1) of the \textit{ICCPR}.\textsuperscript{314} An extension of this argument can also be made to encompass what is arguably the right to culture as protected by section 26(1) of the \textit{Ghanaian Constitution} which permits every person to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of the Constitution. It would appear since communities possess no rights under the \textit{Ghanaian Constitution} individuals who seek to use the expressions of Ghanaian folklore may have a credible claim.

Furthermore, imposition of a folkloric tax may be regarded as a reasonable limitation of the rights of Ghanaians as recognised under section 26 of \textit{Ghanaian Constitution}.\textsuperscript{315} It is to be noted that this is a classic case of a clash between the individual and his community (President of the Republic) in access to and enjoyment of communal intellectual property. This clash is inevitable and a recognition of the intricate relationship between individual creativity and communal ownership.\textsuperscript{316} Since individuals must necessarily create for the benefit and ownership of the community, it will always be a difficult process to determine when an individual

\begin{itemize}
\item \textsuperscript{311} Collins 2006 \textit{Critical Arts} 165-166.
\item \textsuperscript{312} A 15(3) of the \textit{ICESCR} provides that: "The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."
\item \textsuperscript{313} A 1(1) of the \textit{ICCPR} provides that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
\item \textsuperscript{314} See Ludewig 2009 \textit{Mich J Pub Affairs} 19.
\item \textsuperscript{315} See the reaction of Ghanaian artes in (The Committee on Misgivings of Music Industry Practitioners (CMMIP)) to the \textit{Copyright Bill} that became \textit{CA Ghana}: "It is unfair that Ghanaians are not exempted from paying for the use of Ghanaian folklore which is a heritage bequeathed to all Ghanaians by the forebears." Reproduced in Amegatcher 2002 \textit{Copyright Bulletin} 36.
\item \textsuperscript{316} See Chapter 3.3.3.
\end{itemize}
creation has been transformed into communal ownership. Even when there has been such transformation, there is always a further problem as to the nature and extent of individual development required to change communal folklore into a matter of individual ownership. In this regard, it is pertinent to ask whether there is a threshold of incremental development where an individual effort can be recognised as giving the expression of folklore an individual status that requires such recognition to enable the individual to claim ownership of the expressions of folklore.

The now repealed Textile Designs Decree, grappled with this interface by providing that individuals have a right to register textile designs save, *inter alia*, where the design is "substantially made up of well-known indigenous traditional motifs".\(^\text{317}\)

As section 6 of the Textile Designs Decree enables any person to oppose an application for the registration of a design, a community would have been recognised as capable of opposing a design encompassing well-known indigenous traditional motifs. The success or otherwise of these proceedings bears on the nature and extent of a design right. The right accorded by registration was stated by section 8 of the repealed Textile Designs Decree to be a copyright in the design, which was the

...exclusive right in Ghana to make or import for sale or for use for the purposes of any trade or business or to sell, hire or offer for sale or hire, any textile article of which the textile design is registered provided the registration of a textile design which includes any traditional motif shall not give rise to the exclusive use of those motifs.

Accordingly, where the textile design substantially copies an indigenous traditional motif it may not be registered but would entitle the owner to a non-exclusive copyright in the design.\(^\text{318}\) While the legislation was in force it was possible for an individual to register a design. The fact that there was no possibility of the

\(^{317}\) S 2(2)(d) of the Textile Designs Decree 1973. See Bosumprah 2007 www.ghanaculture.gov.gh/mod_print?archived=452 "...not all kente designs are works of folklore. ‘Adwensa’ and other earlier designs many (sic) fall into the realm of folklore due to our inability to identify the creators of those designs. However, ‘fathia fata Nkrumah’ for example was designed to honour the late President Nkrumah. That design if it had not been commissioned by the Republic, the copyright in the design had to be vested in the designer”.

\(^{318}\) The copyright in the design is to last for five years with the possibility of two renewals, meaning that copyright in a textile design can last for at least fifteen years.
rectification of the Register of Textile Designs, ensured that these individual registrations were more secure.

The repeal of the *Textile Registration Decree* would seem to be the reason why the *CA Ghana* recognises *Kente* and *Adinkra* as examples of folklore. Such an inclusion would seem to ensure that individuals would not be able to use any design of *Kente* and *Adinkra* without the permission of the National Folklore Board. Considerable evidence suggests that these designs are commonplace, raising questions of the efficacy of the *CA Ghana* in protecting expressions of folklore. A related question is whether the protection of folklore in *CA Ghana* is preferable to than the model facilitated by the *Textile Registration Decree*. One good way of arriving at an answer is to determine the possibility of anybody registering *Kente* and *Adinkra* designs under the *DA Ghana*, even with the requirement of a folkloric tax under the *CA Ghana*. Analysing the provisions of the *DA Ghana*, it becomes clear that it is not possible to register *Kente* and *Adinkra* designs under the Act.

I turn now to a review of some of the functions of the National Folklore Board. While there is little evidence of the registration of expressions of folklore by the Board in furtherance of its statutory functions, there have been a number of instances in which the Board has permitted the use of expressions of folklore.

Available evidence reveals three cases of the authorisation of expressions of folklore by the National Folklore Board and its predecessors. The first authorisation was granted to Paul Simon in 1990 by the Ghana Copyright Society in respect of the use of "*Yaa Amponsah*" a popular tune in Ghana, in a new recording to be known as the *Spirit of Voices*.\(^{319}\) It is important to note that it was the fact that "*Yaa Amponsah*" was regarded as the work of an unidentified author, that qualified it as an expression of folklore.\(^{320}\) It is to be remembered that the then copyright legislation – the *1985 CA Ghana* – defined expressions of folklore to include works by

\(^{319}\) An account of the authorisation is drawn from Amegatcher 2002 *Copyright Bulletin* 33-42 and Ludewig 2009 *Mich J Pub Affairs* 1-39. Paul Simon paid an initial royalty sum of $16 000 to the Ghanaian Copyright Office with the Copyright Society of Ghana as co-signatory. Over the years Simon has paid well over $80 000 to the National Folklore Board which was set up using his first payment.

\(^{320}\) See Ludewig 2009 *Mich J Pub Affairs* 35.
"unidentified Ghanaian authors". The second instance is the payment of $2 000 by JVC, a Japanese firm which released a film on traditional African music and dance; while the third instance involved royalty payment by an advertising company which used Ghanaian folk music in its advertising.\textsuperscript{321} In all, it may be argued that the folkloric tax is designed to raise substantial revenue for the government. On this point Collins finds that the idea of

\[...\text{nationalizing the folk culture of developing nations (vis a vis the commercial exploitation by industrialized nations) seems laudable enough, particularly in light of substantial royalties accruing from Northern developed nations who commercially exploit the indigenous biological knowledge performing arts and cloth designs of the South.}\textsuperscript{322}\]

It is important to evaluate the use to which the funds raised by the National Folklore Board is put. In this regard, a fund is established into which any fees that may be charged in respect of the use of folklore is deposited. The fund is managed by the Board\textsuperscript{323} and is to be used for the preservation and promotion of folklore and the promotion of indigenous arts.\textsuperscript{324}

A further function of the Board which has not been notable in its performance, is the prosecution of those who engage in the illegal use of expressions of folklore. Even though the Director of the National Folklore Board recently reaffirmed a commitment to a more vigorous prosecution of organisations engaged in illicit use of the country's folklore materials and so depriving the state of substantial revenue,\textsuperscript{325} no evidence of such prosecution could be traced.

\textsuperscript{321} Ludewig 2009 \textit{Mich J Pub Affairs} 13 who cites personal communication with John Collins as authority for the assertion.
\textsuperscript{322} Collins 2006 \textit{Critical Arts} 167.
\textsuperscript{323} S 64(2) of CA Ghana.
\textsuperscript{324} See s 64(3) CA Ghana.
\textsuperscript{325} See "Illicit users of Folklore to be prosecuted" \textit{Ghana News Agency} 24 August 2010 www.ghananewsagency.org/s_humaninterest/r_19700. In the same publication, it is revealed that as part of its information and educational activities the Board has published a magazine titled "Amamerse" to educate members of the public. Allied to this function is the inventory of expressions of folklore. The Director of the Board stated that the NFB was also currently compiling an inventory of Ghana's folklore materials to be displayed at all the Regional and District Centres for National Culture for preservation.
4.2.7 Overview of the sui generis protection of expressions of folklore in Ghana

It is doubtful if the *sui generis* model for the protection of expressions of folklore is very effective in Ghana. The meagre number of permissions granted for the use of expressions of folklore by the National Folklore Board is indicative of an ineffective system given Ghana's enormous entertainment and cultural landscape. An ineffective system directly supports the use of expressions of folklore as the content of traditional intellectual property rights such as copyright, trademarks and designs. It may well be argued that were the Board to live up to its statutory expectations it will be clear to all and sundry that the permission of the Board is required before use of expressions of folklore.

4.3 Sui generis protection of expressions of folklore in Nigeria

4.3.1 Introduction

Nigeria's first post-colonial copyright legislation, the *Copyright Act*, 1970, did not provide for the protection of expressions of folklore. The second piece of legislation adopted in 1988, the *CA Nigeria* follows a framework for the protection of expressions of folklore. This framework is similar to the Ghanaian framework considered in the preceding section. Expressions of folklore are vested in the state through the power granted to the Nigerian Copyright Commission to authorise third-party use.

4.3.2 Definition of expressions of folklore

The *CA Nigeria* defines folklore\(^\text{326}\) as meaning a group-oriented and tradition-based creation by groups or individuals reflecting the adequate expression of their cultural and social identity, their standards and values as transmitted orally, by imitation or by other means including folklore, folk poetry and folk riddles; folk songs and instrumental folk music; folklore dances and folk plays; and the production of folk arts — in particular, drawings, paintings, caving, sculptures, pottery, terracotta

\(^{326}\) The *CA Nigeria* uses the term "folklore" rather than "expressions of folklore".
works, mosaic, woodwork, metalwork, jewellery, handicrafts, costumes, and indigenous textiles. There are a number of issues in this definition. In a country with over 250 ethnic communities, it is easy to imagine the difficulty in identifying the communities referred to in the definition. For example, there are largely distinct sub-groups within these ethnic communities that over the years have assumed a distinct identity. Furthermore, urbanisation has led to cultural mixing which makes it difficult to identify distinct ethnic identities. It is also a fact that many ethnic communities straddle Nigeria and her neighbours such as the Republics of Benin, Cameroon and Niger. On the other hand, it is commendable that the definition recognises the "community" as the determinant of what is and is not "folklore". Such subjective autonomy is crucial in respecting the cultural rights of communities and ensuring a meaningful determination of what constitutes folklore.

4.3.3 Ownership of expressions of folklore

There is no clear indication of the ownership of expressions of folklore in Nigeria. However, it is reasonable to argue that some form of ownership rights is vested in the Nigerian Copyright Commission in that it is authorised to grant permission for the utilisation of folklore. It has also been pointed out that the Nigerian Copyright Commission exercises its right in trust for the communities who produce expressions of folklore.327 If this assertion is correct, the challenge of a trust-beneficiary relationship between the Nigerian Copyright Commission and communities in Nigeria is recognised by Adewopo who wonders:

If that right is not managed to the satisfaction of a given community, can the community challenge or compel the Commission to change its decision? For example, if the Commission grants licence to a T-shirt producer to use the picture of carvings in the place of worship of a community in the T-shirt, can the community challenge this? A similar case will be where the T-shirt producer did not obtain licence from the Commission before using it. Can the community commence legal proceeding to restrain the usage of such work. Nigerian law only provided that the commission could have legal remedy for wrongful usage of folklore but did not make similar provision for the community. However, since the Commission is holding the right on trust, it is believed that the communities could be able to

commence legal proceeding especially since there is no provision in the law restraining them from so doing.\textsuperscript{328}

Perhaps a better description of the powers of the Commission is that of custodianship. At the heart of the trust-beneficiary relationship is the ability of the communities to influence the decisions of the Nigerian Copyright Commission. The fact that the \textit{CA Nigeria} is silent on the nature of this relation makes this an unlikely prospect.

\textbf{4.3.4 Third party use of expressions of folklore}

To understand how third parties may use expressions of folklore in Nigeria, it is important to focus on the provisions of section 28 of the \textit{CA Nigeria} which protects expressions of folklore against: (a) reproduction; (b) communication to the public by performance, broadcasting, distribution by cable, or other means; and (c) adaptations, translations and other transformations when such expressions are made either for commercial purposes or outside of their traditional or customary context. Any person who wishes to perform any of the acts listed above must obtain the consent or authorisation of the Nigerian Copyright Commission.\textsuperscript{329} A key requirement for seeking the consent or authorisation of the Nigerian Copyright Commission is that the expression of folklore is to be used for commercial purposes, or that it is to be used outside of the normal usage of expressions of folklore. However, the meaning of "traditional or customary context" is not entirely clear. An important question is to wonder whether "traditional or customary context" is dependent on the status of the person, or on the processes involved. In this regard, performing a dance as part of a dramatic presentation may require the supervision of a community representative. With respect to "commercial context", this would seem to dispense with the "traditional" context since the former would destroy the latter.

An issue related to the power of the Nigerian Copyright Commission to authorise the use of expressions of folklore is whether the requirement of a fee for authorisation/

\textsuperscript{328} Adewopo 2006 \textit{Script-Ed} 1-10.

\textsuperscript{329} S 28(4) of the \textit{CA Nigeria}.  

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consent can be implied from the custodianship granted to the Nigerian Copyright Commission. It may be argued that a fee is implied since the Commission will incur costs in the process of administering the use of expressions of folklore. A further argument for the requirement of a fee is that part of the fees received may be reserved for communities who are the actual creators of expressions of folklore.

Any use of expressions of folklore without the consent of the Commission results in civil and criminal liability. The civil liability is for damages, injunctions, and any other remedies as the court may deem fit to award in the circumstances.\(^{330}\) Criminal liability is provided in section 29A of the *CA Nigeria*\(^{331}\) which provides that any person who uses expressions of folklore without the authorisation or consent of the Commission, or who wilfully misrepresents the source of folklore, or wilfully distorts it in a manner prejudicial to the honour, dignity, or cultural interests of the community in which it originates, commits an offences and is liable on conviction\(^{332}\) to a fine or term of imprisonment.

4.3.5 Free use of expressions of folklore

The Act permits a number of free uses of expressions of folklore.\(^{333}\) The right to control the use of folklore does not extend to performing any of the acts by way of fair dealing for private and domestic use. The condition for such use is that if the use is public, it must be accompanied by an acknowledgement of the title of the work and its source. It must also be for purposes of education. Where the use is by way of illustrating an original work by an author, the extent of such use must be compatible with fair practice. Where the use constitutes the borrowing of expressions of folklore to create an original work by an author, the extent of the use must also be compatible with fair practice. The incidental use of folklore is also permitted.

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\(^{330}\) See s 29 of the *CA Nigeria*.

\(^{331}\) Inserted by s 10 of the *Copyright (Amendment) Decree*, 1999.

\(^{332}\) In the case of an individual, to a fine not exceeding N100 000 or to imprisonment for a term of 12 months or to both; in the case of body corporate, to a fine of N500 000. In addition the court may order the infringing or offending article to be delivered to the Commission.

\(^{333}\) See s 28(2) of the *CA Nigeria*.
4.3.6 Protection of moral rights

A number of provisions in Act protect the moral rights of Nigerian communities. First, section 28(3) imposes a duty on the users of an identifiable expression of folklore contained in printed publications, and used in connection with any communication to the public, to ensure that the source of such expressions are indicated in an appropriate manner and in conformity with fair practice, by mentioning the community or place from where the expression utilised has been drawn. Consequently, section 28(2) of the CA Nigeria allows the exploitation of expressions of folklore by way of fair dealing and further that, if the use is public, it should be accompanied by an acknowledgement of the title of the work and its source. In addition, section 29A(1)(c) and (d) of the CA Nigeria criminalises the wilful misrepresentation of the source of an expression of folklore or wilful distortion of folklore in a manner prejudicial to the honour, dignity, or cultural interests off the community in which it originates.

It is important to note that there is no evidence of the respect of the moral rights of Nigerian communities in third party use of their expressions of folklore.

4.3.7 Administration of the protection of expressions of folklore

The administration of the protection of expressions of folklore is, as shown above, vested in the Nigerian Copyright Commission even though the composition of the Commission does not specifically reflect the management of expressions of folklore. For example, of the six persons who are to be appointed to the Governing Board of the Commission to represent areas of copyright competence – literary; artistic; musical; cinematograph films; sound recordings and broadcasts – none of them is required to be an expert in folklore works.

There is no recorded instance of the Nigerian Copyright Commission having authorised the use of expression of folklore, even though it is clear that expressions of folklore are in regular use in Nigeria. This is indicative of the ineffective protection of folklore in Nigeria given its vast cultural landscape. As noted in
Chapter 3, Nigeria’s film industry, titled "Nollywood", relies heavily on expressions of folklore. It may well be that the functions of the Nigerian Copyright Commission with respect to the administration of folklore are still in an embryonic state. There is need, therefore, for an elaboration of these functions to address a number of issues including: the form for applications to the Commission for consent and the accompanying fees; how consent is obtained; the time for the grant by the Commission of consent; the duration of the authorisation or consent; and how the source of an identifiable expression of folklore must be indicated.

4.4 Sui generis protection of expressions of folklore in Kenya

4.4.1 Introduction

The protection of expressions of folklore in Kenya is to be found in the CA Kenya. Earlier copyright legislations did not protect expressions of folklore. Again, the sui generis protection of expressions of folklore recalls the Ghananian and Nigerian models.

4.4.2 Definition of expressions of folklore

Section 2 of the CA Kenya provides that an expression of folklore is a literary, musical, or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya. Expressions of folklore are further defined to include: folktales, folk poetry, and folk riddles; folk songs and instrumental folk music; folk dances and folk plays; and the production of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metal ware, jewellery, handicrafts, costumes and indigenous textiles.

The definition of expressions of folklore does not refer to a community, except perhaps to the extent that the expressions of folklore are passed down from

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334 See Chapter 3.4.2.3.
generation to generation which is a key function of communities. From the definition of the expressions of folklore it would appear that its creator is seen as an unidentified person.

There is a measure of recognition for the role of communities as creators of expressions of folklore in the Copyright Regulations, 2004, made pursuant to *CA Kenya*. Specifically, section 20(4)(b) of the Regulations protects the moral rights of the community in which expressions of folklore arise. Another feature of the definition is that the nature of expressions of folklore is limited to literary, musical or artistic works meaning that any expression of folklore that does not fall within one of these types of work will not be protected in Kenya.

4.4.3 Ownership of expressions of folklore

There is no clear indication of the ownership of expressions of folklore. However, it is to be noted that the administration of expressions of folklore is vested on the Kenya Copyright Board. Therefore, through the Copyright Board the Kenyan state can be seen as the owner of the expressions of folklore and remains in control of their regulated utilisation. For all intents and purposes can be regarded as the owner of expressions and folklore.

4.4.4 Duration of protection

There is no clear indication of the duration of the protection offered to expressions of folklore. This is important because the provisions of section 45 of the *CA Kenya* provide that the public domain includes works whose terms of protection have expired. Thus understanding of the duration of an expression of folklore determines whether and when they enter the public domain. There is a hint in the definition of expressions of folklore, that folklore protection is conferred in perpetuity in that expressions of folklore are seen to pass from generation to generation.

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336 See Kenyan Copyright Board "Traditional Knowledge and Traditional Cultural Expressions in Kenya" 2001 *Copyright News* 5: "The defining characteristics of TK and TCEs are that they belong to a particular community(ies) and have been passed on from generation to generation" available at www.copyright.gpo.ke/newsletter_jan2012.pdf.
4.4.5 Third party use of expressions of folklore

The CA Kenya provides the enabling framework for the Minister in charge of copyright to authorise and prescribe the terms and conditions governing the specified use of folklore – except use by a national public entity for non-commercial purposes, or the importation of any work made abroad which embodies Kenyan folklore.337

Under the Copyright Regulations, broad regulations govern applications for the use of folklore. Article 20 of the Regulations provides that any person who wishes to use any folklore for commercial purposes must submit his application to the Kenyan Copyright Board338 together with the required fees.339

The Regulations provide for a number of criminal offences related to the consent of the Kenya Copyright Board to use folklore for commercial purposes. The use of an expression of folklore for commercial purposes without permission from the Board is an offence. Furthermore, if any person wilfully misrepresents the source of an expression of folklore, or wilfully distorts such an expression in a manner prejudicial to the honour, dignity, or cultural interests of the community in which it originates, commits an offence.340

There is no distinction between Kenyans and non-Kenyans as regards the licence requirement to engage in the use of expressions of folklore. This would presumably give rise to concerns of the human rights of Kenyans to the enjoyment of their right to culture as protected by section 44 of the Kenyan Constitution.

There is also no indication of the nature of the permission granted for the use of an expression of folklore. Is it an exclusive or a non-exclusive licence? It is also

337 S 49(d) of CA Kenya.
338 A 20.
339 The fees range from 10 000 Kenyan Shillings (Ksh) for films, broadcasting, theatre, publishing for educational property, to 1 000 Ksh for other public interests per event, per piece, and feature film on a cultural event, per piece to 100 Ksh fee for research per piece.
340 A 20(3) and (4). The punishment for the commission of an offence is a fine not exceeding 6 000 Ksh or a term of imprisonment not exceeding six months, or both.
important to note that the grant of permission to use an expression of folklore carries with it certain obligations. One of these is to respect of the moral rights of the community which springs from the criminal punishment of any person who wilfully misrepresents the source of an expression of folklore, or wilfully distorts any expression of folklore in a manner prejudicial to the honour, dignity, or cultural interests of the community in which it originates.

4.4.6 Free uses of expressions of folklore

Article 20 of The Regulations indicates "commercial use" as the determinant of whether or not the use of an expression of folklore required the sanction of the Kenyan Copyright Board. It is, therefore, surprising that there is a fee for publication of expressions of folklore by educational authorities involved in research and other public interests. It would appear that the classification of these uses as uses which require licences, is out of place save to the extent that these activities are undertaken for commercial purposes. Using commercial use as the only criterion for determining the requirement of a licence may be helpful because an educational institution that provides free access to its holdings of expressions of folklore, may fall outside the ambit of CA Kenya.

4.4.7 Overview of the sui generis protection of expressions of folklore in Kenya

The fact that there is no reported licensing of expressions of folklore in Kenya would indicate that the sui generis protection of expressions of folklore is not effective even though there are regulations that govern their use by third parties. It would appear that the ineffective protection of expressions of folklore has given rise to the belief that there is no mechanism for their protection. For example, the 2009 National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions[^341] is instructive in its omission of a discussion of the extant sui generis protection for expressions of folklore. The National Policy states its mission as the

provision of a national framework for the recognition, preservation, protection, and promotion of sustainable use of traditional knowledge and traditional cultural expressions.

In enumerating the challenges facing the use of expressions of folklore to enhance Kenya's national cohesion and development, the Policy ponders on:

[H]ow to protect the communal rights of the holders of the traditional knowledge, genetic resources, traditional cultural expressions and associated innovations and practices. Given that current intellectual property rights (IPR) are an inappropriate legal regime for the protection of traditional knowledge and traditional cultural expressions, there are no mechanisms for the protection, access to and benefit sharing arising from traditional knowledge, genetic resources and traditional cultural expressions.  

While it may be said that the National Policy is incorrect as to the existence of a protective mechanism, it clearly suggests a reform process to usher in such a mechanism. That reform process has been kick-started by issuing of the *Draft Bill on Protection of Traditional Knowledge and Traditional Cultural Expressions, 2013*.  

The *Draft TCE Bill* is aimed at giving effect to provisions of articles 11 and 40(5) of the *Kenyan Constitution* which requires legislation to protect the intellectual property rights of the Kenyan people. The *Draft TCE Bill* follows the path of negative protection of expressions of folklore in that the Kenyan state and its representatives retain the statutory responsibility to protect expressions of folklore on behalf of communities. However, there are procedures to ensure greater community involvement through a requirement of prior informed consent. In addition, communities will benefit from the use of their traditional cultural expressions by way of compensation and royalties.

In the more detailed examination of the *Draft TCE Bill* which follows, I highlight proposed improvements to extant protection. The protection of traditional cultural

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342 See para 1.2.1.6 of the National Policy.
344 See further discussion in Chapter 7.3.
expressions from misappropriation, misuse, and unlawful exploitation beyond their traditional context; the promotion of the sustainable utilisation of traditional cultural expressions so that communities receive compensation or royalties for the use of their cultures and cultural heritage for national development; as well the preservation of traditional cultural expressions to promote cultural diversity, national pride and identity are declared as the purposes of the proposed legislation. 345

First, the Draft TCE Bill does not require any formalities for the protection of folklore 346 if the traditional cultural expressions are the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown. The expressions must further be characteristic of the community's cultural identity and traditional heritage, and be maintained, used or developed by such community in accordance with the customary laws and practices of that community.

Secondly, local and traditional communities to whom the custody and protection of the traditional cultural expressions are entrusted in accordance with the customary laws and practices of those communities, and who maintain and use the traditional cultural expressions as a characteristic of their traditional cultural heritage, shall be the owners and beneficiaries 347 of the protection of traditional cultural expressions. 348 It is interesting that a community is defined as including "a local traditional or indigenous community" 349 clearly indicating a preference for "ethnic communities".

Thirdly, the protection takes the form of an enhanced negative protection of expressions of folklore as through the National Cultural Agency and the Kenyan

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345 S 1 of the Draft TCE Bill.
346 Draft TCE Bill ss 21 and 22. Where, however, certain cultural expressions of special cultural value or significance shall be notified to the National Cultural Agency.
347 S 27(3)(d) provides that any monetary or non-monetary benefits arising from the use of the traditional cultural expressions shall be transferred directly to the relevant community.
348 S 23.
349 S 2.
Copyright Board, the Kenyan state acts on behalf of traditional communities\textsuperscript{350} – albeit after consultations with them.\textsuperscript{351}

Fourthly, the nature of the rights which traditional communities can exercise against third parties varies in accordance with the type of traditional cultural expression. Consequently, the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public, and fixation (including by still photography) of the traditional cultural expressions or derivatives thereof, including obtaining or exercising intellectual property rights, are prohibited without permission in respect of traditional cultural expression of particular cultural value or significance to the community other than words, signs, names and symbols.\textsuperscript{352} In addition, the third party must acknowledge the community as the source of the traditional cultural expression and ensure that there is no distortion, mutilation or other derogatory action,\textsuperscript{353} and in spite of a declaration that there are number of traditional cultural rights which entitle holders of traditional cultural expressions and traditional owners of traditional cultural expressions to give their prior and informed consent to certain acts.\textsuperscript{354} Where the traditional cultural expression is a word, sign, name or symbol, it is only a use of the traditional cultural expressions or derivatives thereof, or the acquisition or exercise of intellectual property rights over the traditional cultural expressions or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute that is prohibited.\textsuperscript{355} Another stipulation applies to other traditional cultural expressions that the community does not consider of cultural value or significance. These can be the subject of intellectual property rights in so far as: the traditional community is identified as the source of the work; no distortion mutilation or other modification occurs; there are no false, confusing or misleading indications or allegations of connections to the traditional community; and there is equitable remuneration or

\begin{itemize}
\item \textsuperscript{350} S 27(2).
\item \textsuperscript{351} S 27(3).
\item \textsuperscript{352} S 24.
\item \textsuperscript{353} S 24.
\item \textsuperscript{354} S 24.
\item \textsuperscript{355} S 24(4).
\end{itemize}
benefit-sharing with the community. Unauthorised disclosure is the right of traditional communities in respect of their secret traditional cultural expression.

Fourthly, free uses of traditional cultural expressions are acknowledged and include a general permission to use traditional cultural expressions outside of their traditional or customary context, whether or not for commercial gain; and specific non-commercial use such as teaching and research for educational purposes, personal or private use, criticism or review, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions of traditional cultural expressions for inclusion in an archive or inventory exclusively for the purposes of safeguarding cultural heritage; and incidental uses. Such uses must accord with fair practice, must not be offensive to the community, and must acknowledge the creator-community.

Fifthly, a distinction is made between use by members of a traditional community and by third parties. The former are entitled to the normal use, development, exchange, dissemination and transmission of traditional cultural expressions within a customary context and in accordance with customary laws and practices.

In the sixth place, an elaborate procedure for obtaining the prior informed consent of a community and the public notification of the application for such consent is provided for. The acceptance of the application for prior informed consent leads to a negotiation for authorised user agreement.

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356 S 25(5).
357 S 25(6).
358 S 25(1)(b).
359 S 25(1)(a).
360 S 28.
361 S 29.
362 There are implied terms which must appear in an agreement and they include: (a) Sharing of financial and other benefits arising from the use of the traditional knowledge or traditional cultural expressions; (b) Compensation, fees, royalties or other payments for the use; (c) Whether the use will be exclusive or non-exclusive; (d) Duration of the use to be allowed and rights of renewal; (e) Disclosure requirements in relation to the use; (f) The possible sharing by the traditional owners of any intellectual property rights arising from the use of the traditional knowledge or traditional cultural expressions; (g) Access arrangements for the traditional owners; (h) Education and training requirements for the applicant; (i) Controls on publication; (j) Specify whether the rights arising under the agreement can be assigned; (k)
In sum, the Draft TCE Bill represents a significant effort to improve the protective mechanism for expressions of folklore in Kenya. There is no doubt that it has been heavily influenced by the Swakopmund Protocol\textsuperscript{363} owing to Kenya's treaty obligations as a member of ARIPO. Most importantly, it is the greater recognition of traditional and local communities as creators of traditional cultural expressions that signposts the reform process. This enhanced recognition has led to communities' increased involvement in the protective mechanism. On the other hand, one significant challenge of the reform process is the belief that only Kenyan state institutions can effectively protect expressions of folklore on behalf of communities. If the experience of the Kenyan Copyright Board is anything to go by, it would appear that a negative protection of expressions of folklore will not achieve much.

4.5 Sui generis protection of expressions of folklore in South Africa

4.5.1 Introduction

The sui generis protection of expressions of folklore is to be found within the framework of the SA NHRA. The SA NHRA establishes a national system for the management of heritage resources by instituting heritage resources agencies at the national, provincial, and local levels to manage heritage resources. In general, this legislation protects the national estate and requires permits to be issued by heritage authorities for different uses of the national estate. The fact that expressions of folklore are part of the national estate and that third parties can access and use the national estate with the permission of the heritage resources agencies, provides some form of negative protection of expressions of folklore in South Africa. There is a significant interconnection between tangible and intangible heritage which includes expressions of folklore.\textsuperscript{364} Many stories, idioms, customs and protocols are

\textsuperscript{363} See Chapter 6.3.1.

\textsuperscript{364} See Nicholas et al 2010 Heritage and Society 261-286: "Cultural Heritage is comprised of a wide array of expressions of human knowledge and creativity, ranging from stories, songs and traditions-and the language by which they are conveyed-to the various physical manifestations of human enterprise. It is a melding of the tangible and the intangible...The focus on tangible cultural heritage in law and policy, often at the expense of the interlinked nuances and inseparable relations between the tangible and intangible, has much to with the physicality
associated with and embedded within tangible heritage to a level at which destroying, altering, or misappropriating tangible heritage leads to the loss of the intangible heritage and also causes significant psychological harm to its creators. For example, destroying a sacred grave or building in a community robs that community of a medium of expression, meaning and identity.

The role of South African heritage resources agencies is similar in many respects to that of other state authorities in Nigeria, Kenya and Ghana in that the process of consenting to third-party use of the expressions of folklore forms part of the national estate potentially protects expressions of folklore from unauthorised misappropriation. It is important to point out that cultural heritage protection exists in other countries of study that have, however, chosen to protect their expressions of folklore through other means. This conscious choice has side lined the possibility of heritage protection in these countries. The significance of heritage protection in South Africa, on the other hand, lies in the fact that it is the extant mechanism for the protection of expression of folklore – albeit insufficiently appreciated.

4.5.2 Definition of a national estate

The definition of a national estate in section 3(2) of the SA NHRA lies at the heart of the protection offered by the SA NHRA. Section 3(3) of the SA NHRA further provides an elaboration of the national estate.

(and hence the visibility) of the tangible.” See also Coombe "First nations cultural heritage concerns” 247-277; Ndlovu 2011 Conservation and Management of Archaeological Sites 31-57. See, for example, Shyllon 1996 Int’l J Cultural Prop 235.

S 3(2) of the SA NHRA defines the National Estate as including: (a) places, buildings, structures and equipment of cultural significance; (b) places to which oral traditions are attached or which are associated with living heritage; (c) historical settlements and townscapes; (d) landscapes and natural features of cultural significance; (e) geological sites of scientific or cultural importance; (f) archaeological and palaeontological sites; (g) graves and burial grounds, including (i) ancestral graves, (ii) royal graves and graves of traditional leaders, (iii) graves of victims of conflict, (iv) graves of individuals designated by the Minister by notice in the Gazette, (v) historical graves and cemeteries, and (vi) other human remains which are not covered in terms of the Human Tissue Act, 1983; (h) sites of significance relating to the history of slavery in South Africa; and (i) movable objects, including (i) objects recovered from the soil or waters of South Africa, including archaeological and palaeontological objects and material, meteorites and rare geological specimens, (ii) objects to which oral traditions are attached or which are associated with living heritage, (iii) ethnographic art and objects, (iv) military objects, (v) objects of decorative or fine art, (vi) objects of scientific or technological interest, and (vii) books, records, documents, photographic positives and negatives, graphic,
It is evident from the definition that expressions of folklore are contemplated as part of the national estate even if would appear that only tangible heritage is the focus of the SA NHRA. Accordingly, expressions of folklore form part of the national estate even if this has not been acknowledged. For example, the reference to places with which oral traditions are associated, is a clear reference to expressions of folklore. This also applies to the different places listed in the national estate.

The principles for the management of heritage resources include the recognition that heritage resources form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the rights of affected communities to be consulted and to participate in their management. Other principles include a requirement that the identification, assessment and management of the heritage resources of South Africa must take account of all relevant cultural values and indigenous knowledge systems; the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs and contribution "to social and economic development". The definition of the national estate and the principles for its management reveal a broad framework for the negative protection of expressions of folklore.

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367 A place or object is to be considered part of the national estate if it has cultural significance or other special value because of: (a) its importance in the community, or pattern of South Africa's history; (b) its possession of uncommon, rare or endangered aspects of South Africa's natural or cultural heritage; (c) its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage; (d) its importance in demonstrating the principal characteristics of a particular class of South Africa's natural or cultural places or objects; (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group; (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period; (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons; (h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and (i) sites of significance relating to the history of slavery in South Africa.

368 See s 3(2)b of the SA NHRA.

369 SA NHRA s 5(4).

370 SA NHRA s 5(7).
4.5.3 South African Heritage Resources Agency

The SA NHRA establishes the South African Heritage Resources Agency (SAHRA).\textsuperscript{371} The overarching objective of the Agency evident from the provisions of section 13 of the SA NHRA, is to co-ordinate the identification and management of the national estate.\textsuperscript{372}

4.5.3.1 Identification, assessment and management of intangible cultural heritage by the SAHRA

Available evidence indicates that SAHRA has embarked on a number of projects by identifying, assessing and managing intangible cultural heritage which is part of expressions of folklore in South Africa.\textsuperscript{373} The projects include evaluating the "Richtersveld Conservancy Area" as a potential World Heritage Site, evaluating Lake Fundudzi as a national heritage site, identifying, assessing and promoting the Nama heritage with particular focus on the First Nama Church in Port Nolloth (Richtersveld Area).

\textsuperscript{371} SA NHRA s 11A.

\textsuperscript{372} S 13(1) of the SA NHRA sets out the general functions of SAHRA which are to: (a) establish national principles, standards and policy for the identification, recording and management of the national estate in terms of which heritage resources authorities and other relevant bodies must function with respect to South African heritage resources; (b) co-ordinate the management of the national estate by all agencies of the State and other bodies and monitor their activities to ensure that they comply with national principles, standards and policy for heritage resources management; (c) identify, record and manage nationally significant heritage resources and keep permanent records of such work; (d) advise, assist and provide professional expertise to any authority responsible for the management of the national estate at provincial or local level, and assist any other body concerned with heritage resources management; (e) promote and encourage public understanding and enjoyment of the national estate and public interest and involvement in the identification, assessment, recording and management of heritage resources; (f) promote education and training in fields related to the management of the national estate; and (g) perform any other functions assigned to it by this Act or as directed by the Minister.

Other related projects include the promotion of the marginalised Nama language and cultural practices, such as the Nama traditional “Stap” dance. These activities are in furtherance of the specific mandate of the SA NHRA which provides for the declaration of places as national or provincial heritage sites or as protected areas. In addition, specific heritage sites such as burial grounds and graves as well as historical buildings are under contemplation.

4.5.3.2 Permit system

One of the principles of management of heritage sites under the SA NHRA is the regulated access of members of the public to heritage sites. Even though the access policy appears to be a reaction to the tangible nature of the heritage protected by SAHRA, it also affects access to intangible cultural heritage which is often embedded in the latter. Therefore, section 27(18) of the SA NHRA prohibits anybody from destroying, damaging, defacing, excavating, altering, removing from its original position, subdividing, or changing the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the unit.

Another example of the nature of permission required for access by members of the public can be found in the protection of burial grounds and graves by section 36 of the SA NHRA. This section mandates SAHRA to conserve and generally care for graves of victims of conflict and any other grave it considers of cultural significance. No person without a permit issued by SAHRA or a provincial heritage authority is allowed to "destroy damage alter exhume or remove from its original position or otherwise disturb the grave of a victim of conflict or any burial ground". It would appear that a permit is required only for physical interference with the grave. One may ask is whether a filmmaker needs permission to include a grave considered of

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374 See Sefoleng 4.
375 See s 27 of the SA NHRA.
376 SA NHRA s 28.
377 SA NHRA s 36.
378 SA NHRA s 34. In terms of this section all buildings over 60 years of age are termed historical buildings.
379 s 36(3)(a) of the SA NHRA. See Jonker 2005 Griffith L Rev 187-212 with respect to the excavation of Prestwich Place, Cape Town.
cultural significance in a film. The answer would appear to be "no" – even though it can be argued that an implied requirement for permission for the intangible use of the grave can be inferred from the general aim of the SA NHRA. In policing tangible heritage falling within the national estate, the Agency would ensure that the intangible cultural heritage is also protected.

The protection of historic buildings in terms of section 34 has been of considerable significance in heritage management. A number of cases clearly establish a burden on a homeowner not to alter or demolish an historic building.\(^\text{380}\) It remains to be seen whether such historic buildings can be used in literary, dramatic and artistic works without the permission of heritage authorities. Here again, the ambiguity of the SA NHRA to protect intangible use of historic buildings comes to the fore. In the example of graves, the Agency may well proceed against any attempt to denigrate a heritage site or reproduce it in handicrafts without appropriate permission.

With respect to culturally significant graves, it can be inferred from the decision in the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v The City of Cape Town*,\(^\text{381}\) that there is limited protection for the expressions of folklore of a Muslim community in the Cape area of South Africa, which successfully sought to protect sacred graves known as "*kramats*"\(^\text{382}\) contained in an area approved for the development of a township. In refusing to allow the development of the township to continue the court said:

All that remains today of the cultural origin of the Muslim community are its religion, some foreign words and the graves and kramats. The visiting of the latter is considered as culturally precious and is deeply rooted in the Cape Muslim's religion and unwritten history.\(^\text{383}\)

In related litigation\(^\text{384}\) the same court described the burial places as follows:

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\(^\text{380}\) *See Corrans v MEC for the Department of Sport, Recreation Arts and Culture 2009 5 SA 512 (ECG); Provincial Heritage Resources Authority Eastern Cape v Gordon 2005 2 SA 283 (E); and Qualidental Laboratories (Pty) Ltd v Heritage Western Cape 2007 4 SA 26 (C).*


\(^\text{382}\) ‘*Kramats*’ are graves of Muslims who are regarded as having attained an enlightened spiritual situation.


\(^\text{384}\) *Oudekraal Estates (Pty) Ltd v The City of Cape Town 2004 4 SA 222 (SCA).*
They have special religious and cultural significance to members of the Cape Town's Muslim community... The Kramats and other graves are also important cultural symbols in the Muslim community in the Western Cape going back to the era of slavery... It is believed by the followers of the faith that by spending time at these sites they can enhance their own spirituality... In the circumstances access to the kramats is of great importance to the Muslim people of Cape Town.\textsuperscript{385}

It is easy to imagine that South African courts will come to the aid of the Cape Muslim community in the misappropriation of expressions of folklore involving the sacred graves at the centre of the \textit{Oudekraal} litigation. If nothing else, the moral rights of the community will be protected in terms of a proper description of the cultural significance of the graves.

4.5.4 \textit{Overview of the sui generis protection of expressions of folklore in South Africa}

The idea that protecting the national estate may be a means of the protection of expressions of folklore is not a common one because of the focus of the system on tangible heritage which is not usually associated with expressions of folklore. The prohibition of physical damage to tangible heritage highlights the omission of protecting intangible cultural heritage as part of heritage protection. Unless this is expressly stipulated in the \textit{SA NHRA} or recognised by the courts, the possibility of cultural heritage protection of expressions of folklore appears limited. It is also important to stipulate the free uses which third parties can make of intangible cultural heritage of the national estate.

4.6 \textit{Overview of the sui generis protection of expressions of folklore in Ghana, Nigeria, Kenya and South Africa}

In this section issues common to Ghana, Nigeria, Kenya and South Africa in the discussions above are examined. While most of the issues are common to Nigeria, Kenya and Ghana, they are also pertinent to South Africa.

\textsuperscript{385} \textit{Oudekraal Estates} paras 14 and 15.
4.6.1 Recognition of communities as owners of expressions of folklore

One of the fundamental features of the protection of expressions of folklore in Kenya, Nigeria and Ghana is the significant lack of recognition of communities as owners of expressions of folklore. Ownership of expressions of folklore is vested in the President of Ghana, in the Kenyan Copyright Board, in the Nigerian Copyright Commission, and in South Africa in the SAHRA as representatives of the respective states. While ownership of expressions of folklore is direct in Ghana, it is a plausible inference in Nigeria and Kenya. Be that as it may, communities who create these expressions of folklore do not exercise incidents of ownership. These communities are unable to prevent third parties from accessing their expressions of folklore and they receive no compensation for the use of their expressions of folklore. As indicated elsewhere, the lack of significant enforcement of the protection of expressions of folklore is related to the inability of communities to protect their intellectual property. Accordingly, the inability of appropriate state entities to protect expressions of folklore has resulted in ineffective regimes of negative protection. There is thus little doubt that recognising communities as owners of expressions of folklore will enhance the protection of folklore considerably. Communities will be better able to take steps to oppose the registration of intellectual property rights, as well as to benefit from third-party use of expressions of folklore. The recognition of communities as owners of expressions of folklore does not conflict intrinsically with the negative protection of expressions of folklore. As the discussion in Chapter 6 will reveal, this is what the Swakopmund Protocol has done.

4.6.2 Administrative infrastructure for the protection of expressions of folklore

Even though the preceding discussion has shown that communities as owners of expressions of folklore may be a game changer in the protection of expressions of folklore, there is still much to be said for enhancing the status of national institutions endowed with the mandate to protect folklore. A review of the administrative

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387 Chapter 6.3.1.1.2.
capacity and achievements of national copyright bodies in the protection of expressions of folklore would put the National Folklore Board of Ghana at pole position, even though it is acknowledged that there is little information of the activities of the Kenyan Copyright Board or the Nigerian Copyright Commission. This notwithstanding, even the record of the National Folklore Board of Ghana has been called into question with respect to its mandate to prosecute illegal uses of folklore which is an indication that it has not done enough to prosecute the criminal infringement of expressions of folklore. It would also appear to indicate that these national offices lack the infrastructure to engage in administrative oversight of expressions of folklore. It may well also be that they are faced with competing demands for their scarce resources, such as piracy activities, often considered more important than the protection of expressions of folklore. Reviewing the work of COSOMA which is the Copyright Society of Malawi charged with the implementation of the protection of expressions of folklore by the Copyright Act of Malawi, Kerr argues that:

The Copyright Act hands over responsibility for protecting "folklore" to a Government Agency, the Copyright Society of Malawi (COSOMA), which also has many other duties, including the policing of commercial piracy. In the past ten years COSOMA has done much to protect popular musicians and has collected royalty fees on their behalf... The need for COSOMA to collect royalties to sustain its own economic base may have distracted the society from the more difficult (and less lucrative) duty namely to protect "folklore".

4.6.3 Moral rights of communities

It would appear that only Nigeria protects the moral rights of communities because it requires that third parties attribute the source of the expression of folklore to the communities. This is endorsed by the requirement that there must be no distortion, mutilation, or other derogatory action in relation to the expressions of folklore. It has been noted that the Kenyan, Ghanaian and South African protection of expressions of folklore falls short in moral rights protection. However, it may be argued – albeit without much force – that moral rights protection is inherent in the

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388 Malawi Copyright Act, 1993.
protection of expressions of folklore just as it is with respect to copyright protection. It is, however, important that express protection is recognised in appropriate legislation for an effective protection of expressions of folklore.

4.6.4 Free use of expressions of folklore

It would appear that the free uses of expressions of folklore in the CA Nigeria are more extensive than similar provisions in the CA Ghana and CA Kenya. Since it is important to ensure a fair balance between the protection of and access to expressions of folklore important for creativity in general, it would appear important that each of these countries continues to seek a balance that reflects the importance of access to and protection of expressions of folklore. One of the significant drawbacks to the protection offered by cultural heritage protection through the national estate in South Africa, is the lack of a clear concept of the free use of the national estate.

4.6.5 Preferential treatment of nationals

In the protection of expressions of folklore, nationals of Nigeria, Ghana, South Africa and Kenya are not treated differently from foreigners. This position would seem to flow from the fact that communities are not considered owners of their intellectual property. From a free trade perspective, and in accordance with WTO obligations including the standard of national treatment,\textsuperscript{390} the fact that nationals of Kenya, Ghana, South Africa and Nigeria are similarly treated as foreigners, comply with the treaty obligations undertaken by these states. It is also true that many of the nationals of these states are contrary to rules which require them to obtain the consent of national institutions for the use of expressions of the folklore of their communities. It is strongly felt that one of the benefits of membership of communities is the right to use expressions of folklore as part of their culture. There is no indication that this is a matter that has been addressed by any African state.\textsuperscript{391}

\textsuperscript{390} The National Treatment Standard is discussed in Chapter 6.3.1.1.
\textsuperscript{391} This issue is explored in Chapter 7.2.
4.6.6 Intervention in the grant of intellectual property rights

It is important to note that to realise the ownership rights over expressions of folklore effectively, there must be significant possibilities for opposition proceedings in the grant and registration process of registrable intellectual property rights to enable communities to oppose or cancel third-party intellectual property rights. Since the national offices in charge of the protection of expressions of folklore have been unable to discharge their statutory functions, it may be worth considering permitting interested stakeholders, including communities, to initiate opposition proceedings. To ensure that this becomes a credible basis of the protective framework for expressions of folklore, it is important that the amendment of intellectual property legislation in these African states are undertaken to ensure that stakeholders oppose registration, and ultimately to cancel intellectual property rights.

4.6.7 Economic benefits of third party use of expressions of folklore

One of the consequences of vesting the ownership of expressions of folklore in the state in Nigeria, Kenya, South Africa and Ghana should be a commitment that the economic benefits derived from authorising the use of expressions of folklore will be used for cultural development. This goal appears to be implied as none of the national frameworks considered in this chapter recognises the rights of communities in this regard. Again this would appear to be a consequence of state ownership of expressions of folklore. It is possible that even though community ownership of expressions of folklore is not recognised, that some economic benefits are extended to these communities in recognition of the fact that they actually produce these intellectual properties.

4.6.8 Challenge of the Swakopmund Protocol

The evaluation of the protective model offered by the national laws of Ghana, Nigeria, Kenya and South Africa is important for many reasons – including the fact that Ghana and Kenya have both signed the Swakopmund Protocol and are likely to
deposit their letters of ratification. Treaty obligations will be incurred on the coming into effect of the *Swakopmund Protocol* with the consequence that the *CA Ghana* and *CA Kenya* may need to be amended to comply with the Protocol. As seen above, the legislative reform process has begun with the *Draft TCE Bill*. Even though Nigeria and South Africa are not members of ARIPO, it would appear that the text of the *Swakopmund Protocol* could be very instructive as both countries grapple with how to energise the protection of their expressions of folklore.

### 4.7 Conclusion

The discussions in this chapter lead to an inevitable conclusion that the negative protection of expressions of folklore is more apparent than real. There is little desire or conviction to enforce relevant national legislation. It is as if the national legislation is adequate and not much need be done. It must be stressed that it is the recognition of communities as the owners of expressions of folklore that will improve the negative protection of expressions of folklore in Africa. This recognition should result in an enhanced negative protection of expressions of folklore as evident in the Kenyan *Draft TCE Bill*.

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392 The Law Society of South Africa recently recommended the *Swakopmund Protocol* as a fitting framework for the protection of traditional knowledge in South Africa. See Law Society of South Africa "Comments by the Law Society of South Africa (LSSA) on the Draft Protection of Traditional Knowledge (TK) Bill (PMB-2013)". It continued, "we wish to point out that our neighbouring countries, and other African countries, ...have recently adopted a regional Protocol to protect TK and TCEs, viz the ARIPO Swakopmund Protocol (of 2010)". The comments are available at [http://www.lssa.org.za/upload/LSSA%20Coments%20Protection%20Traditional%20Knowledge%20Bill%202013.pdf](http://www.lssa.org.za/upload/LSSA%20Coments%20Protection%20Traditional%20Knowledge%20Bill%202013.pdf). See also Nkomo 2013 *CILSA* 257-273.
CHAPTER 5

THE POSITIVE PROTECTION OF EXPRESSIONS OF FOLKLORE IN AFRICA:
PROTECTING EXPRESSIONS OF FOLKLORE BY
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CHAPTER 5

THE POSITIVE PROTECTION OF EXPRESSIONS OF FOLKLORE IN AFRICA: PROTECTING EXPRESSIONS OF FOLKLORE BY INTELLECTUAL PROPERTY RIGHTS

5.1 Introduction

This chapter critically evaluates the positive protection of expressions of folklore by examining how folklore is protected by intellectual property rights in South Africa, Nigeria, Ghana and Kenya. The protection of expressions of folklore by intellectual property rights is generally considered as positive protection if its primary objective is to endow proprietary rights on the creators of expressions of folklore, usually but not exclusively, communities, to exploit the expressions of folklore through determining how and when third parties will have access to their expressions of folklore.

Chapter 4 of this thesis revealed that Nigeria, Ghana, Kenya, and South Africa currently protect their expressions of folklore through a negative protection model which is considered *sui generis*. This protection turns on state ownership and control of access to expressions of folklore. Of the four countries of study, Nigeria, Ghana and Kenya use a similar mechanism. South Africa possesses the potential of using cultural heritage legislation to protect expressions of folklore if attention is paid to this possibility.

As Chapter 2 of the thesis revealed, the existing intellectual property rights systems in the countries of study hold the potential to protect expressions of folklore. While such an exercise would involve considerable amendment to enabling legislation, there has been little evidence in the countries of study, until recently when we see two significant instances of the use of intellectual property rights to protect expressions of folklore. First, on 6 September 2013 South Africa achieved a milestone by using the *MMA* to restrict the use of the word "Rooibos; Red Bush; Rooibostee; Roosibos Tea; Rooitee and Rooibosch" in connection with any trade,
business, profession or occupation, or in connection with a trade mark, mark, or trade description applied to goods by unauthorised third parties. Secondly, the dual track engagement through, on one hand, the IPLAB 2011, and on the other hand, the Draft Protection of Traditional Knowledge Bill yielded the IPLAA 2013 which came into force on 10 December 2013. For South Africa IPLAA 2013 significantly enhances the existing intellectual property rights protection of expressions of folklore. The novel but controversial manner of the legislative reform in South Africa, is discussed further below and is suggestive of the significant issues involved in using intellectual property rights to protect expressions of folklore.

There is also some movement in the protection of expressions of folklore by intellectual property rights in the other countries in this study. Ghana, for example, has enacted a Geographical Indication Act 659 of 2003 (hereafter GI Ghana) that contemplates expressions of folklore. It is only Nigeria where there is no evidence of legislative activity in this regard.

This chapter proceeds as follows. Each of the countries of study are evaluated as regards the extent of existing and proposed protection of expressions of folklore by intellectual property rights. This is followed by a thematic discussion of a protective model that will reveal some of the challenges facing such protection so that the principles and issues of how intellectual property rights protect expressions of folklore becomes clearer. The first country to be examined is South Africa because of its recent legislative activity, including the milestone achieved through the MMA. The thematic evaluation of the South African legislative activity is more

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393 See GN 911 in GG 36807 of 6 September 2013 issued in terms of s 15(1) of the MMA.
394 Hereafter IPLAB 2011.
395 Hereafter the Wilmot Bill. This is a private member bill introduced to the South African National Assembly by Dr Wilmot James, the Shadow Minister of Trade and Industry in terms of s 73(2) of the South African Constitution and Rules 241(1) and 241(2) of the National Assembly. The Wilmot Bill is based on a bill prepared by Professor Owen Dean. See Dean 2012 TK Bill Synopsis. References to the Wilmot Bill are references to the Bill prepared by Prof Dean. There is an accompanying synopsis to the Bill prepared by Prof Dean. See Dean TK Bill Synopsis (hereafter Wilmot Bill Synopsis). See GN 376 in GG 36353 of 9 April 2013. Private members' bills have become possible as a result of the Constitutional Court decision in Oriani-Ambrosini v Sisulu 2012 6 SA 588 (CC) which struck down certain parliamentary rules which barred private members' bills. IPLAA 2013.
detailed and could serve as an example for the other countries of study. Discussions of Kenya, Ghana and Nigeria follow in that order.

5.2 Protection of expressions of folklore by intellectual property rights in South Africa

5.2.1 Introduction

As the discussion in Chapter 4 revealed, the possibility of using the SA NHRA\textsuperscript{397} to protect expressions of folklore is an idea that does not appear to have even been contemplated in South Africa because of the focus on tangible cultural heritage. To a large extent it appears that there has been no effective protection of expressions of folklore save for the recent protection under the MMA and the IPLAA 2013. Consequently, in South Africa third parties have used expressions of folklore freely. It is therefore important to recount how South Africa arrived at this interesting legislative engagement.

In 2004 the South African Cabinet approved the adoption of a policy on an indigenous knowledge system (IKS)\textsuperscript{398} which led to the formulation of a policy on the commercialisation and protection of indigenous knowledge through the intellectual property system.\textsuperscript{399} In 2008 the South African Minister of Trade and Industry published a "Policy Framework for the Protection of Indigenous Traditional Knowledge Though the Intellectual Property System",\textsuperscript{400} and the Intellectual Property Laws Amendment Bill, 2008.\textsuperscript{401} As we shall see, the IPLAB 2008 was more of a consultative document which generated considerable controversy. In 2010 the Minister of Trade and Industry introduced the Intellectual Property Laws Amendment Bill, 2010, in Parliament.\textsuperscript{402} The IPLAB 2010 also generated its fair share of

\textsuperscript{397} SA NHRA discussed in Chapter 4.5.
\textsuperscript{398} See the Policy document on the Indigenous Knowledge Systems (IKS).
\textsuperscript{399} See the Explanatory Memorandum.
\textsuperscript{400} Hereafter IKS Policy Statement, published in GG 31026 of 5 May 2008.
\textsuperscript{401} Hereafter PLAB 2008. Published in GN 552 in GG 31026 of 5 May 2008.
controversy\textsuperscript{403} resulting in a version that was presented by the Portfolio Committee on Trade and Industry to Parliament after its own share of controversy and amendment in November 2011.\textsuperscript{404} IPLAB 2011 was forwarded to President Zuma for his assent. The President withheld his assent and referred\textsuperscript{405} the Bill to the National Assembly on 20 September 2012 on two grounds. The first was that the National House of Traditional Leaders had not been involved in the process, while the second was that the Bill involved provincial powers and therefore should have been dealt with in terms of section 76 of the Constitution which addresses traditional leadership and culture, rather than section 77 which deals with money bills.\textsuperscript{406} After deliberation, on 6 March 2013 the Portfolio Committee on Trade and Industry recommended that the IPLAB 2011 should be signed into law.

On 5 March 2013, a day before the meeting of the Portfolio Committee on Trade and Industry, Dr Wilmot James the Shadow Minister of Trade and Industry, submitted the Wilmot Bill. As stated earlier, the Wilmot Bill is similar to a Bill drafted by Professor Owen Dean in 2012 as the "New Traditional Knowledge Bill" in a principled reaction to the IPLAB 2010. It is important to point out that the Wilmot Bill differs from the IPLAB 2011 as the ensuing discussions reveal, and is described as designed to:

- Provide sui generis protection for TK;
- Comply with South Africa's international obligations;
- Give effect to the principles for the protection of indigenous knowledge advocated by the World Intellectual Property Organisation (WIPO);
- Safeguard our existing IP statutes from irreparable harm and
- Establish a more sophisticated system for the protection of traditional knowledge in South Africa that far exceeds the level of protection anywhere else in the world.

In December 2013 President Zuma assented to the IPLAA 2013 and, in the normal course of things, this should be our focus in this chapter. However, it would appear

\textsuperscript{403} For a discussion and detail of relevant documents of this legislative process, see Jooste "Trampling Tradition – A Call for Support" CIP Blog post of March 19 2013 available at www.blogs.sun.ac.za/iplaw/2013/03/19/trampling-tradition/
\textsuperscript{404} Hereafter IPLAB 2011.
\textsuperscript{405} In terms of s 79 of the South African Constitution.
\textsuperscript{406} The South African Constitution recognises four categories of bills: Bills amending the South African Constitution (s 74), Bills not affecting provinces (s 75), Bills affecting provinces (s 76), and Money Bills in terms of s 77 of the South African Constitution that deal with appropriation of money, imposition of national taxes, levies, duties, or surcharges.
that the objectives of the *Wilmot Bill* are also important in order to bring many issues into perspective. The *IPLAA 2013* and the *Wilmot Bill* are used in this chapter as a general illustration of the challenges of using intellectual property rights to protect expressions of folklore. Specifically, they offer a comparative context of different approaches to the protection of expressions of folklore by intellectual property rights in South Africa.

This section opens with a discussion of the protection of expressions of folklore by the *MMA* before considering the different forms of intellectual property right recognised under the *IPLAA 2013*.

### 5.2.2 Merchandise Marks Act

Recent legislative activity by the South African Minister of Trade and Industry in terms of the *MMA* controlling the use of certain words in the course of trade, business, or as trademarks indicate a policy preference that has huge significance for the protection of expressions of folklore. The fact that this legislative activity focuses on the use of "Rooibos Tea", "Honeybus Tea", and "Karoo Lamb" is a clear indication of the South African government's desire to protect expressions of folklore using the *MMA* because all three terms relate to agricultural products which are geographical indications and expressions of folklore.

Section 15 of the *MMA* enables the Minister, after investigation, to prohibit – absolutely or conditionally – the use of any mark, word, letter or figure, or a combination thereof, in connection with any trade, business, profession, occupation

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407 17 of 1941 as amended up to 2002.

408 See GN 817 in *GG* 36736 of 16 August 2013. The Notice states that the South African Honeybush Tea Association (SANTA) has conveyed a request for the prohibition, in terms of s 15(1) of the said Act, on the use of the words indicated hereunder in connection with any trade, business, profession, or occupation or in connection with a trade mark, mark or trade description applied to goods, other than the use thereof by SAHTA members or any other party in accordance with the "Rules of Use for Honeybush".

409 See GN 1073 in *GG* 36973 of 1 November 2013 which states that the Karoo Development Foundation Trust has sought for the prohibition of the term 'Karoo Lamb' in terms of s 15(1) of the *MMA*.

410 The investigations by the Minister would include affording interested persons an opportunity to comment on a proposed notice in terms of s 13 of the Act.
or event, or in connection with a trademark or trade description applied to goods. Accordingly, since expressions of folklore include a "mark, word, letter or figure or a combination thereof" it is plausible for a traditional term or expression reflecting an expression of folklore to be restricted in the course of trade and in that way to achieve protection for that folklore as a geographical indication.

The final prohibition on the use of "Rooibos" and its five variants, restricts the use of the word to only members of the South African Rooibos Association. Third parties are also permitted to use the term in accordance with the Rules of Origin attached to the Final Notice of Prohibition for Rooibos Tea. In this way the MMA functions as geographical indicator protection through a collective trade mark paradigm. The aim of the Final Notice establishes protection by the MMA, as well as the international protection of Rooibos since local protection of geographical indication is a necessary measure.

The prohibition of the use of "Rooibos" and five variations of the term was at the instance of the South African Rooibos Association suggesting the trade related objective of the protection. However, the fact that "wild-harvested" Rooibos is protected by the Final Notice also contemplates the traditional Rooibos industry sustained by the Khoi/San indigenous people. The fact that a traditional and a modern Rooibos industry has grown separately, indicates that the Rooibos community has changed drastically. What appears to have become important is not the membership of the Khoi/San community, but the fact of cultivation of Rooibos.

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411 These variants are 'Red Bush' 'Rooibooste' 'Rooibos Tea' 'Rooitea' and 'Rooibosch'.
412 The Rules of Origin provide as follows: "The name ROOIBOS can only be used to refer to the dry product, infusion or extract that is 100% pure Rooibos – derived from Aspalathus linearis and that has been cultivated or wild-harvested in the geographic area as described in this application."
Rooibos flavoured tea or infusions with liquid flavourants ("flavoured Rooibos") can be called "Rooibos liquid flavourant" on the conditions that: Rooibos is the main ingredient (after water); The exact percentage of Rooibos content appears on the label/packaging; The final product must still be recognizable as Rooibos, as characterized in the description of the product.
Following guidance from the SA Rooibos Council, other products (for instance extracts, soaps, cream, yoghurts, liquor, etc.) may be called "Rooibos other product" only if it contains Rooibos, and on the conditions that: "Rooibos" (or "Aspalathus linearis") appears on the list of ingredients. It can be proven that Rooibos adds to the characteristics of the product.
413 See Chapter 2.4.1.1.1.c.
with its geographic area. Accordingly, the Rooibos community has been extended to incorporate the Khoi/San and industrial concerns involved in the production of Rooibos. It would appear that the modern production of "Rooibos" may not qualify as an expression of folklore, but that the traditional "Rooibos" community will qualify and to that extent, therefore, the MMA protects expressions of folklore.

As stated above, the South African Honeybush Tea Association and the Karoo Development Foundation Trust have followed the South African Rooibos Association in seeking the protection of the MMA. These applications indicate the potential of the MMA to operate in different ways. It can be deployed to act as a geographical indication protection evident in the application by the South African Rooibos Council and the South African Honeybush Tea Association. The application by the Karoo Development Foundation Trust is to operate a certification mark within specified areas of South Africa, a process which reveals territorial disputes over the geography of the Karoo.\(^4\) It is therefore clear that using the MMA to protect a geographical indication in a \textit{sui generis} manner – as the Rooibos Notice has done – may be far more flexible than using it to protect geographical indication through a certification mark – as the Karoo Development seeks to do. Using a certification mark seems to generate questions of inclusion and exclusion.\(^5\) This challenge is also germane to a collective trade mark which covers goods and services that are not geographically contiguous.

One may well predict that many other groups, including communities, can seek the aid of the MMA to protect their expressions of folklore. It is envisaged that other products that are viable for protection, include: Camedeboo Mohair; Swakara Karakul Pelt; Kalahari Melon Seed (KMS) Oil; Klein Karoo Ostrich; South African Olive Oil; as well as Boland Water Blommetjies (the stem, leaves and flowers of \textit{Aponogeton\textit{(distachyos)}}). As stated above, the nature of the communities engaged

\(^4\) See Jordan "1360ha of veld dotted with highly prized sheep" available at www.news.howzit.msn.com/border-war-erupts-over-Karoo-Lamb. The news story reports a dispute of the exact definition of Karoo in light of the proposed notice to be issued under the MMA.

\(^5\) See Oguamanam and Dagne "Geographical Indication" 81.
in the production of these products will determine whether the MMA will protect their expressions of folklore.

5.2.3 IPLAA 2013

An overview of the history of the IPLAA 2013 and its objectives is found in "The Memorandum on the Objects of the Intellectual Property Laws Amendment Bill 2010". Essentially, the legislation aims to "...enable and promote the commercial exploitation of IK for the benefit of indigenous communities from which the IK originated". The Explanatory Memorandum continues in item 1.4 that

[t]o create an appropriate legal framework for the recognition and protection of IK and to provide appropriate structures and mechanism to enable the commercialization of IK, it was considered appropriate to create an interface of IK with the current IP legislative dispensation and to integrate the protection of IK into the current IP protection laws of the Republic.

The Exploratory Memorandum advanced a number of reasons for the need for the IPLAA 2013. These include avoiding exploitation by foreign countries of the indigenous knowledge of indigenous communities, and the need for indigenous communities to derive full benefit from indigenous knowledge.

The object of the IPLAA 2013 is to provide for the recognition and protection of certain manifestations of indigenous knowledge as a species of intellectual property through the amendment of a number of pieces of intellectual property law legislation – such as the Copyright Act 98 of 1978 (hereafter SACA) – to provide for the recognition and protection of traditional works and other management structures; the SA TMA to provide for the recognition of indigenous terms and expressions and

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416 Hereafter the Explanatory Memorandum and is contained in B8B-2010 in GG 33055 of 29 March 2010 36. This version of the Bill was presented by the Portfolio Committee on Trade and Industry to Parliament after amendments occasioned by vigorous public debate. The original Bill was introduced by the government into the National Assembly through the Intellectual Property Laws Amendment Bill 2010.


418 These management structures for indigenous knowledge include the establishment of a National Council in respect of indigenous knowledge; to provide for National Databases for recording indigenous knowledge and to providing for recording of indigenous works and to provide for the establishment of a National Trust Fund for Indigenous Knowledge.
for the registration of such terms and expressions as trademarks; to create further registers in the trade mark register; to provide for the recording of indigenous terms and expressions; and to provide further protection for geographical indications. The SADA, is also amended to provide for the recognition and registration of indigenous designs and to create a further category in the designs register. So also is the SA PPA, amended to provide for the recognition and protection of performances of traditional works.

The preamble to the IPLAA 2013 also provides a general context within which its objectives can be assessed. Parts of the preamble illustrate this point. For example, the preamble recognises the importance of giving effect to the recognition of cultural values and freedom to participate in cultural activities as contemplated by sections 30 and 31 of the South African Constitution, so that the wealth of indigenous knowledge is recognised, preserved, protected, promoted, and made accessible to the public. This preamble indicates that the IPLAA 2013 was conceived to give effect to sections 30 and 31 of the South African Constitution which generally protect the right to culture.

One of the key challenges facing sections 30 and 31 of the South African Constitution, is how its individual and group dimensions interface. The two sections recognise that individuals can exercise their rights in concert with other members of their cultural, linguistic and religious communities. This collective exercise of individual rights, indirectly protects a community, making the extent to which this is possible something of a challenge. Another key issue in the constitutional domain of the IPLAA 2013 is the extent to which the South African Constitution – and especially the Bill of Rights – will affect its interpretation. The IPLAA 2013 may be unique in that it acknowledges the constitutional cultural and human rights basis of intellectual property. The preamble speaks of the protection of and accessibility to indigenous knowledge and, therefore, highlights the ever-present tension in the protection afforded by intellectual property rights whether the public and private interests are adequately represented in intellectual property rights.
The preamble also recognises indigenous knowledge as a valuable economic and cultural resource, as well as the creation of a legal dispensation for indigenous communities and their members. The international dimensions of the protection of indigenous knowledge and the importance of understanding the national and international challenges faced in protecting expressions of folklore is also recognised in the preamble. The mention of the World Trade Organisation (WTO) in the preamble suggests that indigenous knowledge should relate to the free trade ethos of the WTO. The preamble recounts the creative agency of human beings as a justification for an intellectual property paradigm.

5.2.3.1 Protection of traditional works

Section 4 of the IPLAA 2013 inserts a Chapter 2A in the SACA to protect traditional works. As section 28B(1) of the SACA provides that traditional works shall be eligible for copyright, it is important to consider that what the IPLAA 2013 envisages is a "traditional work". Section 3 of the IPLAA 2013 amends section 1 of the SACA to provide that a "traditional work" includes a "derivative indigenous work" and an "indigenous work". A "derivative indigenous work" is defined to mean "any work 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 has been derived from indigenous cultural expressions or knowledge, irrespective of whether or not such derivative indigenous work was derived" before or after the commencement of the IPLAA 2013.\(^{419}\) A derivative indigenous work is, therefore, a secondary work based on an indigenous work.

An "indigenous work" is defined as meaning "a literary artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which is created by persons who are or were members, currently or historically, of an indigenous community and which literary artistic or musical work is regarded as part of the heritage of such indigenous community". An indigenous cultural expression or cultural knowledge is defined as

\(^{419}\) See s 3 of the IPLAA 2013.
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— (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words, signs, names or symbols; (b) musical or sound expressions, such as songs, rhythms, or instrumental music, the sounds which are the expression of rituals; (c) expressions by action, such as dances, plays, ceremonies, rituals, expressions of spirituality or religion, sports, traditional games, puppet performances, and other performances, whether fixed or unfixed; or (d) tangible expressions, such as material expressions of art, handicrafts, architecture, or tangible spiritual forms, or expressions of sacred places.

It should be noted that the definition of indigenous cultural expressions or knowledge is similar to the definition of expressions of folklore examined in Chapter 2.420

5.2.3.1.1 Eligibility of a traditional work for copyright protection

There are a number of eligibility criteria for a traditional work. The first is set out in section 28B(2) of the SACA which largely dispenses with the requirement of materiality required by section 2(2) of the SACA. Accordingly, a traditional work is ineligible for copyright "unless it has been written down, recorded, represented in digital data or signals, or otherwise reduced to a material form or is capable of substantiation from the collective memory of the relevant indigenous community". 421 The addition of "substantiation from collective memory" in effect recognises the oracular nature of expressions of folklore and is a response to the traditional obstacle of materiality recognised as making copyright unsuitable for protecting expressions of folklore.422

The second eligibility criterion is that the traditional work or a derivative work must have been created on or after the coming into effect of IPLAA 2013 by an indigenous community that was so at the creation of the work. To be eligible for copyright protection the derivative indigenous work must have the prior informed consent of the relevant authority or indigenous community; there is disclosure of the indigenous cultural expressions or knowledge to the Companies and Intellectual

420 Chapter 2.2.
421 S 28B(2) of the SACA.
422 See the discussion in Chapter 2.4.1.1.1.
Property Organisation (CIPRO), and a benefit-sharing agreement between the applicant and the relevant authority or indigenous community has been concluded.

5.2.3.1.2 Registration of a traditional work

All indigenous cultural expression must be entered into databases that are additions to the existing intellectual property registers whose purpose is the "recordal of ownership and identification of representation within an indigenous community". The register shall serve as prima facie proof of the "existence of the manifestation of indigenous cultural expressions or knowledge and the veracity of the information recorded". In other words, the recording shall be prima facie evidence of ownership of the traditional work. An indigenous community or the author of a derivative indigenous work are eligible to request registration. If the applicant for registration is an existing indigenous community, the request for recording shall include a community protocol setting out relevant information about the indigenous community including identification of the indigenous community and its acknowledged structure; full details of the appointed representative of the indigenous community in whose name the copyright must be registered; full details of a juristic person if a juristic person represents the community; the indigenous work that is being recorded and the justification for the indigenous community claiming rights to it; whether such indigenous work is sacred, or should for any other reason which must be provided, be kept confidential; and a written undertaking by the representative of the indigenous community to the effect that he or she will hold the copyright on behalf of the indigenous community.

It is important to draw attention to the Community Protocol that is required as an addition to the application for the recordal because of the information that is

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423 Established pursuant to s 185 of the Companies Act 71 of 2008.
424 S 28B(5) of SACA provides that if an indigenous community has established a community protocol, the interaction with the indigenous community contemplated in subsection (4) must take such community protocol into account.
425 S 28C (1) and (2) of SACA.
426 SACA s 28C(4).
427 SACA s 28C(14).
428 "Author" is defined in s 1 of SACA as including the person who first made or created a "derivative indigenous work" and the indigenous community from which a work originated and acquired its traditional character.
429 SACA s 28C(7).
430 SACA s 28C(8).
required in such a document. A Community Protocol is defined as "a protocol developed by an indigenous community that describes the structure of the indigenous community and its claims to indigenous cultural expressions or knowledge and indigenous works, and provides procedures for prospective users of such indigenous cultural expressions or knowledge or indigenous works, to seek the community's prior informed consent, and negotiate mutually agreed terms and benefit-sharing agreements". The National Council for Indigenous Knowledge is required to assist the indigenous community to articulate a Community Protocol.431

There are possibilities for opposition proceedings to the registration by the Registrar of Copyright.432 Accordingly, any person may, within a stipulated period, oppose the recording by lodging with the Registrar of Patents Copyright, Trademarks and Designs, a notice of opposition setting out the grounds of opposition.433 An opposition request can either be refused or accepted and the Registrar may record the information; or record the information subject to certain conditions.434 There are also procedures for the amendment or removal of recorded information in the register.435

5.2.3.1.3 Ownership of traditional work

An appropriate indigenous community is regarded as the owner of a traditional work while the owner of a derivative indigenous work is the person who first made or created the work.436 However, the National Trust Fund for Indigenous Knowledge is regarded as the owner of the copyright in the traditional work in three ways; first if the author cannot be determined; is an indigenous community which is no longer in existence and thirdly if the authorship cannot be shared between more than one indigenous community claiming authorship.437

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431 SACA s 28C(9).
432 SACA s 28C(11).
433 SACA s 28C(12).
434 SACA s 28C(13).
435 SACA s 28C(16).
436 SACA s 28D.
437 SACA s 28D(3).
5.2.3.1.4 Duration of a traditional work

The term of an indigenous work shall be in perpetuity. If the work is a derivative indigenous work, the term of protection shall be 50 years from the end of the year in which the work was first communicated to the public with the consent of the author(s), or the life of the author(s), whichever terms expires last.438 If, however, the copyright of a traditional work vests in the state, the term of copyright shall be "perpetual in nature".439

5.2.3.1.5 Nature of copyright in traditional works

Copyright in a traditional work grants the exclusive right to do or authorise the doing of a number of acts subject to any rights in respect of the traditional work acquired by any person prior to the commencement of the IPLAA 2013.440

The exclusive rights extend to reproducing the traditional work and reproducing the cinematograph film containing the traditional work and publishing the traditional work. In the case of a traditional work of a literary or musical nature, the exclusive rights include the performance of the traditional work in public and broadcasting the work or causing a communication to the public by whatever means. If the traditional work is of a musical or artistic nature, or dramatic work, extend to the inclusion of the traditional work in a cinematograph film, television broadcast or sound recording; broadcasting the traditional work, or the cinematograph film or sound recording in which the traditional work is included. Other rights include communicating the cinematograph film in which the traditional work is included, to be seen or to be heard in public. The exclusive rights also include hiring a copy of the cinematograph film or a reproduction of the sound recording and transmitting the work in a diffusion service. The exclusive rights of the owner of a copyright are

438 SACA s 28F.
439 SACA s 28F(2).
440 SACA s 28E.
subject to rights in respect of any rights relating to the traditional work acquired before the commencement of IPLAA 2013.\(^{441}\)

Third parties who wish to engage in any of the acts reserved exclusively for the author, must do three things. They must obtain the prior informed consent of the indigenous community or the state. Secondly, they must disclose the indigenous cultural expression to the Commission, and thirdly, they must conclude a benefit sharing arrangement.\(^{442}\)

5.2.3.1.6 Free uses of traditional works: Exceptions and limitations

The structure of the free uses of traditional works is built around the exceptions and limitations applicable to copyright works. The free uses of a traditional work are defined by the uses to which the traditional work is to be put and the time of its creation. With respect to uses to which a traditional work is to be put, section 28G of the IPLAA 2013 provides that the exceptions and limitations generally contained in the SACA\(^{443}\) shall apply to traditional works with such modification as the traditional

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\(^{441}\) SACA s 28E(2).

\(^{442}\) SACA s 28G(4).

\(^{443}\) The exceptions covered by ss 12, 13, 14, 15, 16, 17, 18 and 19B of the SACA relate to literary artistic and musical works; published editions and computer programs; program carrying signals; cinematographic films; and sound recordings. As adapted the relevant parts of the SACA provides that copyright shall not be infringed by any fair dealing with a traditional work or its adaptation in its original language or a different language in a number of instances: (a) for the purposes of research or private study by, or the personal or private use of, the person using the work; (b) for the purposes of criticism or review of that work or of another work; or (c) for the purpose of reporting current events (i) in a newspaper, magazine or similar periodical, or (ii) by means of broadcasting or in a cinematograph film. Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work. Secondly, the copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings. Thirdly, The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation there from, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work. Fourthly, usage by way of illustration in any publication broadcast or sound or visual record for teaching provided that such use shall be compatible with fair practice and the source shall be mentioned as well as the name of the author if it appears on the work. Fifthly, a broadcaster may with its own facilities reproduce and keep a traditional work for not more than six months or a longer term as agreed with the owner of a copyright if the reproduction is intended for lawful purposes and the reproduction is destroyed. If the reproduction of the traditional work is of exceptional documentary nature the work may be kept in an archive and not used for
work may require for the exception and limitation to be specifically applicable to the traditional work. It would appear that part of modifications required to be made to the general exceptions and limitations, are set out in section 28G(7) of the SACA which provides that reasonable parts of a traditional work may be used with due acknowledgment of the of the copyright owner, without obtaining prior consent if the use is "for the purpose of private study or private use; professional criticism or review; reporting on current events; education; scientific research; legal proceedings; or the making of recordings and other reproductions of indigenous cultural expressions or knowledge for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes and incidental uses".

In terms of the time of creation of the traditional work, there are detailed provisions governing the effect of acquisition of intellectual property rights prior to the commencement of the IPLAA 2013. Where a person has acquired IP rights prior to the commencement of the IPLAA 2013 and continues to act in relation to the IP right after the commencement of the IPLAA 2013, such a person shall, subject to a number of obligations, continue to hold the IP right as if it had been granted before the IPLAA 2013. The obligations are that, first, "the person must within twelve months of the commencement of the IPLAA 2013, inform the Commission of the existence of the indigenous cultural expression or knowledge", and secondly, negotiate a benefit-sharing arrangement with the relevant authority or indigenous community.

5.2.3.1.7 Royalties and benefits

Two broad categories are envisaged for the payment of royalties and/or benefits.\(^444\) The first category involves sound recordings of a traditional work and the inclusion of a traditional work in a cinematograph film and communicating the sound broadcasting except with the consent of the copyright owner. Sixthly, if a dealer in radio and television services use a traditional work to demonstrate the equipment to a client. Seventhly, an authorisation to include a traditional work in a cinematograph film includes a right to broadcast such a film.

\(^{444}\) S 28H of the SACA envisages that the provisions of ss 6, 7, 8, 9 of SACA will also apply to traditional works with necessary changes to make them applicable to specific traditional work.
recording to the public. It is envisaged that the owners of a traditional work and the third party will negotiate the payment of royalties and benefits in respect of the broadcast, transmission of, and playing of a sound recording of a traditional work. They are also expected to negotiate royalties for showing, broadcasting, or transmitting a cinematographic film recording a traditional work, or including a traditional work in a cinematograph film or television broadcast. If no agreement is reached for the free use of such traditional work, then the third party must pay a royalty and/or benefit to the owner of the relevant copyright. The amount of the royalty, benefit or both, shall be determined by an agreement between the parties or their respective collecting society. Where no such agreement is reached, the value or amount shall be determined by a number of institutions, including, first, a section 28K(1) SACA institution, the Copyright Tribunal, or through arbitration as the parties may agree, or on the referral of one of the parties. Any agreement reached between third parties and the owners of indigenous works must be submitted to the National Council on Indigenous Knowledge who must examine the agreement for compliance with intellectual property laws, the community protocol, and the IPLAA 2013. Where any clause in the contract is regarded as not being to the benefit of the indigenous community or member of the indigenous community concerned, the National Council for Traditional Knowledge must request renegotiation and intervene to provide necessary advice.

The second category is found in the requirement in section 28H(2) of the SACA and provides that the owner of a copyright in a derivative work shall pay a royalty or benefit or both, to the owner of a copyright in a indigenous work from which the derivative indigenous work has been derived.

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445 See SACA s 28G(2).
446 SACA s 28G(2).
447 A s 28K(1)-institution is an institution with necessary capacity which must be accredited by the Companies and Intellectual Property Registration Commission to adjudicate on any dispute arising from the application of the IPLAA 2013.
448 See SACA s 29(1).
449 Arbitration is in terms of the Arbitration Act 42 of 1965.
5.2.3.1.8 Assignments and licences

Section 28J(1) of the SACA provides that copyright in an indigenous work is not transmissible by assignment, testamentary disposition, or operation of law except in the case of transfer to a duly appointed representative of the community, or assignment to a collecting society. Where the last-known member of the indigenous community dies, copyright in the traditional work will vest in the National Trust.

5.2.3.2 Protection of indigenous terms and expressions

5.2.3.2.1 Introduction

The protection of indigenous terms and expressions proceeds principally through proposed amendments to the SA TMA which will be effected by the insertion of Part XIIA titled "Traditional Terms and Geographical Indications" into IPLAA 2013. It would appear that since registration is crucial to the validity of trademarks, there is a twin objective in the amendment process that seeks to ensure that indigenous terms and expressions are registrable as collective marks, certification marks, and geographical indications on one hand, and ensuring that indigenous terms and expressions are not registered as trade marks, on the other hand by third parties. Ancillary issues in this regard include provisions made to ensure that, through the recognition of a "derivative indigenous term and expression", trademarks which qualify as indigenous terms and expressions registered before the commencement of the IPLAA 2013 continue subject to certain obligations.

It is important as this point to clarify the meaning of indigenous terms or expressions. An Indigenous term or expression is defined as "a literary, artistic or musical term or expression with an indigenous or traditional origin and a traditional character including indigenous cultural expressions or knowledge which was created by persons who are or were members current or historically of an indigenous community and which is recognized as part of the heritage of the community". A "derivative indigenous term or expression" is defined as meaning any term or

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450 See s 2 of the SA TMA.
expression applied to any form of indigenous term or expression 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 the term or expression was derived before or after the commencement of the IPLAA 2013.

5.2.3.2.2 Registrable traditional marks

Indigenous terms and expressions cannot constitute a trademark but can under section 43B(2) of the SA TMA, qualify as a certification trademark, a collective trademark, or a geographical indication. A traditional term or expression is registrable if it has been passed down from a previous generation or a derivative created after the commencement of the IPLAA 2013, and the community from which the term expression or geographical indication originated was an indigenous community at the time of its creation.

It would appear that registration does not validate a traditional mark because section 43F(3) of the SA TMA provides that any person who wishes to acquire rights involving the use of indigenous terms or expressions or geographical indications after the commencement of the IPLAA 2013, must seek the prior informed consent of the indigenous community, inform the National Commission on Indigenous Knowledge, and conclude a benefit-sharing arrangement with the indigenous community.

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451 See s 43B(1) of the SA TMA.

452 A certification trade mark is described by s 42 of the SA TMA as a mark capable of distinguishing in the course of trade, goods and services certified by any person in respect of kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods and services, or the mode or time of production of the goods or rendering of the services as the case may be, from the goods and services not so certified shall on application be registered as a certification trade mark.

453 A collective trade mark is described by s 43 of the SA TMA as a mark which is capable of distinguishing in the course of trade goods or services of persons who are members of any association from goods or services of non-members and the mark is in the name of such association.

454 A ‘geographical indication’ is defined by s 2 of the SA TMA (in as far as it relates to indigenous cultural expressions or knowledge) as meaning an indication which identifies goods or services as originating in the territory of the Republic or in a region or locality in that territory, and where a particular quality, reputation or other characteristic of the goods or services is attributable to the geographical origin of the goods or services, including natural and human factors.

455 See s 43B(8)(b) of the SA TMA.
community. Therefore, an indigenous community may be content merely to license its traditional term or expression or geographical indication, or it may also wish to register a trade mark. In order to be registrable as a certification or collective mark, an indigenous term or expression must be capable of "distinguishing the goods or services of the indigenous community in respect of which it is registered or proposed to be registered, from the goods or services of another community or person, either generally or where the traditional term or expression is registered or proposed to be registered subject to limitations, in relation to use within those limitations". 456

Where a traditional trade mark was registered before the commencement of the IPLAA 2013, or has been registered after the IPLAA 2013, section 43C provides that it can be removed from the register if it is a mark of two kinds. The first are marks that consist "exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, or other characteristics of the goods or services, or mode or time of production of the goods or of rendering of the services". Second, are marks that consist "exclusively of a traditional term or expression and which in the bona fide and established practices of the trade have become indicative of or are generally associated with the goods or services for which the mark is sought to be registered". In other words the traditional term has become generic. 457

5.2.3.2.3 Registration of derivative indigenous term or expression or a geographical indication

Derivative indigenous terms and expressions can be registered as trademarks on certain conditions which include obtaining prior informed consent from the community or relevant authority, and a disclosure of the indigenous cultural or knowledge to the Commission. In addition, a benefit-sharing agreement between

456 S 43B(3) of the SA TMA.
457 S 43C(1)(b) of the SA TMA.
the applicant and the relevant authority or indigenous community has been concluded.\textsuperscript{458}

5.2.3.2.4 Registration of traditional terms, expressions and geographical indications in the national database

The National Database for Indigenous Knowledge shall constitute and function as a sub-register within the register of trademarks for traditional terms and expressions.\textsuperscript{459} Two classes of traditional terms and expressions are recordable in the database. The first class refers to trademarks submitted to the Registrar of Patents, Copyrights, Trademarks and Designs which in the opinion of the Registrar are a traditional term or expression or a geographical indication. If the National Council for Indigenous Knowledge certifies, at the request of the Registrar, that the mark sought to be registered is a traditional term or expression or a geographical indication, the Registrar is bound to refuse the registration and include the mark in the database as a traditional term or expression or a geographical indication.\textsuperscript{460} The second class of mark includes traditional terms or expressions which are registered as certification trademarks, collective trademarks, or geographical indications.\textsuperscript{461}

A relevant person\textsuperscript{462} may submit to the Registrars a request together with the appropriate information as prescribed for a traditional term or expression or geographical indication to be registered in the database.\textsuperscript{463}

There are circumstances which require the National Trust and Fund for Indigenous Knowledge to be recognised as the applicant and proprietor of an application for

\textsuperscript{458} See s 43B(6) of the \textit{SA TMA}. S 43B(7) requires that if an indigenous community has established a community protocol, the interaction with the indigenous community contemplated in subsection (6) must take such community protocol into account.

\textsuperscript{459} S 43D of \textit{SA TMA}.

\textsuperscript{460} See ss 43D(2)(a) and 43D(14) of the \textit{SA TMA}

\textsuperscript{461} See \textit{SA TMA} s 43D(2)(b).

\textsuperscript{462} Any natural person who created the traditional terms and expressions or geographical indications; natural or juristic person authorised to act on behalf of an indigenous community, or on behalf of an individual; or person appointed by the Minister in the manner prescribed, to act on behalf of an indigenous community which is no longer in existence.

\textsuperscript{463} See \textit{SA TMA} s 43D(4).
recording in the database. In all other instances the applicant and proprietor must be a person authorised to act on behalf of the indigenous community or indigenous communities, or on behalf of an individual. Where a geographical indication is involved, the applicant must be a person authorised to act on behalf of the indigenous community or indigenous communities, or the relevant member of the indigenous community. Where derivative traditional terms or expressions are involved, only a member of an indigenous community can be an applicant or proprietor. If the applicant for registration is an indigenous community, a community protocol containing the relevant information must accompany the application.

The Registrar is empowered to register a mark as a collective mark, a certification trade mark, or a geographical indication if it appears that the mark consists exclusively or significantly of a traditional term or expression or a geographical indication. Any person eligible to file an application for registration, or an interested third party, may file a request for the amendment or removal of a traditional term, expression, or geographical indication from the database.

The Registrar shall notify the National Council for Indigenous Knowledge if he accepts to register a traditional term or expression or geographical indication as a

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464 See *SA TMA* s 43D(5)(a). The circumstances include where the originator of the traditional term or expression or the geographical indication cannot be determined, where the originator of the traditional term or expression or the geographical indication, is an indigenous community which is no longer in existence; and where the indigenous terms or expressions or geographical indication developed in such a manner that proprietorship cannot be shared amongst indigenous communities.

465 See *SA TMA* s 43D(5)(b)-(d).

466 *SA TMA* s 43D(6). The relevant information includes identification of the indigenous community and its acknowledged structure full details of the appointed representative of the indigenous community in whose name the traditional term or expression or the geographical indication must be registered; if the representative is a juristic person, full details of registration of such juristic person; the indigenous term or expression or geographical indication that is being registered and the justification for the community claiming rights to it; whether such indigenous term or expression or geographical indication is sacred, or should for any other reason, which must be provided, be kept confidential; and a written undertaking by the representative of the indigenous community to the effect that he or she will hold the right to the indigenous term or expression or geographical indication on behalf of the indigenous community. S 43D(7) requires the National Council to assist the indigenous community to ensure that the protocol corresponds to the structure of the community.

467 See *SA TMA* s 43D(12).

468 *SA TMA* s 43D(11).
In the event of the acceptance of a geographical indication as a certification or collective trademark, the Registrar shall inform the Director-General of the department responsible for agriculture. The duration of a registered indigenous term or expression or geographical indication is in perpetuity.

5.2.3.3.5 Infringement of a traditional mark

The infringement of a traditional mark is dependent on whether a trademark in use before the coming into effect of the IPLAA 2013 is an indigenous term, an expression, a geographical indication, or a derivative trade mark. In this regard section 43F(1) of the SA TMA preserves the rights of users of well-known marks.

Therefore, the registered proprietor of a trade mark which is a traditional term or expression, is not entitled to interfere with or restrain any person who has been using a mark in the course of trade before the IPLAA 2013 came into effect, and has continued to make bona fide use of the mark – provided that "if any commercial benefit arises from the use of the mark after its registration as a certification trademark, a collective trade mark, or a geographical indication, a license fee, a benefit, or both royalty and benefit shall be paid to the proprietor". Section 43F(2) of the SA TMA requires that the user of the trademark shall within twelve months of the commencement of IPLAA 2013, disclose the indigenous cultural expression or knowledge to the National Commission on Indigenous Knowledge and conclude a benefit-sharing arrangement with the indigenous community. The rights of the indigenous community to royalties and benefits begins from the commencement of the IPLAA 2013 and any person having the right to the use of a mark which is a traditional term or expression or geographical expression shall also have a right in a derivative indigenous term or expression or geographical indication.

\[\text{SA TMA s 43D(17)(a).}\]

\[\text{SA TMA s 43D(17)(b).}\]

\[\text{SA TMA s 43E(2).}\]

\[\text{See SA TMA s 35.}\]

\[\text{In terms of s 43B(6)(b) & (c) of the SA TMA.}\]
The effect of the registration of a derivative indigenous term or expression or geographical indication, is that a licence fee is due to owners of the certification or collective marks or geographical indication in the indigenous terms expressions or geographical indication.474

The exceptions and limitations that apply to a traditional term and expression or geographical indication are the same as for traditional works.475 A reasonable portion of a traditional term or expression or geographical indication may be used without obtaining prior consent of the trade mark proprietor, if the use is "for purposes of private study or private use; professional criticism or review; reporting on current events; education; scientific research; legal proceedings; or the making of recordings and other reproductions of indigenous cultural expressions or knowledge for purposes of their inclusion in an archive, inventory; dissemination for non-commercial cultural heritage safeguarding purposes and incidental uses". The user must in addition acknowledge the trade mark proprietor.

5.2.3.3 Protection of traditional designs

5.2.3.3.1 Introduction

The protection of indigenous designs by the IPLAA 2013 is through the recognition of an intellectual property right described as "traditional designs" to be inserted into the SADA. While indigenous communities can register an indigenous design, third parties can also register a derivative indigenous design based on the indigenous designs. Unlike traditional marks, there is no class of un-registrable traditional designs. Section 11 of the IPLAA 2013 seeks to change the definition of "design" in section 1 of the SADA of adding the term "traditional design" to the definition of "design".476

A "traditional design" is defined to include an indigenous design and a derivative indigenous design. An "indigenous design" is defined to mean "an aesthetic or

474 SA TMA s 43F(6).
475 SA TMA s 43F(8).
476 Section 11 of the SADA.
functional design with an indigenous or traditional origin and a traditional character, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and that design is regarded as part of the heritage of the community". An indigenous design can either be an aesthetic or functional indigenous design. An aesthetic indigenous design is defined to mean "an indigenous design applied to an article for the pattern, the shape, the configuration, or the ornamentation thereof, or for two or more of those purposes, and by whatever means it is applied". It must further have features which appeal to and are judged solely by the eye, irrespective of its aesthetic quality. An aesthetic design is registered as "TA" in the design register.

A functional indigenous design refers to a design applied – by whatever means – to an article on the basis of its pattern, shape, or configuration, or for two or more of these purposes, having features which are necessitated by the function of the article to which the indigenous design is applied. A functional indigenous design is registered as "TF" in the design register.

A "derivative indigenous design", on the other hand, means "any aesthetic or functional design forming the subject of the Act, applied to any form of indigenous design recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which has been derived from indigenous cultural expressions or knowledge irrespective of whether the derivative indigenous design was derived before or after the commencement" of the IPLAA 2013. A derivative indigenous design can be either aesthetic or functional.

5.2.3.3.2 Registration of an indigenous design

Section 53A(5) of the SADA provides that an indigenous community may apply for the registration of an indigenous design. The author of a derivative indigenous
design which is new;\textsuperscript{477} any person who created the derivative indigenous design; any person authorised to act on behalf of an indigenous community, or on behalf of an individual; or a person appointed by the Minister in the prescribed manner, to act on behalf of an indigenous community which no longer exists, may submit a request together with the appropriate information for a traditional design to be registered in the Database.\textsuperscript{478}

If the applicant for registration is an indigenous community, the requirement for a community protocol applicable with respect to traditional works and marks also applies.\textsuperscript{479} Section 53C(12) of the \textit{SADA} empowers the Registrar of Patents, Copyright, Trademarks and Designs to consider the application and register the indigenous design under Part T of the database. If, however, the Registrar is in doubt as to whether the application complies with the \textit{SADA}, he or she must refer the application to the National Council on Indigenous Knowledge,\textsuperscript{480} and the Council must give its opinion within three months of the referral, as to whether or not the design can be registered.\textsuperscript{481}

Registration has a number of consequences. The first is that a registered proprietor of a design has the right to exclude other persons from "making, importing, using or disposing of any article containing the design".\textsuperscript{482} Secondly, an indigenous community may register an indigenous design within 36 months from the commencement of the \textit{IPLAA 2013} or such longer period as the Minister may prescribe, and enjoy royalties and benefits conferred from the date of commencement of the \textit{IPLAA 2013}. Where, however, the indigenous community registers an indigenous design after the commencement of the \textit{IPLAA 2013} period contemplated above, the indigenous community will enjoy the right to royalties and

\textsuperscript{477} A derivative indigenous design is considered to be new if it is different from or does not form party of the state of art immediately before the date of the application for registration or the release date whichever is earlier.

\textsuperscript{478} Whereupon the provisions of s 28C of the \textit{SAC4} shall, with necessary changes, apply. \textit{SADA} s 53C(1) provides that the National Database of Indigenous Knowledge shall constitute and function as a sub-register within the register of designs. A part T is to be opened in the register for traditional designs.

\textsuperscript{479} \textit{SADA} s 53C(6)–(8).

\textsuperscript{480} \textit{SADA} s 53C(15).

\textsuperscript{481} \textit{SADA} s 53C(16).

\textsuperscript{482} \textit{SADA} s 20.
benefits will become due from the date of registration.\textsuperscript{483} The term of protection of an indigenous design is in perpetuity.\textsuperscript{484}

5.2.3.3.3 Registration of a derivative indigenous design

The author of a derivative indigenous design can apply for registration if the design is new and has features based on or derived from an indigenous design.\textsuperscript{485} A derivative indigenous design shall be deemed to be new "if it is different from, or if it does not form part of, the state of art immediately before the date of application for registration or the release date whichever is earlier, provided that in the case of a release date being within ten years preceding the date of commencement of the \textit{IPLAA 2013}, the application for registration is lodged within two years of the commencement date of the \textit{IPLAA 2013}". If the release date is after the commencement of the \textit{IPLAA 2013}, the application for the registration of the design is lodged within two years of such release date.\textsuperscript{486} It is a further requirement for registration that prior informed consent has been obtained from the relevant authority or indigenous community; that a disclosure of the indigenous design has been made to the Commission; and a benefit-sharing agreement has been concluded between the applicant and the relevant authority or indigenous community.\textsuperscript{487}

The duration of an aesthetic derivative indigenous design is fifteen years from the date of registration or release date, whichever is earlier. However, the period is ten years for a functional derivative indigenous design.\textsuperscript{488}

\textsuperscript{483} \textit{SADA} s 53C(9).
\textsuperscript{484} \textit{SADA} s 53E(1)(b).
\textsuperscript{485} \textit{SADA} s 53B(1).
\textsuperscript{486} \textit{SADA} s 53B(2).
\textsuperscript{487} \textit{SADA} s 53B(4) provides that the negotiations with the third party shall take into account a community protocol on a benefit sharing arrangement.
\textsuperscript{488} \textit{SADA} s 53E(1).
5.2.3.3.4 Amendment removal or revocation of a traditional design

Any eligible person can apply for the amendment of or removal of a traditional design from the database. Section 31 of the SADA allows for the revocation of a registered design on a number of grounds including that the application of the registered design was not made by the person entitled to make the application; that the registration is in fraud of the rights applicant; that the design in question is not registrable under the terms of section 14 of the SADA; that the application for registration contains a false statement or material representation and that the Registrar of Designs ought to have refused the application pursuant to section 16 of the SADA.

Section 53E(2) of the SADA requires an application for the revocation of a traditional design to be served on the National Council of Traditional Property. The Council must notify the Registrar whether or not it intends contesting the revocation.

5.2.3.3.5 Rights of a registered proprietor of a traditional design

The registered proprietor of a traditional design is entitled under section 35 of the DA to institute proceedings against infringement of the design. The interests of a registered proprietor must not interfere or restrain any person who had dealings with articles embodying the traditional designs, before the commencement of the IPLAA 2013, provided that in the case of any commercial benefit from such dealings, a royalty benefit shall be paid to the proprietor of the traditional design.

The following exceptions and limitations apply to a traditional design. A traditional design may be used without obtaining prior consent, in reasonable proportion and appropriate acknowledgement if it is for the "purposes of private study or private use; professional criticism or review; reporting on current events; education; scientific research; legal proceedings; or the making of recordings and other reproductions of indigenous cultural expressions or knowledge for purposes of their

\[489\] SADA s 53C(11).
\[490\] SADA s 53F.
inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes and incidental uses”.

5.2.3.4 Performances of traditional works

5.2.3.4.1 Protection of performances in traditional works

It was long thought that because the definition of literary and artistic works in the SA PPA included expressions of folklore, the performers' right recognised by the SA PPA was a way of protecting expressions of folklore. The IPLAA 2013 continues this trend by creating a special category of rights termed "performance in traditional works" through amendments to the SA PPA. A traditional work is defined with reference to the definition in the IPLAA 2013 and includes expressions of folklore. Section 1 of the SA PPA includes the term "traditional works" in the definition of "artistic works" "literary works" and "musical works". The new right created by the IPLAA 2013 is found in section 8A(1) of the SA PPA which extends the provisions of the SA PPA to performances of a traditional work.

A traditional performance gives rise to the protection offered by section 5 of the SA PPA, regarding broadcasting or communicating to the public an unfixed performance by the performer, unless: the performance used in the broadcast or the public communication is itself already a broadcast performance; or (ii) making a fixing of the unfixed performance of such performer; or (iii) making a reproduction of a fixing of a performance by the performer.

It is envisaged that the rights granted by section 5 of the SA PPA will commence on the date the performance took place, or if the performance is included in a phonogram or film, on the day the film was fixed and will continue for 50 years calculated from the end of the year in which the performance took place or was incorporated in a phonogram or film.

491 See, for example, Visser 2002 SA Merc LJ 656-687.
5.2.3.4.2 Exceptions to and limitations on the use of performances of traditional works

A number of concepts automatically apply to the protection of traditional performances. In this regard the exceptions to the rights of performers complement the rights of performers. Consequently, section 8(2) of the *SA PPA* provides that short excerpts of a performance, a fixation of a performance, or a reproduction of such a fixation, may be used freely if it is for the purposes of private study or personal and private use; if it is for the purposes of criticism or review; or for the purpose of reporting on current events. A further condition is that whenever possible, the performer's name or the names of the leading performers are acknowledged if it used for teaching, scientific research, or legal proceedings. If it is for the demonstration of recording, amplifying or similar apparatus, the demonstration must be made by a licenced dealer on his premises to a specific client.

Broadcasters can make a fixation of a performance and reproductions of that fixation provided that the fixation or any reproduction thereof: is intended exclusively for broadcasts to which the performer has consented; is not of an exceptional documentary character; and is destroyed within six months commencing on the day on which the fixation was first made, or such longer period as may be agreed to by the performer.492

5.2.3.4.3 Civil and criminal liability for infringing performers' rights

There are a number of offences and penalties for the breach of performers' rights. Accordingly, any person who with intent contravenes any of a performer's rights by selling, hiring, distributing offering for sale or hire, any fixation or a reproduction of such a fixation, or has a device for the reproduction of fixations of a performance, commits an offence and is liable to a fine or imprisonment. On the application of the

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492 S 8(3) of the *SA PPA*. 

performer whose rights have been infringed, and without proof of any damages, the court may further order a reasonable payment as damages.\(^{493}\)

A number of civil remedies such as damages or an interdict are also available to the performer.\(^{494}\) Furthermore, the court may order that all fixations, reproductions of fixations, or plates in the possession of the accused or the defendant, be destroyed or dealt with as the court may determine.\(^{495}\)

5.2.3.5 Management of indigenous knowledge

The \textit{IPLAA 2103} envisages a management structure for the protection indigenous knowledge. At the apex of this structure is the National Council for Indigenous Knowledge,\(^{496}\) followed by the National Trust and Fund for Indigenous Knowledge,\(^{497}\) with dispute settlement bodies and collecting societies with competence over indigenous knowledge bringing up the rear.

5.2.3.5.1 National Council for Indigenous Knowledge

The National Council for Indigenous Knowledge shall consist of not less than fifteen members, appointed by the Minister.\(^{498}\)

The structure of the Council is set out in section 28L of the \textit{SACA} and it is to be broadly representative of the different cultures within the Republic. Given the peculiar functions of the Council, it is envisaged that representatives of branches of indigenous knowledge must be present in the Council at all times. This includes at least two persons with extensive knowledge in and patronage of traditional cultures

\(^{493}\) \textit{SA PPA} s 9.

\(^{494}\) \textit{SA PPA} s 10.

\(^{495}\) \textit{SA PPA} s 11.

\(^{496}\) Hereafter Council.

\(^{497}\) Hereafter Trust.

\(^{498}\) S 28L of the \textit{SACA}. Before appointing members of the Council the Minister shall publish a notice in the \textit{Gazette} or any other widely circulating means of communication calling for nominations and setting forth the criteria for nomination. In appointing the members of the Council, the Minister may consult the Ministers responsible for agriculture, arts and culture; environmental affairs, science and technology; organised local government; an association of traditional healers; the Council of Traditional Leaders; academia; the legal profession; organized commerce and industry or any other relevant body or institution.
and values of indigenous communities; at least two persons with extensive knowledge in and patronage of traditional artistic, literary, musical and performing arts; and at least two persons with extensive knowledge of the law.\textsuperscript{499}

Section 28M of the \textit{SACA} sets out the functions of the Council which are essentially advisory in support of the South African government, other institutions involved in the management of indigenous knowledge, and the general public.\textsuperscript{500}

5.2.3.5.2 National Trust and Fund for Indigenous Knowledge

The functions of the National Trust for Indigenous Knowledge\textsuperscript{501} include responsibility for "the promotion and preservation of indigenous cultural expressions and knowledge, including, but not limited to, the commercialisation and exploitation of indigenous cultural expressions or knowledge for the purpose of generating income; the facilitation of the development of indigenous communities with respect to training on, and awareness of, their intellectual property and associated rights; and assisting indigenous communities in the application of the legislation dealing with indigenous cultural expressions or knowledge". Another important function of the Trust is to act as a collecting society as an indigenous community may request

\textsuperscript{499} S 28L(6) of the \textit{SACA}.

\textsuperscript{500} See \textit{SACA} ss 28M and 28M(2). The Council is to advise the Minister on a number of issues including any matter concerning indigenous cultural expressions or knowledge; matters relating to performances of traditional work; the integrity of a database of intellectual property in relation to indigenous cultural expressions or knowledge and matters involving the registration of indigenous cultural expressions or knowledge relevant. When any of these registrars is in doubt as to the suitability of an application for registration for a traditional work traditional mark traditional design or performance of a traditional work the Council can be approached for advice on whether the registrar is to accept or refuse the application. With respect to performances of traditional works the Council is regarded as the authority under s 6 of the PPA when a performance of a traditional work is performed by several performers as a group and no other designated authority exists. The Council shall also refer any disputes to a dispute settlement body established pursuant to s 28K of \textit{SACA} and carry out any other function(s) assigned to it by the Minister. In furtherance of its statutory function the Council has powers to appoint any person to assist the Council with the performance of any specific act, task or assignment, or to investigate any matter relating to its functions; constitute and maintain such committees as it may deem necessary; appoint as members of the committees any of its members and any other persons for such periods of time as the council may determine; and refer to such committees any tasks or matters as may be necessary to enable the Council to carry out its functions.

\textsuperscript{501} S 28I(1) of the \textit{SACA} envisages the establishment of a Trust made up of five members and to be known as the National Trust for Indigenous Knowledge.
the Trust to collect, manage, and distribute royalty benefits or licence fees on the payment of a prescribed fee.\textsuperscript{502}

The Trust shall establish a Fund to be known as the National Trust Fund for Indigenous Knowledge\textsuperscript{503} which shall consist of separate sub-funds that will vest in and be administered at the request of and on behalf of the Trust by the Registrar of Patents, Copyright, Trademarks and Designs.\textsuperscript{504} All income derived by the Trust from the use of indigenous knowledge, including all royalties and benefits payable as described above, shall be paid to the fund to be used for the benefit of indigenous communities.\textsuperscript{505}

The Trust is to work with any legal entity, business, or any other enterprise to promote or exploit traditional intellectual property.

5.2.3.5.3 Companies and Intellectual Property Registration Office

The Companies and Intellectual Property Registration Office is endowed by section 28L(15) and section 28I(7) of the \textit{SACA} with the responsibility for the administration of the Council and of the Trust respectively.

5.2.3.5.4 Dispute settlement institutions

One of the remarkable innovations introduced by the \textit{IPLAA 2013} is the requirement in section 28K(2) of the \textit{SACA} that any dispute emanating from the changes brought about by the \textit{IPLAA 2013} must first be instituted before an accredited institution which has the necessary capacity to adjudicate any dispute arising from the introduction of the \textit{IPLAA 2013}. Any adjudication must take into account existing

\textsuperscript{502} See s 28I(9) of \textit{SACA}.
\textsuperscript{503} Hereafter the "Fund".
\textsuperscript{504} \textit{SACA} s 28I(5).
\textsuperscript{505} \textit{SACA} s 28I(6) provides that in utilising the Fund for the benefit of indigenous communities the Minister may prescribe administration fees; fees relating to commercialisation, exploitation and training of indigenous communities; the frequency and manner in which payments shall be made to indigenous communities; and any other matter related to the administration of the income received by the Fund.
customary dispute resolution mechanisms. The decision of the institution may be served, executed, and enforced as if it were an order of the High Court. Any party to proceedings before a dispute settlement institution may appeal to a court of law against any decision of such institution, and the appeal must be noted and dealt with in the manner prescribed by law for appeals against the civil order or decision of a single judge.

5.2.3.5.5 Collecting societies for indigenous knowledge

The general scheme of the IPLAA 2013 envisages the involvement of collecting societies in the administration of indigenous knowledge especially in the negotiation of royalties and benefits between owners of indigenous works, marks and designs, and owners of derivative indigenous works, marks and designs, as well other third parties who wish to use indigenous works, marks and designs. To ensure that collecting societies function properly, it is envisaged that the Minister of Trade and Industry, in consultation with the Minister of Finance, will make regulations for the establishment, composition, funding and functions of collecting societies and any other matter that it may be necessary or expedient to regulate for the proper functioning of such societies, whether in respect of copyright or any other type of intellectual property.

5.2.3.5.6 Compliance of IPLAA 2013 with treaties

One of the objectives of the IPLAA 2013 is to ensure that South Africa complies with multilateral commitments on the protection of indigenous knowledge. This is understandable since it is incumbent on South Africa to ensure that other

506 SAC 28K(4).
507 SAC 28K(5).
508 SAC 28K(6).
509 S 1 of the SAC defines a "collecting society" as a society created by this Act, or agreement and which amongst others manages matters related to rights in copyright works; negotiates for, and collects royalties and benefits on behalf of its members; and distributes royalties and benefits to copyright owners.
510 See, for example, s 28H(3)(a) of SAC; s 43F(4)(a) of the SA TMA; and s 53F(4)(a) of the DA.
multilateral obligations it has undertaken by becoming a party to treaties such as the *WTO Treaty* are fulfilled.

Two of such obligations: the "national treatment" standard and the "most favoured nation" standard are of pivotal importance. With respect to the national treatment standard South Africa is bound to treat its nationals and foreigners in the same manner. An examination of the *IPLAA 2013* indicates that there is no preferential treatment for South African nationals. Furthermore, the legislative framework for the protection of indigenous knowledge must also be available for the protection of the indigenous knowledge of other states so that when a party seeks the recognition of a foreign indigenous knowledge before a South African court, *IPLAA 2013* can come to the aid of the foreign indigenous knowledge. To ensure this point, section 28N(1) of the *SACA* requires the Minister to extend, by notice in the *Government Gazette*, any provision of the *IPLAA 2013* to any country so that a community recognised in the specified country as an indigenous community will be deemed to be an indigenous community as defined by the *IPLAA 2013*, and a traditional work recognised in the specified country as a traditional work will be deemed to be a traditional work as defined by the *IPLAA 2013*. In addition the Minister may make the *IPLAA 2013* applicable to different persons in the specified country including citizens or subjects, persons who at material times are domiciled or resident in the listed country and who are members of an indigenous community in that country, and juristic persons incorporated under the laws of the specified country and representing indigenous communities of that country.

The Minister is required to act on the basis of reciprocity to ensure that the envisaged countries which enjoy the benefits of the *IPLAA 2013* are countries which are members of multilateral treaties with South Africa. Unless the Minister is satisfied that, in respect of the class of works to which the notice relates, provision

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511 See Nkomo 2013 *CILSA* 257-273.
512 The notice may include exceptions or modifications to the application of the *IPLAA 2013* in respect of a specified country; provide for general or limited application of the *IPLAA 2013* to traditional works.
has been or will be made under the laws of that country whereby adequate protection will be given to owners of copyright in traditional works under this Act.

5.2.4 Wilmot Bill

As stated above the Wilmot Bill provides a comparative perspective to the IPLAA 2013 and therefore compels a brief overview. The Wilmot Bill created a new category of Intellectual property described as "Traditional Knowledge" which is simply defined as a "traditional work"; "traditional designs" and "traditional marks".\(^{513}\)

5.2.4.1 Protection of traditional works

There are three conditions for the protection of a traditional work.\(^{514}\) The work must first have been reduced to a material form.\(^{515}\) Secondly, the reduction must be by or on behalf of a traditional community;\(^{516}\) and thirdly, the traditional work must be recognised by third parties as being derived from and characteristic of that community.

The exclusive rights\(^{517}\) granted to a traditional community are similar to the rights granted by the IPLAA 2013. Infringement of a traditional work occurs if the infringer

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\(^{513}\) S 1 of the Wilmot Bill.

A traditional work is defined as a literary musical or artistic work which evolved in, or originated from, a traditional community, and in respect of which no individual maker is known. See s 1 of the Wilmot Bill. The definition of the term 'literary musical or artistic work 'is the definition in s 1 of the SACA.

\(^{514}\) This means "written down, recorded, represented in digital data or signals, or otherwise fixed in a material form".

A traditional community means "a natural, indigenous and homogenous grouping of people that have a common language and customs, which exists in the Republic within an organised structure, and is generally recognised as having a separate and individual character".

\(^{515}\) S 3 of the Wilmot Bill describes these rights as: (a) reproducing it in any manner or form; (b) publishing it if it was hitherto unpublished; (c) performing it in public; (d) broadcasting it; (e) causing it to be transmitted in a diffusion service, unless such services transmits a lawful broadcast, including the work, and is operated by the original broadcaster; (f) making an adaption of it; (g) doing in relation to an adaption of the work without any of the acts specified in relation to the work in paragraphs (b) to (e) inclusive; and (h) in regard to a copy of the work made without the authority of the copyright owner, (i) selling or letting it for hire or by way of trade offering or exposing it for sale or hire, (ii) importing it into the Republic otherwise than for the private or domestic use of the importer, (iii) distributing it for purposes
knows that his derivative work is not permitted by the owner.\textsuperscript{518} According to the *Synopsis to the Wilmot Bill*: "So-called 'guilty knowledge' is thus a requirement before conduct in relation to the subject of a traditional work right or a traditional design right can constitute an infringement of that right".\textsuperscript{519} In addition, the owner of a traditional mark is entitled to moral rights.\textsuperscript{520}

While a traditional community is beneficiary of the protection offered by the *Wilmot Bill*, the owner of a traditional work is deemed to be the community proxy of the traditional community who is a person duly designated as the owner of the traditional work by the traditional community.

There are three classes of limitation and exceptions to the exclusive right.\textsuperscript{521} The first and second exception is referenced to the *SACA* and involve literary musical\textsuperscript{522} and artistic work\textsuperscript{523} respectively; while the third exception permits members of an originating traditional community to perform the traditional work in accordance with the customs and traditional practices of that community.

The duration of a published\textsuperscript{524} traditional work is 50 years, while the duration of an unpublished traditional work is indefinite. This would mean that an unpublished work unknown to third parties would not constitute infringement as guilty knowledge is a key requirement for the infringement of a protected traditional work.

\begin{flushright}
\textsuperscript{518} *Wilmot Bill* s 3(2).
\textsuperscript{519} *Wilmot Bill* synopsis para 23.
\textsuperscript{520} *Wilmot Bill* s 41 provides as follows: (1) Where any work, design, or mark is, or is derived from, an item of protected traditional knowledge, the owner of the traditional knowledge right shall have the unlimited right to claim that is such a work, design or mark, and to require acknowledgement thereof, and to object to any distortion, mutilation or other modification thereof where such action is, or would be, prejudicial to the honour or public esteem of the originating traditional community. (2) Any infringement of the provision of this s shall be treated as an infringement of copyright under Chapter 2 of the Copyright Act, and for the purposes of the provision of the said chapter, the owner of the traditional knowledge rights shall be deemed to be the owner of the copyright in question and the protected traditional knowledge shall be deemed to be a work in which copyright subsists.
\textsuperscript{521} *Wilmot Bill* s 4.
\textsuperscript{522} See ss 12-14 of the *SACA*.
\textsuperscript{523} See s 15 of the *Wilmot Bill*.
\textsuperscript{524} "Publish" is defined to mean "issuing copies of that work or of that design to the public with the consent of the community proxy in sufficient quantities to reasonably meet the needs of the public".
\end{flushright}
The protection of a traditional work lapses if the community proxy or his or her representative decides to institute infringement proceedings under the *Copyright Act*. \(^{525}\)

The remedies available to the owner of traditional work include an interdict; delivery – up of the infringing article; damages; and the imposition of a standard licence fee. \(^{526}\)

### 5.2.4.2 Protection of traditional designs

The conditions for the protection of traditional designs \(^{527}\) are similar to those for the protection of a traditional work. \(^{528}\) The owner \(^{529}\) of a traditional design has the exclusive right to prevent the making, importing, use, or disposal of any article embodying the design. Again, the infringer must know that the design is a protected design; that the alleged infringing design must have been copied from the protected traditional design; and the prohibited act must be without the consent of the owner of the traditional design right. \(^{530}\) The owner of a traditional mark is entitled to moral rights.

The sale of an article embodying the traditional design right by the owner or his or her representative exhausts the rights of the owner. \(^{531}\) Third parties can use the design for private purposes, evaluation, analysis, research, or writing. \(^{532}\)

The duration of a published traditional design is fifteen years from the date of its first publication; and indefinite in respect of an unpublished traditional design design.

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525 S 7 of the *Wilmot Bill*.
526 S 40 of the *Wilmot Bill*.
527 A traditional design is defined as "any design applied to any article, whether for the pattern or the shape or the configuration thereof, or for any two or more of those purposes, and by whatever means it is applied, having features which appeal to and are judged solely by the eye, irrespective of the aesthetic quality, which evolved in, or originated from, a traditional community, and in respect of which no individual maker is known".
528 S 8 of the *Wilmot Bill*.
529 Similar to the owner of a traditional mark.
530 S 9(2) of the *Wilmot Bill*.
531 S 10(1) of the *Wilmot Bill*.
532 S 10(2) of the *Wilmot Bill*.
right, but will lapse if infringement proceedings are launched by the owner under the *Designs Act.*

5.2.4.3 Protection of traditional marks

The conditions for the protection of a traditional mark are similar to those for traditional works and designs. The materiality required is that the traditional mark is represented graphically.

The right of the owner of a traditional mark is the right to register that mark as a certification mark, a collective mark, or a trade mark under the *Trade Marks Act.*

The owner of a traditional mark is also entitled to take advantage of the opposition proceedings under section 10(2) of the *Trade Marks Act.* The owner of a traditional mark is entitled to moral rights.

The duration of a traditional mark is indefinite provided that the traditional mark is not registered by the owner or with his consent as a certification mark or a trade mark under the *Trade Marks Act.*

5.2.4.4 Management of traditional knowledge

The *Wilmot Bill* articulates the management of traditional knowledge in much the same way as the *IPLAA 2013*. First, a Register of Traditional Knowledge is established which is to contain the names and addresses of applicants for the registration of traditional knowledge. The owners of traditional knowledge are

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533 S 11 of the *Wilmot Bill*.
534 S 12 of the *Wilmot Bill*.
535 A traditional mark is defined in s 1 of the *Wilmot Bill* as "(a) a certificate trade mark as described in s 42(1) of the *SA TMA*; (b) a collective mark as described in s 43(1) of the *Trade Marks Acts*; (c) a trade mark as defined in s 2 of the *SA TMA*; which evolved in, or originated from, a traditional community".
536 S 14(1) of the *Wilmot Bill*.
537 S 14(2) of the *Wilmot Bill*.
538 Ss 15 and 16 of the *Wilmot Bill*.
539 S 18 of the *Wilmot Bill*.
540 S 22 of the *Wilmot Bill*. 
entitled to apply for registration of that knowledge\textsuperscript{541} and on registration shall be
issued with a certificate of registration.\textsuperscript{542} The Registrar is obliged to publish a
notice of this registration in the \textit{Patent Journal}.\textsuperscript{543} The register is \textit{prima facie}
evidence of its contents\textsuperscript{544} and also constitutes constructive notice from the date of
publication of its notice of registration in the \textit{Patent Journal}.\textsuperscript{545} A rebuttable
presumption arises on the basis of the constructive knowledge that an infringement
of the rights of an owner took place without the authority of the owner. Unregistered traditional knowledge loses the benefit of the constructive knowledge
and it must be proved that the infringer knew of the existence of the traditional
knowledge.\textsuperscript{546} The registration is reviewable by a court which can either confirm the
registration or declare it invalid.\textsuperscript{547} Secondly, a National Council of Traditional
Knowledge\textsuperscript{548} and National Trust Fund for Traditional Knowledge are established.\textsuperscript{549}
The proceeds of all licence fees paid for the use of all traditional work is to be paid
into the Fund which, after deducting its administrative fees, must pay the balance to
the community's proxy. Thirdly, it is envisaged that the owner of a traditional work
or design can license it orally, in writing, or by conduct, on the payment of a
contractual fee or a standard licence fee.\textsuperscript{550}

5.2.5 \textit{Evaluation of IPLAA 2013 in the protection of expressions of folklore}

Given the extensive provisions and controversies involved in the IPLAA 2011 and the
\textit{Wilmot Bill}, one may assert that the \textit{IPLAA 2013} will have substantial consequences
for the legal system in general, and for the protection of intellectual property in
particular. Understanding some of the challenges of the \textit{IPLAA 2013}, therefore,
equips us in understanding the legislation as a framework for the use of intellectual
property rights to protect expressions of folklore. The challenges considered below

\textsuperscript{541} S 25 of the \textit{Wilmot Bill}.
\textsuperscript{542} S (1)(a) of the \textit{Wilmot Bill}.
\textsuperscript{543} S 27(1)(b) of the \textit{Wilmot Bill}.
\textsuperscript{544} Ss 28 and 29 of the \textit{Wilmot Bill}.
\textsuperscript{545} S 30 of the \textit{Wilmot Bill}.
\textsuperscript{546} S 31 of the \textit{Wilmot Bill}.
\textsuperscript{547} See s 32 of the \textit{Wilmot Bill}. A certification of validity entitles the owner to full costs charges and
expenses.
\textsuperscript{548} S 33 of the \textit{Wilmot Bill}.
\textsuperscript{549} S 36 of the \textit{Wilmot Bill} (hereafter the Fund).
\textsuperscript{550} S 38(6) of the \textit{Wilmot Bill}. S 39(1) requires that the licence fee is to be paid to the Fund.
address some of the broad issues discussed in Chapters 2 and 3 which considered broad general features of a protection model.

5.2.5.1 IPLAA 2013 and the public domain status of indigenous cultural expressions

Many commentators who oppose the protection of expressions of folklore through intellectual property rights, argue that expressions of folklore are in the public domain. Commenting on the *IPLAB 2008*, Owen Dean believed that:

In the main cultural expressions have been around since time immemorial and it is uncertain which individual(s) created them. Such works are presently in the public domain. What is now however sought to be achieved is to take works out of the public domain and give them protection in the form of a monopoly of use for unlimited period.\(^{551}\)

Even though Dean's position has changed – as is evident in his work which formed the intellectual inspiration for the *Wilmot Bill* – one may argue that the content of that Bill may have been influenced by this disposition. In particular, concern over the effect of the *IPLAA 2013* on existing intellectual property rights can be said to drive this viewpoint. While it is true that indigenous cultural expressions have provided the staple for certain intellectual property rights in South Africa, they are not required to remain in the public domain in order to provide content for intellectual property rights. What the *IPLAA 2013* and the *Wilmot Bill* do is to recognise the ownership and control of indigenous communities over their expressions of folklore and provide a framework for third party use. One of the challenges in the implementation of *IPLAA 2013* is how to distinguish between original and derivative versions of expressions of folklore.\(^{552}\)

5.2.5.2 Constitutionality of IPLAA 2013

One of the significant challenges to the *IPLAA 2013* is whether it can pass constitutional scrutiny? Since the *South African Constitution* applies to all law –

\(^{551}\) Dean 2010 *SAMRO Notes* 16.
\(^{552}\) See "Umoja and Gallo Settle Music Feud" *The New Age* 4 March 2013.
including legislation to be amended by the IPLAA 2013 and the Wilmot Bill – it is important to engage in an analysis of whether these two bills would in any way fail constitutional scrutiny. In the main, constitutional scrutiny will enquire into compliance with the Bill of Rights in the South African Constitution, and will turn on whether any of the rights contained in the 1996 Constitution has been breached and/or whether the legislation in question justifiably limits the rights in terms of section 36 of the South African Constitution. The rights that are most likely prove contentious are the right to property and the right to the freedom of expression. However, other areas of constitutional scrutiny are also possible. For example, the extent to which the access to information right protected by section 32

553 S 36 of the South African Constitution provides that: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

554 S 25 of the South African Constitution provides that (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application - (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court; (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including - (a) the current use of the property; (b) the history of the acquisition and use of the property; (e) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation. (4) For the purposes of this section - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (6) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1). (9) Parliament must enact the legislation referred to in subsection (6).

555 S 16 of the South African Constitution provides that (1) Everyone has the right to freedom of expression, which includes - (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (e) freedom of artistic creativity; and (f) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to - (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.
of the *South African Constitution* would impact on the protection of expressions of folklore will be an issue.

It is important at this stage to turn to an examination of the possibility of the *IPLAA 2013* breaching the right to property, and so depriving persons of their constitutional property without justification. At the outset, it is important to note that in anticipation of the possibility of a constitutional challenge, paragraph 3 of the Memorandum attached to the draft *IPLAA 2013*, recognised that there are people using traditional intellectual property for their benefit, and that such persons may have to pay compensation on the commencement of the *IPLAA 2013*.

The first point to address is whether expressions of folklore are property within the contemplation of section 25. To answer this question, it is important to ask whether intellectual property is constitutional property. It appears settled that intellectual property is property within the meaning of section 25. First, judicial opinion points in this direction. Since Sachs J in his concurring judgment characterised the issue in *Laugh-It-Off v South African Breweries Ltd*\(^{556}\) as a balancing of competing rights of property and freedom of expression,\(^{557}\) it is safe to conclude that copyright which is an intellectual property right just as a trade mark, will so qualify. Secondly, academic opinion is largely unanimous\(^{558}\) that intellectual property is constitutional property. For example, Van der Walt states that\(^{559}\) "... patents, copyright, and trademarks are generally regarded as property for the purposes of the constitutional property clause".

Roux argues that:

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\(^{556}\) 2006 1 SA 144 (CC).

\(^{557}\) 2006 1 SA 144 (CC) para 83.

\(^{558}\) Dean 1997 *Journal of Contemporary Roman-Dutch Law* 113: who does not agree that "intellectual property" is "constitutional property": The issues of expropriation of property and restoration of property previously dispossessed, with which s 25 is preoccupied, not only have no relevance to IP but would, if applied to IP, abrogate the very underlying principles and theory of IP. See *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 ALL SA 461 (GJ).

\(^{559}\) *Constitutional Property Law* 94-95.
...[I]ntellectual property rights in the form of patents, trademarks and copyright should, and are likely to be, recognized as constitutional property, for ...reasons (of) the need to subject any interference with such rights to the Courts more flexible balancing test for arbitrariness, their importance to the economic development of South Africa and the weight of foreign law authority.  

Currie and De Waal contend that:

'Property' for the purposes of s 25 should therefore be seen as those resources that are generally taken to constitute a person's wealth, and that are recognized and protected by law. Such resources are legally protected by private law rights-real rights in the case of physical resources, contractual rights in the case of performances and intellectual property rights in case of intellectual property.

Accordingly, if intellectual property is constitutional property there is no reason why expressions of folklore, which form part of communal intellectual property, should not qualify as constitutional property.

One of the potential attacks on a legislation protecting expressions of folklore is that such legislation expropriates property and, therefore, fails constitutional muster under section 25. The understanding of constitutional property as protected by section 25 is the proportional balance between private property and public interest. That balance is achieved first, by the concept of deprivation which enables the state to interfere with private property to enhance public interest on the satisfaction of certain requirements. Secondly, a concept of expropriation is also recognised by which the state is required to pay compensation when it acquires private property compulsorily, in addition to other requirements such as satisfying the public interest or public purpose test. A grey area between deprivation and expropriation is indirect expropriation which can generally be described as representing circumstances where the state does not compulsorily acquire private property but adopts a legislative scheme that substantially affects the use and enjoyment of private property. On the one hand it is argued that it is the acquisition of the

560 "Property" 46-17.  
561 The Bill of Rights Handbook 539; See also Du Bois 2012 SA Merc LJ 177-193.  
564 Harsken v Lane NO 1998 1 SA 300 (CC); Steinberg v South Peninsula Municipality 2001 4 SA 1243 (SAC).
property by the state that is the crucial ingredient in expropriation. Without state acquisition all that exists is deprivation. On the other hand, it is argued that a legislative scheme that substantially interferes with the use and enjoyment of a property but without the acquisition of the property by the state, amounts to expropriation all the same and qualifies for compensation. The recent case of *Agri South Africa v Minister for Minerals and Energy* 565 has brought the question of whether the concept of indirect expropriation exists in South African law, to the fore. Indirect expropriation relates to substantial interference in the enjoyment of the benefits of a property, even though the title to the property remains with the owner and has not been acquired by the state. *Agri SA* dealt with the effect of the *Mineral and Petroleum Resources Development Act (MPRDA)* 566 which, like the outcome of the *IPLAA 2013*, drastically changes the legal regime governing minerals and petroleum operations. A key provision of the *MPRDA* with respect to existing mineral and petroleum rights on its inception was a transitional corridor to enable existing holders to continue enjoying such rights. 567 In addition, any person who could prove that the *MPRDA* had expropriated his right was entitled to compensation from the state. The claimants in *Agri SA* argued successfully in the High Court that the *MPRDA* had expropriated their property. On losing in the Supreme Court of Appeal, an unsuccessful appeal was launched to the Constitutional Court. The majority of the Constitutional Court held that the *MPRDA* did not expropriate existing mineral and petroleum rights on its inception, essentially because the state did not become owner of the property in that transfer of ownership in property is an essential requirement for expropriation. It may be asserted that since the *IPLAA 2013* does not transfer expressions of folklore to the state with the result that existing intellectual property owners could claim that their property has been indirectly expropriated on the basis of the compensation they are compelled to pay to indigenous communities who own the expressions of folklore.

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565 [2013] ZACC 9 (hereafter *Agri South Africa*).
567 See Schedule II to the MPRDA. In effect the existing rights were given a lifespan of between two to five years from the commencement of the *MPRDA* within which the owner could lodge a conversion application which would yield *MPRDA* rights.
The next question is whether the *IPLAA 2013* will in any way restrict freedom of expression. Our analysis in Chapter 3 correctly identified expressions of folklore as information goods which can be sequestered and made inaccessible by information goods. In principle, therefore, the protection of expressions of folklore will impact on the freedom of expression.\(^{568}\) It is therefore plausible that there will be challenges to the remit of the *IPLAA 2013* as restricting the freedom of expression.

5.2.5.3 Definition of an indigenous community

One of the significant features of the *IPLAA 2013* is the recognition it accords to communities by creating IP rights which enable communities to deal as they wish with their property. A substantive problem arising from the framework for the protection of expressions of folklore is whether the *IPLAA 2013* adequately defines an indigenous community since the ownership of indigenous cultural expressions is vested in an indigenous community. As noted above, section 1 of the *SACA*\(^{569}\) defines an indigenous community as:

> [A]ny recognizable community of people originated in or historically settled in a geographic area or areas located as such borders existed at the date of the commencement of the Intellectual Property Laws Amendment Act 2011, characterized by social cultural and economic conditions which distinguish them from other sections of the national community, who identify themselves and are recognised by other groups as a distinct collective.

There appear to be three component parts to the *IPLAA 2013* definition. The first is that the community of people must be characterised by social, cultural and economic conditions as indices of differentiation and belonging. The second component recognises the autonomy of the community in determining that it is a distinct community; while the third component is that the perception of a community is recognised by other groups to be sufficiently distinctive to make them different. It is not, of course, clear whether these components are cumulative and how they interact in identifying indigenous communities. What is clear is that the definition favours ethnic communities. It was noted earlier in Chapter 3 that a combination of


\(^{569}\) This definition is used in the *SA TMA*, the *SADA* and the *SA PPA*. 

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sections 211(2) and 212 of the *South African Constitution* contemplates ethnic communities more than religious linguistic and cultural communities. It is thus clear that there will be little controversy where ethnic communities are concerned with respect for the protection of expressions of folklore. Whether other communities will qualify is less clear and will be a point of contention.

It is safe to say that while this definition assists in identifying certain indigenous communities through its open ended features and the definitional component by which communities can be distinguished on a basis of "social cultural and economic conditions" and that the scope of envisaged communities is rather broad. As correctly noted by Dean commenting on an earlier but similar definition of "indigenous community":

One can think of this definition relating to nations such as the Zulu or Xhosa, and branches of these nations, but at the other end of the spectrum, the definition also covers, to mention, but a few, residents of a golf estate, members of a church, the citizens of Orania, the ANWB, the members of the Afrikaanse Taal en Kultuur Vereniging (ATKV), the members of AgriSA and political parties such as the Pan African Congress.

The meaning of indigenous community as correctly recognised by Dean, is very broad because *IPLAB 2010* contemplated a community organised on all manner of social facts ranging from consanguinity, language, religion, political conviction, and geographical contiguity. The fact that "social, cultural and economic conditions" now feature in the definition introduced by the *IPLAA 2013* confirms Dean's views. While many ethnic groups are defined by the social fact of blood ancestry, other social factors such as religion, language, and geographical contiguity appear to be no less important.

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570 Dean's comments related to a definition of the term "indigenous community" in the *IPLAB 2010* which is "any community of people living within the borders of the Republic or which historically lived within the geographic area located within the borders of the Republic".

571 Dean 2010 *Without Prejudice* 16.
Along the same line, Geyer adopts a more restrictive interpretation of the meaning of indigenous community. According to her, the definition of indigenous community in *IPLAB 2010* is not clear and should be amended to read:

'Indigenous community' means any community of people currently living within the borders of the Republic or which historically lived in the geographic area currently located within the borders of the Republic and which maintains and develops traditional lifestyles, whether its members live closely together or not, including immigrant communities that are uniquely South African, but excluding communities defined by criteria other than indigenousness, such as religion or gender.

This clearly restricts "indigenous community" to people connected by the social fact of blood ancestry. In other words only racial and ethnic groups would qualify. Her views appear to resonate with those of Dean. In this regard Mukuka suggests that indigenous communities in South Africa are limited to ethnic groups such as the Khoisan communities; the Nguni peoples (Zulu, Xhosa, Swazi and Ndebele); the Sotho-Tswana peoples such as the Tswana, Pedi and Basotho; and the Venda, Lamba and Shangaan-Tsonga. Dean also favours a restrictive meaning of "indigenous community" in that he advocates that the appropriate meaning of the term is "a natural indigenous and homogenous grouping of people that have a common language and customs, which exists in the Republic within an organized structure, and is generally recognized as having a separate and individual character".

The *Wilmot Bill* affirms the views of Dean and Geyer where it defines a "traditional community" as

[a] natural, indigenous and homogenous grouping of people that have a common language and customs, which exists in the Republic within an organized structure, and is generally recognized as having a separate and individual character.

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572 See Geyer 2010 *PELJ* 127-143. The comments by Geyer are also based on the definition of "indigenous community" in the *IPLAB 2010*.
573 Geyer 2010 *PELJ* 139-140. See also Rengecas 2008 *De Rebus* 24-27.
574 See also Harms 2009 *Journal of Contemporary Roman-Dutch Law* 175 whose description of "community" clearly refers to a community related to blood.
575 See Mukuka *Indigenous knowledge systems* 18.
576 See Dean 2012 *Install 1*.
577 S 1 of the *Wilmot Bill*. 
However, race and ethnicity as the defining feature of an indigenous community is not without controversy. For example, many doubt whether the Afrikaans and English white communities can be conceived as an indigenous community in the South African context because the term refers to economically disadvantaged groups. Yet the definition of "indigenous community" would appear to contemplate a white community.

It is clear from the IPLAA 2013 that the constitutional recognition of membership of religious, linguistic, and cultural communities in sections 30 and 31 of the South African Constitution greatly influenced the definition of "indigenous community" in the IPLAA 2013. An important question is whether only black communities can own expressions of folklore under the IPLAA 2013. It is clear from cases such as Pillay where the Constitutional Court recognised a South Indian Community in KwaZulu-Natal, that the 1996 Constitution contemplates many communities who do not qualify as black communities. Other communities organised along "social cultural and economic" conditions qualify for the protection of their indigenous cultural expressions.

There appears to be no serious reason why only communities organised along racial lines should take advantage of the protective model offered by the IPLAA 2013. In this regard "religious communities" should be recognised as capable of owning expressions of folklore. The discussion of Muslim graves in Oudekraal Estates would qualify Cape South African Muslims to some sort of protection over Muslim graves relevant to that case.

Attention is now turned to two decisions of the South African Supreme Court of Appeal: Century City Apartments v Century City Property Owners and Groupe LFE

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579 2008 1 SA 474 (CC).
581 [2009] ZASCA 157 (hereafter Century City.)
These decisions provide some support for the contention that social facts other than blood ancestry and race can define communities.

In *Century City* the Supreme Court of Appeal determined, *inter alia*, the status of Century City which the court characterised as

... a huge commercial and residential 'development' falling within the municipality of the City of Cape Town and, more particularly, the suburb Montague Gardens... independently functioning and operating, providing across pollination of services and industries to the owners and tenants within Century City... a city within a city, presenting a high value investment opportunity to the owners of property within the development providing commercial, business, retail, residential and leisure opportunities.

The court described the function of the Century City Association of Property Owners thus:

[T]he Association is a non-profit home owners' association. Its main activity is to promote, advance and protect the communal interests of all the owners, lessees, occupiers and visitors to Century City, and to manage the common property. All owners and all new owners are obliged to become members of the association. It collects levies from its members and performs functions similar to those of a body corporate of a sectional title development. Its services are, in the main, to supply access control, security, traffic and parking control, provision of public transport within the development, approval of special events staged within Century City, development control through the setting of design requirements and approval mechanisms, and landscaping.

The central question is whether Century City is a "community" in terms of the *IPLAA 2013*. It is important to remember that it was the contention of the appellants that the name "Century City" had become the name of a geographical location, and was liable to be removed from the trade mark register in terms of section 10(2)[b] of the *SA TMA* which provides that a mark shall not be registered and a registered mark is liable to be removed from the register if it consists exclusively of a sign or an indication which may serve in trade to designate the geographical origin of services. In concluding that "Century City" had become a geographical location that served in

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582 [2011] ZASCA 4 (hereafter *LFE*).
583 See Van der Vyver 2012 *De Juris* 140 who asserts that members of the Zulu Tribe, the Roman Catholic Church, and the Afrikaans-speaking community qualify to be a people.
584 See *Century City* [2009] ZASCA 157 para 37.
trade to designate the geographical origin of the services covered by certain trade mark registrations, the Supreme Court of Appeal confirmed that Century City is a community bound together by the social fact of common property. It is submitted that Century City should qualify as an indigenous community in terms of the IPLAA 2013 because it can clearly be characterised as "cultural community".

In _LFE_ there was no doubt that "Swartland" is a geographical indication for wines from the districts of Malmesbury, Darling, the Riebeecks, Morreesburg, Porterville, Piketberg, and beyond. It would be strange to contend that wine makers from this region do not form an indigenous community, but that only a racial community – and a black one at that – living in this area is entitled to register "Swartland" as a traditional term or expression.

Our analysis above indicates clearly that the identification of what constitutes an indigenous community will be one of the fundamental challenges to the legislative framework of the _IPLAA 2013_. It is suggested that the definition of indigenous communities should be approached from the point that cultural communities envisage communities organised around some significant social fact. Accordingly, indigenous communities should not be restricted to ethnic communities because doing so would be to indirectly highlight race in the protection of expressions of folklore. This type of interpretation would fly in the face of the racial neutrality of the _South African Constitution_. Accordingly, the definition of indigenous communities in the _IPLAA 2013_ is to be preferred to the definition of "traditional communities" in the _Wilmot Bill_.

5.2.5.4 Subjective and objective criteria in the definition of indigenous cultural or knowledge rights

Another very serious challenge facing the _IPLAA 2013_ is the nature of the definition of the different indigenous cultural expressions because the definitions of traditional works, terms, expressions and designs has an both objective and a subjective element. The former describes the nature of the intellectual property right, while the subjective aspect emphasises that it is the recognition of the indigenous
community that qualifies the expression as an indigenous cultural expression or knowledge. Again it is not clearly stated how the two aspects interact, even though it would appear that they are of equal importance. This notwithstanding, there may be some controversy because of the subjective aspect of the definition. In this regard attention is drawn to the views of Dean who criticises the enormous discretion allowed indigenous communities in this regard. According to him:

Each community can decide subjectively for itself and 'recognize' that a particular work has an indigenous origin and a traditional character and is therefore a traditional work. The decision of the community is final, whether viewed by outsiders as right or wrong. The court will have to accept the subjective pronouncements of a community that a particular work is a traditional work. The work is then protected. This gives rise to interesting and startling possibilities. For instance, the PAC, being an indigenous community, can decide that "Shoot the Boer" is one of its traditional works and everybody can gainsay that pronunciation. If the ANC, or the ANC Youth League, which are also indigenous communities, should decide that it is their traditional work, they are also correct... It goes further. The ATKV or AgriSA could also subjectively decide that the song is a traditional work of their community. The fact that such a claim may be completely unsupported by the facts is irrelevant, since the decision of a particular community to recognize the work as a traditional work is purely subjective and final, and binding on all.\(^{586}\)

It would appear that the subjective belief of a community can be reviewed to establish the basis of the claim. Consequently, while the views of a community will be accorded significant respect, it will be important in appropriate cases to seek justification for the belief, including resort to experts and other evidentiary sources especially when more than one community claims a traditional work, term, or design as its own.

One of the hallmarks of the definition of traditional works, designs and marks in the *Wilmot Bill* is that the traditional work, design or sign must be acknowledged by third parties as deriving from and characteristic of a traditional community. This definition is designed to eliminate or reduce the subjective element in the identification of expressions of folklore.

\(^{586}\) Dean 2010 *Without Prejudice* 186.
It must be stated, however, that the definition of indigenous cultural expressions in the IPLAA 2013 is consistent with the recognition of the rights of communities to their culture. Their capacity to determine their culture lies at the heart of their autonomy and dignity. The essence of recognising a community partly requires an element of deference to the way it orders its affairs and what it represents to the outside world as manifestations of its culture such as expressions of folklore. The deference and subjectivity important in recognising cultural facts was in issue in Pillay v MEC for Education KZN. In this case the of the court acknowledged the rule that to determine if a practice of belief qualifies as religious, the sincere belief of a claimant is the only determinant. On the other hand, they contended that because culture is inherently an associative practice, a more objective approach should be adopted when dealing with cultural beliefs or practices. The minority opinion stresses the fact that:

A cultural practice on the other hand is not about a personal belief but about a practice pursued by individuals as part of a community. The question will not be whether the practice forms part of the sincerely held personal beliefs of an individual, but whether the practice is a practice pursued by a particular cultural community.

It is clear, therefore, that if an individual must demonstrate that a cultural practice is pursued by the community, the community must demonstrate that an expression of folklore is part of its culture. This objective test, it is submitted, accords with due deference to the community. The objective test of ascertaining a traditional intellectual property is evident in the test to determine a geographical name/indication set out in Century City. The Supreme Court of Appeal held that for a geographical name to be recognised as an indication of origin, the name must suggest a current association in the mind of the relevant class of persons with the category of goods and services in question, or else it must be reasonable to assume

587 See Pillay 2008 1 SA 474 (CC)
588 See Pillay 2008 1 SA 474 (CC) para 52.
589 See Pillay 2008 1 SA 474 (CC) para 52.
590 See Pillay 2008 1 SA 474 (CC) para 147.
that such a name may, in the view of those persons, designate the geographical origin of that category of goods or services.\footnote{See Century City [2009] ZASCA 157 para 34 adopting para 38 of the judgment in Peek and Cloppenburg KG's Application [2006] ETMR 33. See also Pistorius 2010 WIPO Magazine 10-14.}

Therefore, if an indigenous community were to claim a traditional term or expression as a geographical indication, it will be entirely correct to subject the claim to a demonstration of veracity.

However, while it is important to respect the views of any community on the nature of their indigenous cultural expressions, it would be stretching the deference shown to communities to urge that their determination is final, as argued above. With due respect, it appears implicit that a community must demonstrate how they have arrived at the recognition of a traditional work or other traditional intellectual property. Certainly, if recognition is tantamount to a declaration, the matter would end there. However, the process of recognition seems to begin with an awareness of a fact, and perhaps its widespread use, before the appropriation that signifies ownership. Moreover, any claim of ownership can be contested by other communities who can establish that they recognise the indigenous cultural expression as their own.

Any significant concern over the determination of an indigenous cultural expression appears to be addressed by the registration of indigenous cultural expression mandated by the \textit{IPLAA 2013} in national databases as explained above. The fact that registration in the national database is regarded as \textit{prima facie} evidence of ownership, the possibility that such registration can be amended and removed, as well as the role of the National Council of Indigenous Knowledge in advising on the registration of indigenous cultural expression at the request of the Registrar of Patents Copyrights Trademarks And Designs reduce the subjectivity inherent in the definition of indigenous cultural expressions. Consequently, even though there is a reasonable amount of subjectivity in the determination of traditional intellectual property, there is also a fair amount of objectivity in the manner in which the recognition will be evaluated.
5.2.5.5 Challenges of the oracular nature of expressions of folklore

The oracular nature of many expressions of folklore represents one of the fundamental challenges in seeking to protect these expressions by intellectual property rights. Any attempt to use IP to protect expressions of folklore will have to resolve these contradictions. With respect to the oracular nature of expressions of folklore, the IPLAA 2013 seeks to resolve the requirement of materiality by stating that traditional works should be capable of substantiation from the collective memory of the relevant indigenous community as one of the criteria for eligibility. It can be said that this criterion respects the oracular nature of indigenous cultural expressions. It would appear, however, that in the long run the registration of an indigenous cultural expression would ensure that there is a record of it.

There are many who would argue that part of the dynamics and vitality of indigenous cultural expressions is its oracular nature and that recording them would ossify them and may not even represent the true nature of the expressions of folklore. However, it is true that materiality is concomitant with an intellectual property paradigm. In any case the recognition of derivative indigenous cultural expressions ensures that adaptations of these expressions are in a fixed form on which the latter can claim materiality.

On the other hand, the Wilmot Bill requires materiality as a basis for recognition of traditional works. This requirement raises doubts as to whether expressions of folklore are truly conceived as the subject of protection. While it is conceivable that an expression of folklore – such as a traditional term or expression or a geographical indication – could meet the requirement of materiality, it would mean that a significant number of expressions of folklore will not be subject to the protection envisaged by the Wilmot Bill. Some of the consequences of requiring materiality are evident in the status of unacknowledged derivative works based on the oral expressions of folklore. The question is what is to stop the creator of such a work claiming that the work is original. Materiality envisages a huge evidentiary burden on traditional communities which will become a principal basis for litigation. It is to
be remembered that the oracular nature of expressions of folklore has been a key reason for the demand for alternative frameworks for the protection of these expressions.

The requirement of materiality in the *Wilmot Bill* is closely tied to the requirement that an infringer of a traditional work must have guilty knowledge of the status of the work. Surely, given the difficulty of proving such knowledge, this also raises the bar owners of traditional works will have to meet. This requirement is closely linked to the requirement of materiality since one sure way of proving guilty knowledge is to prove that the work has been reduced to material form. It could be difficult to prove guilty knowledge of an oracular work. It would appear that the requirement of guilty knowledge in the *Wilmot Bill* presents considerable obstacles to the protection of expressions of folklore.

5.2.5.6 Balance between the interests of indigenous community and the general public

The balance between the private and public interests in the protection of expressions of folklore is a contentious one. It is even more so when intellectual property rights are used to protect expressions of folklore. Intellectual property rights (IP rights) generally reflect the public and private interest in their regulatory framework. For example, copyright can be said to be made up of private and public interests. There is no question that intellectual property rights are recognised as enabling owners of IP rights to exploit these rights by determining who and how access is granted to the IP rights on one hand, to ensure that in appropriate cases the general public will have access to the IP rights. The dual purpose of IP rights is recognised as part of international human rights through article 27(1) and (2) of the *Universal Declaration of Human Rights, 1948,* (hereafter *UDHR*) and article 15(1) of the *ICESCR.*

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593 See, for example, Davies *Copyright and the public interest* 7.
594 A 27(1) and (2) of the *UDHR provides that (1) everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Professor
There is considerable disagreement as to how the balance between the private and public interest in IP rights should be struck. While there is support for the view that private and public interest should be equal, most IP legislation strikes a balance that favours the exclusive rights of owners to the detriment of the public interest because it is generally believed that IP rights exist to protect their owners. Consequently, in much IP legislation it is customary to find a number of exclusive rights of owners while there are a few exceptions and limitations designed to protect the public interest. The *IPLAA 2013* follows the tradition of ensuring that there are free uses of indigenous cultural expression which do not require the permission of the owners. It is significant that the *IPLAA 2013* declares the same uses as free with respect to traditional works; traditional terms, and expressions and traditional designs. These free uses are not available to traditional IP rights for which exceptions and limitations vary from one IP right to another and are strictly construed.\(^{596}\)

Far more significant is the nature of these uses which include private study; private use; education and scientific research; as well as non-commercial heritage safeguarding purposes. These uses represent huge sectors of public interest challenges and have been canvassed for introduction to the structure of traditional IP rights.\(^{597}\) There is considerable literature advocating that the present copyright laws significantly restrict access to knowledge in South Africa.\(^{598}\) It would, therefore, be a matter of considerable importance to evaluate the nature of the balance struck between the private and public interest in the *IPLAA 2013*. It is commendable that the *IPLAA 2013* has introduced significant exceptions to the ownership rights of

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\(^{595}\) Paul Torremans states that even though the UDHR as the product of the United Nations General Assembly may be regarded as aspirational or advisory, the UDHR has 'gradually acquired the status of customary international law and of the single most authoritative source of human rights norms. See Torremans "Copyright as a human right" 5 (hereafter Torremans).

\(^{596}\) A 15(1) provides that: "The State parties recognize the right of everyone (a) To take part in cultural life (b) To enjoy the benefits of scientific progress and its applications (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

\(^{597}\) See, for example, Nwauche 2008 *IIC-Int'l Rev IIC-Int'l Rev Indus Prop & Copyright L* 917.

\(^{598}\) See, for example, Rens and Ncube 2012 www.infojustice.org/archives/9110.
indigenous communities that address public interest challenges. It should be noted that the exceptions and limitations in the IPLAA 2013 is not even available to users of traditional intellectual property rights such as copyright. For example, while it is unlikely that, absent an amendment, fair dealing for the purposes of parody or satire would not succeed under the SACA to specifically introduce such a use, it is submitted that the IPLAA 2013 would support such a free use. Accordingly, the serious fears of the effect of protective models of expressions of folklore being able to shut out large parts of culture from the public and the innovation cycle, will not materialise in the case of the IPLAA 2013.

A note of caution must be sounded on the linkage between exceptions to and the limitation of traditional works and the exceptions and limitations found in the SACA. In this regard, section 13 of the SACA provides, with respect to the reproduction right, that the permitted reproduction is not in conflict with the normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright. This qualification follows the tenor of article 9(2) of the Berne Convention to which South Africa is a party. Furthermore, the TRIPS Agreement provides in article 13 what is generally regarded as the three step test:

Members shall confine limitations or exceptions to the exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

The interpretation of article 13 in a WTO Panel Decision and other national decisions has shown that it is unlikely that any exception or limitation will pass the three-step test. It is therefore recommended that that an express exclusion of

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599 See, for example, Visser 2005 CILSA 321-343.
600 See generally Brown Who owns native culture?
601 "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."
603 See, for example, the French Supreme Court in Mulholland v Drive French Supreme Court, 28 February 2006 (2006) IIC 760; the Brussels Court of First Instance in Google Inc v Copiepresse SCRL Court of First Instance of Brussels 13 February 2007 [2007] ECDR 5.
604 See Geiger 2006 Int'l Rev Intellec Prop & Comp L 683; Oliver 2001 Colum JL & Arts 119.
the three-step test be included in the IPLAA 2013 as a necessary modification to the exceptions and limitations in the SACA to apply to traditional works.

The provisions for exceptions and limitations in the Wilmot Bill are tied to the existing exceptions and limitations with respect to the reproduction right in the SACA which, as noted above, is unduly restrictive. The provisions of the IPLAA 2013 are therefore to be preferred as regards how a balance is struck between the protection of expressions of folklore and access to these works by the public. It is submitted that the impact of expressions of folklore on human rights is a further challenge that will confront the implementation of the IPLAA 2013.

5.2.5.7 Ensuring a credible regulatory framework for collecting societies for indigenous cultural expressions

One of the fundamental challenges facing the IPLAA 2013 is how to deploy collecting societies within such a protective framework. Even though the IPLAA 2013 recognises collecting societies, there is no regulatory framework governing these institutions. The existing collecting societies are voluntary and act pursuant to section 6(a) of the SACA which reserves to the copyright owner, the exclusive right to reproduce or to authorise the reproduction of the copyright work in any manner or form. The IPLAA 2013 requires the owners and users of indigenous cultural expressions to negotiate royalty payments with one another.

It must be mentioned that there are many concerns with respect to the operation of collecting societies. One of these is the distribution of royalties to rights' owners. While collecting societies remain a practical and convenient means of generating income to protect expressions of folklore, particular care must be taken in ensuring that the regulations envisaged by the IPLAA 2013 to be made by the Minister of Trade and Industry in conjunction with the Minister of Finance to provide for the establishment, composition, funding and functions of collecting societies.

Collecting societies are organisations, usually of rights owners, which assist users of copyright works to obtain permissions and licences. In turn, they greatly assist right
owners to receive remuneration for the use of their work. Collecting societies, therefore, reduce transactional costs in the use of copyright.\textsuperscript{605} They are able to do this because they make it unnecessary for users to contact every right holder to negotiate a licence. This is even more so when, in certain circumstances, users such as members of educational institutions need instant access to copyright materials.

5.2.5.8 Moral rights of indigenous communities

As a significant objective of the protection of expressions of folklore is the protection of moral rights, it is important to review how the \textit{IPLAA 2013} expresses this objective. The nature of moral rights in South African copyright law is found in section 20(1) of the \textit{SACA} which provides that:

\begin{quote}
Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of the this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author provided that an author who authorizes the use of his work in a cinematograph film or television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.
\end{quote}

Any infringement of the moral right of an author is regarded as a copyright infringement. It is clear from the tenor of section 20 that a moral right is closely linked to the creator of the work.\textsuperscript{606} Furthermore, the moral right is distinct from the copyright which explains why section 20 retains the right for the author even in the face of transfer of copyright. If juristic persons can enjoy moral rights it is arguable that an indigenous community should also be able to do so. It should be natural that on the recognition of indigenous cultural expressions, the indigenous community which created the traditional work should be able to enjoy the moral rights that come with their intellectual output. The \textit{IPLAA 2013} has met this requirement to some extent because one of the requirements for the free uses of

\begin{footnotesize}
\textsuperscript{605} See Towse 2012 \textit{Review of Economic Research on Copyright Issues} 3-30; Gervais "The evolving role(s) of copyright collectives" 27-56.
\textsuperscript{606} See Dean 1996 \textit{Copyright World} 38.
\end{footnotesize}
indigenous cultural expressions is that the user mentions the name of the indigenous community.

The ability to complain about how the indigenous cultural expression is used when the use distorts, mutilates, or destroys the honour and dignity of an indigenous community is also important. Accordingly, there is a need for an amendment to section 20 of the SACA to recognise the moral rights of indigenous communities at least to their traditional works. In this regard section 41 of the Wilmot Bill is commendable because it protects an unlimited right for the owner of a traditional or derivative work to require acknowledgement of ownership and to object to any distortion, mutilation or other modification that is prejudicial to the owner or the public esteem of the originating traditional community.

5.2.5.9 Membership of indigenous communities and access to indigenous cultural expressions

A recurring challenge to the protection of expressions of folklore by intellectual property is how to reconcile the individual rights of members of the community with the expressions of folklore and other traditional intellectual property. Within a human rights framework there is, on the one hand clear rights of individuals to enjoy and take part in their culture, which is pitted against the right of a community to protect its culture.

If expressions of folklore are protected in favour of an indigenous community, then to what extent should an individual member of the community be able to appropriate what is in a sense his own, to his benefit? Should a member of a community have a right to use the community indigenous cultural expression? The question is whether the member must be treated in the same way as other members of the public. The path trodden by the IPLAA 2013 is not to refuse the members of an indigenous community privileged access to the indigenous cultural expressions and to treat them just like everybody else. It is important to remember that the

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approach of the *IPLAA 2013* satisfies the national treatment standard which is an obligation undertaken by South Africa under the *WTO Agreement*, especially when it is borne in mind that the *IPLAA 2013* aims to further intellectual property and therefore falls within the purview of the *TRIPS Agreement*.

Even if it is accepted that the *IPLAA 2013* falls outside the purview of the *TRIPS Agreement*, it would appear correct that the *IPLAA 2013* does not differentiate between members of indigenous communities and foreigners, including South African nationals who are not members of the relevant indigenous community. Be that as it may, there is always a concern that the natural tendency of members of a community is to transform the character and nature of an indigenous cultural expression. In terms of normal cultural development, such transformation would not change the character of the expressions of folklore save that the persons involved are connected with the maintenance and development of the expression of folklore. One plausible solution is to remember that, like all other citizens, members of a community are entitled to the free use of the expression of folklore.

A note of caution must, however, be sounded when it is declared that members of an indigenous community are not treated differently from foreigners. This is because a distinction should be drawn between different types of indigenous cultural expression given the fact that the expressions have a different function. For example, there appears to be a difference between a traditional work and a traditional term that is a geographic indication. The essence of the latter is captured by Ecols who asserts that a geographic indication is a local group right and the use of the term is available to whomever in the locality meets the criteria.\(^608\) The collective character of a geographical indication, collective or certification trade mark, would ensure a wider participation than a traditional work. For example, all producers of Rooibos tea are entitled to its use in terms of the *MMA*.

Treating geographical indications differently acknowledges, for example, that the essence of a geographical indication is to secure a communal right for the benefit of

\(^{608}\) See Ecols 2003 *JAL* 215.
local farmers. It would seem somewhat disconcerting if the people for whose benefit the traditional intellectual property is secured cannot enjoy the benefits of a geographical indication.

5.2.5.10 Community protocols as evidence of indigenous community customary law and practices

The requirement in the *IPLAA 2013* that community protocols must be deposited with the Registrar of Patents Copyrights Trademarks and Designs as one of the documents to indigenous cultural expressions sought to be registered in the national database is commendable. It would appear that the community protocol is a codification of the customary laws of the indigenous community and reinforces the ownership status of the indigenous community and its right to determine how third parties are allowed to use indigenous cultural expressions. Since customary law is largely oracular, it may well be that many communities would not have such written customary laws and protocols. In such a case the *IPLAA 2013* would serve as a facilitator of the codification of customary law since the customary law must be reduced to writing. It is recognised that not all indigenous communities would have a community protocol. Accordingly, the National Council of Indigenous Knowledge is mandated to assist indigenous communities to produce an acceptable community protocol.

5.2.5.11 Duration of indigenous cultural expressions

It would appear a matter of consensus that the indefinite duration of expressions of folklore is one reason why intellectual property rights are generally unsuited for the former’s protection. It should not be surprising, then, that any model of protection fashioned on intellectual property rights would seek to set a finite term for expressions of folklore. The *IPLAA 2013* and the *Wilmot Bill* set a definite term for different expressions of folklore. Therefore, while the *Wilmot Bill* provides for a fifty year duration for published traditional works and an indefinite duration for unpublished traditional works, the *IPLAA 2013* sets an indefinite duration for
traditional works. Both Bills, however, set a term limit for traditional marks and designs.

To set a finite term for the duration of expressions of folklore is to strike at one of the fundamental challenges facing the protection of expressions of folklore. To differentiate between the different types of expression of folklore is to set a scale of preference that may be difficult to justify.

5.2.5.12 Autonomy of indigenous communities and the state

One of the challenges of the protection of expressions of folklore is the extent to which traditional communities would be allowed to manage their affairs and determine how to protect their folklore. Both the IPLAA 2013 and the Wilmot Bill exhibit paternalistic tendencies – albeit in different degrees – as regards the extent of state involvement in the protection of expressions of folklore.

5.2.5.13 Protection of existing intellectual property rights

One of the unique features of the Wilmot Bill is that the envisaged protection of traditional knowledge does not affect any intellectual property right until the commencement of the Act based on the Bill.\textsuperscript{609} Furthermore, if there are related \textit{bona fide} continuing acts of infringement by virtue of intellectual property rights after the commencement of the Act, they are not to be regarded as an infringement.\textsuperscript{610} In other words, if an intellectual property right infringed traditional knowledge before the commencement of the Act that "alleged" infringement may continue if there is \textit{bona fide} use in the ordinary manner of the intellectual property right.

The IPLAA 2013 also deals with this crucial issue by recognising the continuing validity of all derivative works if a benefit agreement is concluded with the traditional community based on their prior informed consent, and there is disclosure of the

\textsuperscript{609} S 43(1) of the Wilmot Bill.
\textsuperscript{610} S 43(2) of the Wilmot Bill.
derivative work to the Commission. One of the most strident objections to the
IPLAA 2013 was with respect to existing intellectual property rights.\footnote{See Dean 2009 De Rebus 7; Harms 2009 Journal of Contemporary Roman-Dutch Law 175-191; Bull 2012 Without Prejudice 38-40.}

5.2.5.14 Evaluation of the proposals for the protection of expressions of folklore by intellectual property rights

The dual-track legislative activity towards the protection of expressions of folklore by intellectual property rights in South Africa represented an awareness of the lack of protection for these expressions. The recourse to the MMA to protect certain words that are indigenous geographical indications, is not only an affirmation of this awareness but also a demonstration that, in general, intellectual property rights can protect expressions of folklore. The discussion in Chapter 2 reviewing how the different types of intellectual property rights can protect expressions of folklore, pointed out that geographical indications represent a huge potential for protecting expressions of folklore. The use of the MMA to protect expressions of folklore has confirmed this. It is interesting that the IPLAA 2013 quickly followed the use of the MMA. While the determination to protect expressions of folklore through intellectual property rights is without question, it is hoped that the implementation of the IPLAA 2013 will be pursued with the same determination. The enormous challenges – some of which have been discussed above – facing the IPLAA 2013 demand no less. It is important further to urge that some of the perspectives in the Wilmot Bill should guide the implementation of the IPLAA 2013.

5.3 Protection of expressions of folklore by intellectual property rights in Ghana

5.3.1 Introduction

Ghana has an intellectual property law framework that is composed of the CA Ghana, the Trade Marks Act 664 of 2004 (hereafter TA Ghana); DA Ghana and GI Ghana, as well as subsidiary legislation made thereunder. The previous chapter
revealed that the negative protection of expressions of folklore is dominant in Ghana. It is therefore understandable that the possibility of using intellectual property to protect expressions of folklore has not been seriously considered. It is also true that since expressions of folklore are vested in the President of Ghana, it would be difficult for communities to seek the protection of intellectual property rights without the President's permission. In addition, academic opinion in Ghana acknowledges the usual obstacles in protecting expressions of folklore using intellectual property rights.\textsuperscript{612} Be that as it may, the possibility exists that some of the intellectual property rights – such as collective trademarks and geographic indications – can be used to protect expressions of folklore.

5.3.2 Copyright

As stated above,\textsuperscript{613} the fact that the \textit{CA Ghana} makes provisions for expressions of folklore suggests that it is likely that copyright will be successfully used to protect folklore. However, the framework for the protection of expressions of folklore indicates otherwise. The fundamental challenge is that expressions of folklore are vested in the President of the Republic of Ghana who licenses their use through the National Folklore Board. To imagine that the President of Ghana would seek to hold copyright in expressions of folklore seems a bit far-fetched. Accordingly, it appears difficult for any community to seek to enforce what is not vested in them by asserting that they have a copyright in an expression of folklore.

5.3.3 Trademarks

Collective trademarks can be used to protect expressions of folklore given the definition of a collective trademark in section 2 of the \textit{TA Ghana}.\textsuperscript{614} Section 8 of the \textit{TA Ghana 2004} permits an application for the registration of a collective mark. A collective trade mark lasts for ten years with the possibility of ten year renewals.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{612} See Amegatcher 2002 \textit{Copyright Bulletin} 33-42.
\item \textsuperscript{613} Chapter 4.2
\item \textsuperscript{614} “[a] visible sign capable of distinguishing the origin or any other common characteristic including the quality of goods and services of different enterprises which use the sign under the control of a registered owner from the goods and services of any other enterprises”.
\end{enumerate}
\end{footnotesize}
Collective trademarks are also to be registered in a special section of the Register of Trademarks. It is therefore possible that communities in Ghana may, with the permission of the President, apply to register the terms and expressions of different communities in Ghana. There is no evidence that the registration of such a trademark has been sought.

5.3.4 Geographical indications

There is direct protection of geographical indications in Ghana through the provisions of the *GI Ghana*. A geographical indication is defined in the *GI Ghana* as:

An indication which identifies a good as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation and other characteristic of the goods is essentially attributable to its geographic origin.  

Goods are also defined by the same section to include "a natural or agricultural product or a product of handicraft or industry and *Kente*. The inclusion of *Kente* in the definition is evidence that expressions of folklore are clearly contemplated by the *GI Ghana*. However, there is no definition of what constitutes an "indication". The protection offered by the *GI Ghana* is available regardless of whether a geographical indication is registered or not. However, registration of a geographical indication raises a presumption that the indication is a geographical indication.

In the case of homonymous geographical indications for wines or any other products, protection shall be accorded each product subject to the requirement that the goods do not indicate that they originate from another territory, even if they represent their true region place or locality. The Registrar-General of Geographical Indications is required to determine the practical conditions under which the homonymous indications in question shall be differentiated from each other.

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615 S 22.
616 See s 2(1)a of the *GI Ghana*.
617 See s 2(2) of the *GI Ghana*.
618 See s 3(1) of the *GI Ghana*. 

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other, taking into account the need to ensure equitable treatment of the producers concerned, and that consumers are not mislead.619

The producers entitled to geographical indications are defined by section 22 of the *GI Ghana* to include a producer of agricultural products or any other person exploiting natural products; a manufacturer of products of handicraft or industry; or a trader dealing in products of handicraft or industry. It would seem that a community is contemplated under the rubric "producer" or "manufacturer". This interpretation is supported by the provisions of section 6(2) of the Act which permits a person or a group of persons, a group of consumers, or a competent authority to file an application for the registration of a geographical indication. Even though there is no definition of a competent authority in the Act, there is no doubt that it contemplates Ghanaian communities.

Indications which do not meet the definitional criteria of geographical indications, are contrary to public order or morality, or are not or cease to be protected in their country of origin or have fallen into disuse in Ghana, are excluded from protection.620

5.3.4.1 Rights of holders of geographical indications

In terms of section 11 of the *GI Ghana* only producers active in the geographical area specified in the registration, have the right to use a registered geographical indication in the course of trade, with respect to products specified in the register, provided the products possess the quality, reputation, or other characteristics specified in the register. In addition, the owners of a geographical indications can prevent the use of the means in the designation or presentation of goods to indicate that the goods emanate from the geographical origin represented by the indication other than the true origin of the goods. They can also prevent use which constitutes

619 See s 3(2) of the *GI Ghana*.
620 S 4 of the *GI Ghana*. 
an act of unfair competition under the *Protection against Unfair Competition Act*, 2000.\(^{521}\)

Section 5 of the *GI Ghana* criminalises the prohibited acts set out above and where a person is convicted of any offence, the means by which the goods and things by which the crime has been committed may be forfeited by order of court and a fine may be imposed.

5.3.4.2 Geographical indications and trademarks

It is gratifying to note that the *GI Ghana* links the protection it offers to trademark protection. One of the many ways that traditional signs, names and indications were unlawfully used was by third parties who registered them as trademarks. Section 18 of the *GI Ghana* enables the Registrar-General of his own motion or at the request of third parties, to refuse or cancel the registration of such a trademarks if it contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if the use of the indication in the trademarks misleads or is likely to mislead the public as to the true place of origin.

A similar provision to section 18 of the *GI Ghana* is section 5(e) of the *TA Ghana* 2004 which enables the Registrar of Trademarks to refuse to register a trademark if "it is likely to mislead the public or trade circles with particular reference to the geographical origin of the goods and services, their nature or characteristics".

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\(^{521}\) Act 589 of 2000. S 1 of this Act provides that any act or practice in the course of industrial or commercial activities that causes or is likely to cause confusion with respect to the registered or unregistered trademarks; trade name; a business identifier; the presentation of a product or service; or a celebrity or a well-known fictional character of the products of another person's enterprise or its activities constitutes unfair competition. S 2 of the protects the goodwill or reputation of a person's enterprise or activities represented by a registered or unregistered trademarks; trade name; a business identifier; the presentation of a product or service; or a celebrity or a well-known fictional character from any act or practice that damages or is likely to damage it whether or not it act or practice causes confusion; (iii) the use of a geographical indication identifying wines or spirits not originating in the place indicated by the geographical indication even when the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "style", "imitation" or the like.
5.3.4.3 Implementation of the *Geographical Indications Act*

It is important to note that there is no evidence that the *GI Ghana* is in use because no geographical indications have been registered in Ghana, nor has the *GI Ghana* been used to protect any expression of folklore. This may be attributed to the lack of regulations or implementation envisaged by section 21 of the *GI Ghana*. In the implementation of the Act, it will be a challenge for the Registrar-General to grapple with the problems posed by the ownership rights of the President of the Republic of Ghana with respect to expressions of folklore. In particular, it will be important to determine whether a geographical indication can be obtained by a producer for a handicraft or the expression of folklore such as *Kente*, without the permission or license of the President. Another challenge is whether to obtain a national registration of a geographical indication for the indigenous textile such as *Kente*, or allow regional or communal indications.

5.3.5 Performers' rights

Another intellectual property right that can protect expressions of folklore is the performers' rights to their expressions of folklore. It would follow that even though the ownership of expressions of folklore is vested in the President of the Republic, this would not affect the rights of performers since performers' rights are independent of the existence of copyright.

Section 28(1) of the *CA Ghana* provides that a person shall require the authorisation of a performer to a number of elements related to the performance. These are the broadcast or communication of a performance by the performer directly or indirectly to the public, except where this emanates from a previously authorised fixation, or the broadcasting organisation which transmits the first performance. Other acts include the arrangement of the fixation of a performance not previously fixed on a physical medium; the exercise the right of reproduction of the fixation in any

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623 See Amegatcher *Ghanaian law of copyright* 78-79.
manner or form; the provision of the first public distribution of the original or a copy of a fixation of a performance; the provision or obtaining a rental of the original or a copy of the performance for the purpose of direct or indirect commercial advantage, irrespective of the ownership of the original or copy rented; and the making available to the public a fixed performance by wire or wireless means, in a way that members of the public may access from a place and at a time individually chosen by them.624

The duration of performers' rights is seventy years starting from the end of the calendar year in which the performance was fixed on a physical medium or, in the absence of such fixation, from the end of the calendar year in which the performance took place.625

Section 31 of the CA Ghana provides for the moral rights of a performer which are independent of the economic rights of the owner and continue to exist even after the transfer of those rights. These rights require the owner to be identified with the performer's live, oral performances and performances fixed in phonograms, and to object to any distortion, mutilation, or other modification of a personal performance which would be prejudicial to the reputation of the performer.

There is a further possibility for the protection of traditional names and expression from being registered as a trade mark in that registration may be declined on the grounds of public order or immorality.626 It is plausible to argue that using a well-known traditional term or expression could fall into this category.

624 See also s 28(2) which grants a performer the exclusive right to authorise or prohibit: (a) the rebroadcasting, rental and distribution of a fixation of the performance; (b) the fixation of the performance; (c) the reproduction of a fixation of the performance; or (d) the communication to the public of the performance except where the performance has been lawfully fixed on audio visual or audio recording media which may be broadcast without the consent of the performer, if the recordings have been published; subject to the payment of equitable remuneration to the performer.
625 See s 29 of CA Ghana.
626 See s 5 of the TA Ghana.
5.3.6 Industrial design rights

The DA Ghana defines an industrial design to include a textile design where the composition, form or material gives a special appearance to a product of industry or handicraft, and can serve as a pattern for the product of industry or handicraft. A textile design is registrable if it is new, and it is new if it differs significantly from known designs or combinations of known designs. The viability of the industrial design as a means of protecting expressions of folklore is severely reduced because section 3 of the Act appears only to contemplate individual creators of designs. While it is possible that a representative of a community can apply to register a design, this appears unlikely because of the vesting of the ownership of expressions of folklore in the President of Ghana.

5.3.7 Evaluation of the protection of expressions of folklore by intellectual property in Ghana

One fundamental challenge to the protection of expressions of folklore by intellectual property rights in Ghana is the ownership of the President of Ghana of these expressions. Unless the President licenses a community it would appear difficult for communities to seek to use intellectual property rights to protect expressions of folklore. It is unlikely that the President would proceed along this line because of the existing framework in the CA Ghana for the protection of expressions of folklore. An extensive legislative process is therefore necessary if intellectual property rights are to be used to protect expressions of folklore in Ghana.

5.4 Protection of expressions of folklore by intellectual property rights in Nigeria

5.4.1 Introduction

In Nigeria, the possibility of the protection of expressions of folklore through intellectual property rights is fundamentally hampered by the fact that expressions of folklore vest in the Nigerian Copyright Commission. This fact would present
enormous problems for communities wishing to use any of the intellectual property rights to protect expressions of folklore they have produced. Nigeria's intellectual property framework includes the *NPDA*, the *TMA Nigeria* and *CA Nigeria*.

5.4.2 Copyright

There is no evidence that either the Nigerian Copyright Commission as the owner of the expressions of folklore, or any community in Nigeria has sought to enforce any copyright of an expression of folklore. This is not surprising given the fact that the *CA Nigeria* has a framework for the protection of expressions of folklore from third party use, anchored in the approval of the Nigerian Copyright Commission.

5.4.3 Trademarks

The use of certification marks recognised by the *TMA Nigeria* in section 43 to protect traditional names and expression is a strong possibility. However, the control exercised by the Nigerian Copyright Commission makes this unlikely. Section 43 of the *TMA Nigeria* provides that a mark adapted in relation to any goods to distinguish in the course of trade, goods certified by any person in respect of origin material, method of manufacture, quality, accuracy, or other characteristic, from goods not so certified, shall be registrable as a certification mark in Part A of the Register of Trade Marks. It would appear impossible to register collective marks under the *TMA Nigeria* while some potential exists for the registration of geographical indications under the TA Nigeria.627

5.4.4 Design rights

The possibility of protecting a communally created design is doubtful in light of the provisions of section 14 of the *NPDA* which is individual in orientation. Again, only the National Copyright Commission can seek the protection of the *NPDA*.

627 See Adewopo "A consideration of communal trademarks" 108-131.
5.4.5 Performers' rights

The other possibility of the protection of expressions of folklore even in the face of the ownership rights of the Nigerian Copyright Commission, is the protection of performers' rights by the CA Nigeria. There is academic support for this position. For example, Asein is of the opinion that:

An unauthorized recording of the live performance of a folk singer whose music is not in any fixed format would be an infringement of his performer's right. 628

Section 23 of the CA Nigeria grants a performer the exclusive right to control: the performance; recording; live broadcast; reproduction in any material form; and adaptation of the performance. The duration of the performer's rights subsists for fifty years from the end of the year in which the performance first took place.

Under section 26 of the CA Nigeria an infringement of a protected right shall be actionable by the person entitled to the right as a breach of statutory duty. The performer shall be entitled to damages, an injunction, an account for profit, or conversion. Where a person has in his possession, custody, or control, in the course of trade or business or otherwise than for a private or domestic use, an unauthorised recording of a performance, a person holding the performer's right or recording rights in relation to the performance, shall under this section be entitled to an order of the court that the recording be forfeited and delivered-up to him. There is also criminal liability in respect of infringement of performer's right. 629

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628 Asein Nigerian Copyright Law 186.
629 Thus s 27 of CA Nigeria provides that a person who infringes a performer's rights shall, unless he proves to the satisfaction of the court that he did not know that his conduct was an infringement of the performer's right, be liable on conviction: (a) in the case of an individual, to a fine not exceeding N10 000; (b) in the case of a body corporate, to a fine of N50 000; (c) in all other cases, to a fine of N100 for each copy dealt with in contravention or to imprisonment for twelve months or to both such fine and imprisonment. In addition a court before which an offence under this section is tried shall order that the recording or any other part thereof be delivered to the performer.
5.4.6 Evaluation of the protection of expressions of folklore by intellectual property in Nigeria

Nigeria, like Ghana, suffers from the fundamental obstacle of state ownership and control of expressions of folklore. Available evidence from Nigeria does not even suggest that intellectual property rights have been used to protect expressions of folklore. If the situation is to change there would need to be extensive changes to the existing intellectual property legislation.

5.5 Protection of expressions of folklore by intellectual property rights in Kenya

5.5.1 Introduction

Kenya's intellectual property rights are governed by various pieces of legislation including: the IPA Kenya; the TMA Kenya and the CA Kenya. Like Nigeria and Ghana, the control if not the ownership of expressions of folklore are vested in the Kenya Copyright Board which acts on behalf of the Kenyan state. The fact of state ownership is therefore a fundamental obstacle to the use of intellectual property rights to protect expressions of folklore.

5.5.2 Copyright

The possibility of deploying intellectual property rights to protect expressions of folklore is negatively affected by the fact that expressions of folklore are vested in the state.

5.5.3 Trade marks

Of all the intellectual property rights, trade marks would appear the most likely right in seeking to protect expressions of folklore in Kenya. Currently, geographic indications are possible through registration as certification marks and collective marks under the TMA Kenya.
Section 40 of the *TMA Kenya* defines a certification mark as:

A mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic from goods not so certified shall be registrable as a certification trade mark in Part A of the register in respect of those goods in the name, as proprietor thereof, of that person: Provided that a mark shall not be so registrable in the name of a person who carries on a trade in goods of the kind certified.

To strengthen the effect of a certification mark further, section 12(1)(d) of the *TMA Kenya* provides that for a trade mark to be registrable it must contain a word or words having no direct reference to the character or quality of the goods and not a geographical name according to ordinary signification.

A collective mark is provided for by section 40A and it is a mark capable of distinguishing, in the course of trade, the goods or services of persons belonging to an association, from goods or services of persons who are not members of such an association. On application in the prescribed manner, the mark is registrable in the name of the association, as a collective trade mark or service mark in respect of the goods or services.

Section 40A(5) of the *TMA Kenya* specifically provides that geographical names or other indications of geographical origin may be registered as collective trademarks or service marks.

In contrast to Nigeria, there is evidence of the recognition of geographical indications through registration as collective marks. For example, in September 2006 the Kenyan Industrial Property Institute registered a collective mark "ECHUCHUKA" for aloe-vera cosmetic products made from aloe-vera grown around Lake Turkana and owned by the community living around the lake.\(^{630}\)

\(^{630}\) See Project Document 2009 www.ige.ch/fileadmin/user_upload/.../e/MoU-swiss-kenya-e.pdf (hereafter *Swiss-Kenya*).
5.5.4 Design rights

The *IPA Kenya* conceives of individual creators of design⁶³¹ which makes it unlikely that communal designs will receive protection.

5.5.5 Geographical indications

At present, it is doubtful whether there can be meaningful protection of expressions of folklore through geographical indications since there is no legislative framework. However, a *Draft Bill for the Protection of Geographical Indications* is before Parliament. The first draft was ready in 2001. In 2009 "Drafting Instructions for a Bill for an Act of Parliament for Registration and Protection of Geographical Indications" were available, together with Bill for the geographical indications regulations.⁶³² A question arising is whether the proposed legislation is favourable to traditional terms and expressions in Kenya. It would appear to have been so designed. For example, in reviewing the proposed legislation, Bocedi and Avvocati argue that the definition of geographical indication in the proposed Bill is similar to the definition of geographical indications in the *TRIPS Agreement*.⁶³³ Furthermore, the definition of indication includes "geographical designation traditional indication and figurative indication or any combination thereof conveying or suggesting the geographical origin of goods to which it applies".⁶³⁴ The broad scope of the proposed legislation applies to natural, agricultural, food, handicraft or industrial products.⁶³⁵ Other features supportive of traditional terms are that even though the proposed legislation "provides for a registration proceeding for Geographical indications. The protection granted to GIS is available regardless of registration".⁶³⁶ Another fact is that indigenous communities seem to be contemplated as capable of applying for a geographical indication as they may fall within the class of legal entities carrying on activities as producers in the geographical area, or a

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⁶³¹ See s 87 of the *IPA Kenya*.
representative of the producers. Another class of persons who may apply for a geographical indication is any competent authority, "in respect of indications with a national character ...". It is plausible that because expressions of folklore are vested in the Kenyan state, the Copyright Board might qualify as a "competent authority" to apply for expressions of folklore.

The essence of a geographical indication is found in the section 14 of the proposed regulations which supports the right of a producer within the geographical area to use the geographical indication. This means that even though the geographical indication is communally generated, it is really for the benefit of individuals in that community.

A number of products have been identified as having potential. These include: coffee, tea, soap stones, wild silk, honey, and wines. Some of the potential products for geographical indications are already being regulated by the Kenyan government, while others have not been so regulated even though their potential has been recognised. For example, the coffee industry is "highly regulated and the sector benefits already from an institutional platform". At the beginning of 2010, the Coffee Board of Kenya (CBK) launched a brand of Arabica coffee that will give Kenyan coffee a distinct global identity.

One of the challenges to the geographical indication of an expression of folklore is whether to proceed to obtain a national registration of a product or to allow each of the geographic regions to apply for their own geographical indication. With respect to coffee in Kenya the challenge is:

Whether working on a GI for Coffee Kenya (benefitting from the reputation that such a name has been achieving on international markets) or rather aim at various

GIS on specific geographical areas (i.e. Mount Kenya West, Kiambu, Kirinyaga, Nyeri, Ruiru and Thika).  

It would appear that the latter option is preferable since it would allow communities to protect the brand of coffee unique to their region as established by cultural traditions. The same consideration applies to Kenyan tea grown in four major production centres: Mount Kenya, Nandi, Mau Wet, and Aberdare; and cut flowers produced around Lake Naivasha, Kinangop, Nakuru, Mt Elgon, Kitale, Eldoret, Kericho, Limuru, Kiambu, Athi Plains, Thika and Mt Kenya region.

5.5.6 Performers' rights

The protection of performers’ rights is found with the framework of CA Kenya. Section 30 provides that only the performer can authorise the broadcast of his or her performance; its communication to the public; the fixation of his or her previously unfixed performance; the reproduction of the fixation the performance and the rental to the public of the original and copies of his or her fixed performance for commercial purposes. The performer is entitled to his or her moral rights during his or her lifetime which is to be identified as the performer of his performances, and to object to any distortion, mutilation, or other modification of the performances that would be prejudicial to his or her reputation. The protection of a performers’ rights subsists for fifty years.

5.5.7 Evaluation of the protection of expressions of folklore by intellectual property rights in Kenya

The 2009 National Policy on Traditional Knowledge Genetic Resources and Traditional Cultural Expressions, reveals that Kenya is thinking seriously of walking down the road already tread by South Africa. For example, paragraph 3.1.2 of the National Policy sets out a number of policy statements indicating that the path of

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645 See s 30(5) of CA Kenya.
reform Kenya will follow in the protection of expressions of folklore by intellectual property rights.

These policy statements require Kenya to develop mechanisms to facilitate integration of traditional cultural expressions into the policy, development, planning, and decision making processes at the local, national, regional and global levels. The legislation that will be developed pursuant to the policy will ensure that communities have effective control over traditional cultural expressions, documentation, and database based on their know-how, practices and skills. It is also envisaged that a Registry of Inventions in which communities can register their traditional innovations, and a clearing house for horizontal networking and innovation will be established. Also to be established are searchable traditional cultural expression databases and networks. A key part of the envisaged legislation is the payment of adequate compensation to owners of traditional cultural expressions should they be compulsorily acquired by the government.

Yet another key element in the envisaged legislation is an appropriate response to treaties and protocols by the ARIPO and other regional bodies which apply to traditional cultural expressions owned across national borders.

These policy statements support the contention that Kenya will initiate fundamental legal changes to her intellectual property legislation if expressions of folklore are to be protected by intellectual property rights. The consideration of the Draft TCE Bill in Chapter 4\textsuperscript{646} indicated, however, that Kenya is not prepared to walk down the path of full-blown protection through intellectual property rights. Rather, an enhanced negative protection model that significantly improves the role of communities is on the drawing board enabling them to benefit directly from the exploitation of their expressions of folklore. Communities are also enabled to give their prior informed consent to the exploitation of their expressions of folklore in a manner that appears transparent and interactive. It is, therefore, not difficult to surmise that there may be no need for Kenya to turn to intellectual property rights

\textsuperscript{646} See Chapter 4.4.7.
to protect expressions of folklore. This could indeed have been the case save for the fact that the Kenyan state continues to act on behalf of communities believing that an effective protection of expressions of folklore requires such an arrangement. Unfortunately, as argued above enormous administrative and regulatory infrastructure must be established if the Kenyan government is to protect expressions of folklore effectively.

It remains to be seen whether Kenyan intellectual property institutions are able to enforce the legislative outcome of the Draft TCE Bill. Whether such legislation is a fitting response to the requirement of the Kenyan Constitution for a legislation to promote and protect the intellectual property rights of the Kenyan people, may still be an open question and is explored in Chapter 8 of this thesis.

5.6 Conclusion: An overview of the protection of expressions of folklore by intellectual property rights in South Africa, Ghana, Nigeria and Kenya

This chapter reviewed, the extent if any, to which the countries of study have used intellectual property rights to protect expressions of folklore. It was noted that this type of protection is regarded as positive protection because communities are recognised as rights-bearers and are therefore entitled to protect their expressions of folklore as they deem fit.

This chapter has revealed that at present only South Africa and Ghana offer some protection for expressions of folklore through intellectual property rights. In addition, South Africa has demonstrated a concrete intention in this regard through a legislative process evident in the IPLAA 2013 and the Wilmot Bill. Even though Kenya has hinted that it will also enact legislation using intellectual property rights to protect expressions of folklore, the Draft TCE Bill indicates a preference for an enhanced negative protection of expressions of folklore.

The inability of Ghana to operationalise GI Ghana is to be regretted, and it is hoped that simple steps will be taken in this regard. The South African intellectual property
system demonstrates that it is possible to protect expressions of folklore through intellectual property rights – albeit with modifications.
CHAPTER 6

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CHAPTER 6

REGIONAL PROTECTION AND INTERNATIONAL PERSPECTIVES OF EXPRESSIONS OF FOLKLORE IN AFRICA

6.1 Introduction

In the preceding chapters the nature and extent of national protection of expressions of folklore was investigated critically. This chapter turns to understanding and evaluating the protection of expressions of folklore on the basis of geography and trade. The fact that expressions of folklore often exist in a number of contiguous communities in different countries requires an understanding of how this challenge can be addressed. The options for these countries are either to resort to a bilateral or a multilateral solution in terms of which they elect to follow either an ad hoc or a permanent framework for resolving conflicts that arise by reason of their geography.

This chapter addresses regional frameworks which potentially address the resolution of conflicts that arise from the presence of ethnic communities in more than one state. The chapter also considers how the regional articulation of the protection of expressions of folklore in Africa has enhanced and/or undermined the national protection of these expressions.

International frameworks for the protection of expressions of folklore are important as they set minimum standards to which states must adhere in formulating their national legislation so as to ensure that expressions of folklore are protected by as many states as possible. Without such international frameworks, many states would leave expressions of folklore unprotected making them havens for piracy.

This chapter proceeds as follows. The following section opens with a consideration of the application of international law in the four countries of study. This will provide context for the ensuing discussions on the effects of the regional and international frameworks that are subsequently discussed. I then explore the
regional protection of expressions of folklore in Africa by considering the *Swakopmund Protocol* and the *Revised Bangui Agreement*. These treaties address the economic value of expressions of folklore. In addition, the possibility that regional economic communities in Africa protect expressions of folklore is also considered. In the third section, the international protection of expressions of folklore is evaluated. This section considers the international protection of expressions of folklore at WIPO and its proposed draft treaty, and how the *TRIPS Agreement* affects the protection of expressions of folklore.

The international protection of expressions of folklore from a cultural perspective is explored principally through a consideration of two UNESCO Conventions – the *CCD* and the *CCH*. Although a consideration of the *DRIP* falls within the ambit of this chapter, for purposes of clarity and context it is discussed in Chapter 7.

### 6.2 Application of international law in Kenya, Ghana, Nigeria and South Africa

The fact that the regional and international perspectives for the protection of expressions of folklore depend on bilateral and multilateral treaties, requires an examination of the application of international law in the municipal legal systems of the countries of study. On a general note, two approaches are recognised. The dualist tradition recognises international law as distinct from municipal law with the result that unless a treaty has been enacted into law by a country's legislature it will have no municipal effect. The monist tradition recognises no distinction between international law and municipal law which means, in turn, that treaties ratified by a state become part of the law of that state and apply without further ado. There are variations of both approaches in state practice.

In Kenya, section 2(6) of the *Kenyan Constitution* provides that treaties and conventions which have been ratified[^647] form part of Kenyan law without the need

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[^647]: See the *Treaty Making And Ratification Act* 45 of 2012. This legislation was made to give effect to s 2(6) of the *Kenyan Constitution*. See s 7 of this Act which provides that parliament shall ratify a treaty submitted to it by Cabinet.
for any domestic legislation. In addition, section 2(5) of the same Constitution provides that general principles of international law are part of Kenyan law. Kenya can be said to be a monist country\textsuperscript{648} with international law applying directly, and in appropriate cases, superseding domestic law.\textsuperscript{649} In \textit{Re the Matter of Zipporah Wambui Mathara}\textsuperscript{650} a Kenyan court held that article 11 of the ICCPR supersedes the Kenyan Civil Procedure Act.

In Ghana, the relationship between international and domestic law is based on the dualist tradition and domestic legislation is required if a treaty or convention is to become part of Ghanaian law.\textsuperscript{651} However, treaties ratified but not yet domesticated into Ghanaian law can, like other sources, be used as a guide in amending existing legislation. Furthermore, international law may be used as a basis for interpretation, especially in the elaboration of the \textit{corpus} of human rights permissible in terms of section 33(5) of the Ghanaian Constitution which enjoins Ghanaian courts to recognise the rights, duties, declarations and guarantees relating to fundamental human rights and freedoms specifically not mentioned in the Constitution if they are considered inherent in a democracy and are intended to secure the freedom and dignity of man.\textsuperscript{652} It is therefore plausible that international human rights treaties may be a source of human rights especially if the human rights in question are not contained in the Bill of Rights of the 1992 Constitution.

In Nigeria, section 12(1) of the Nigerian Constitution provides that no treaty between Nigeria and any other country shall have force of law except to the extent to which it has been enacted into law by the National Assembly.\textsuperscript{653}

\textsuperscript{648} See \textit{David Njoroge Macharia v Republic} [2011] eKLR 15. See Njoroge 2011 \textit{Comp Int'l LJ SA} 293; Ambani "Navigating past the 'dualist doctrine' " 25. See also Orago 2013 \textit{AHR LJ} 415-440.

\textsuperscript{649} Note should be taken of s 21(4) of the \textit{Kenyan Constitution} which requires national legislation to fulfill Kenya's international obligations in respect of human rights and fundamental freedoms.\textsuperscript{[2010] eKLR 4.}

\textsuperscript{650} See \textit{NPP v Attorney General} [1996-1997] SCGLR 729 at 761 (hereafter the \textit{CIBA} case); Dankwa 1991 \textit{African Society of International and Comparative Law Proceedings} 57. See also Quansah "'International law as an interpretative tool'" 37.

\textsuperscript{651} See Atuguba JSC in the \textit{CIBA} case 788.

\textsuperscript{652} See the following cases, \textit{Abacha v Fawehinmi} (2000) 6 NWLR (Pt 660) 228; \textit{Registered Trustees of National Association of Community Health Practitioners of Nigeria v Medical and Health Workers Union of Nigeria} [2008] 2 NWLR (Pt 1072) 575.

\textsuperscript{653}
The application of international law in the South African legal system depends on the nature of the international law. Customary international law is applicable in terms of section 232 of the *South African Constitution* unless it is inconsistent with the Constitution or an Act of Parliament. On the other hand, section 231(4) of the *South African Constitution* provides that international agreements (treaties) must be enacted as domestic legislation before they can have effect in the country’s municipal law. An exception is, however, made for a self-executing provision in a treaty approved by Parliament which will find municipal application without legislative incorporation to the extent that it is consistent with the Constitution and Acts of Parliament. The fact that a treaty has not been domesticated in South Africa does not rob the treaty of all effect. Section 39(1)(b) of the *South African Constitution* provides that a court, tribunal or forum must consider international law when interpreting the Bill of Rights in the Constitution. In addition, section 233 requires courts to prefer a statutory interpretation that is consistent with international law. South African courts have recognised that international law must be used in the interpretation of statutes. In *Glenister v President of the Republic of South Africa* the Constitutional Court relied on international corruption treaties to invalidate two Acts of Parliament which impacted on the obligation of the state to promote and protect human rights.

In sum, it is clear that international law plays a role in the municipal legal systems of the countries of study. While customary international law applies directly in all these countries, the same cannot be said of treaties. Therefore, while treaties – like other forms of international law – apply directly Kenya because it is a monist country, they must be domesticated in Nigeria, Ghana, and (for the most part) in South Africa before they can be applied. In all the countries of study International law can influence the interpretation of legislation generally, and human rights in particular. While the effect of international treaties on expressions of folklore is better discussed at the end of this chapter, it is fitting to note at this stage that the

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654 See *Azapo v President of the Republic of South Africa* 1996 4 SA 671 (CC); *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).
655 See Scholtz and Ferreira 2008 *Comp Int’l LJ* SA 324.
657 2011 3 SA 347 (CC).
potential of international law to affect the domestic legal systems we considered in Chapters 4 and 5 is more real than imagined.\textsuperscript{658}

\section*{6.3 Regional protection of expressions of folklore in Africa}

The regional protection of expression of folklore proceeds principally through the mandate of the two African regional intellectual property organisations that reflect intra-regional cooperation. A second mechanism, which too, holds this potential, are the African regional economic communities (RECs).

\subsection*{6.3.1 Protection of expressions of folklore by regional intellectual property organisations}

There are two regional intellectual property systems in Africa: the African Regional Industrial Property Organisation (ARIPO), and the African Intellectual Property Organisation (OAPI). Given the focus of this thesis, greater attention will be paid to ARIPO.

\subsection*{6.3.1.1 African Regional Intellectual Property Organization (ARIPO)}

\subsubsection*{6.3.1.1.1 Introduction}

In 1973, the United Nations Economic Commission for Africa (ECA) and the WIPO, in response to request for assistance in industrial property matters from Anglophone African countries agreed to set up a new organisation. Following a series of consultations, a draft \textit{Agreement on the Creation of an Industrial Property Organization for English-Speaking Africa (ESARIPO)} was prepared and adopted by a diplomatic conference on 9 December 1976 in Lusaka, Zambia. This Agreement came into force on 15 February 1978. In 1985 the Organisation’s name was changed to the African Regional Industrial Property Organisation.\textsuperscript{659} Nigeria, the

\textsuperscript{658} See De Wet “South Africa” 567-593.

\textsuperscript{659} The Administrative Council of ARIPO amended the Agreement on 12 December 1986.
Seychelles and South Africa are regarded as potential member states and enjoy observer status in the organs of the organisation.

6.3.1.1.2 Objectives of ARIPO

The mandate of ARIPO can be gleaned from the preamble to the *Lusaka Agreement* where member states recognise the advantages they can derive from the effective and continuous exchange of information and the harmonisation and coordination of their laws, policies and activities in intellectual property matters.

The objectives of ARIPO are set out in article III of the *Lusaka Agreement* and include the promotion of the harmonisation and development of the intellectual property laws and matters related thereto, appropriate to the needs of its members and of the region as a whole.

Three organs exist in ARIPO to coordinate its activities. They are the Council of Ministers, the Administrative Council, and the Board of Appeal. The Council of Ministers consists of the Ministers of the governments of member states in charge of industrial property matters. The Council, which is the supreme organ of the Organisation, is charged with the orientation of the Organisation and the development of its activities. The Council is also charged with making decisions on matters which, because of their nature, cannot be resolved by the Administrative Council.

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660 See "The African Regional Industrial Property Organization (ARIPO) and its Activities in the Protection of Industrial Property in Africa".

661 See a III(a) of the *Lusaka Agreement*. Other objectives listed in a III include: (b) to foster the establishment of a close relationship between its members in matters relating to intellectual property; (c) to establish such common services or organs as may be necessary or desirable for the coordination, harmonization and development of the intellectual property activities affecting its members; (d) to establish schemes for the training of staff in the administration of intellectual property laws; (e) to organize conferences, seminars and other meetings on intellectual property matters; (f) to promote the exchange of ideas and experience, research and studies relating to intellectual property matters; (g) to promote and evolve a common view and approach of its members on intellectual property matters; (h) to assist its members, as appropriate, in the acquisition and development of technology relating to intellectual property matters; (i) to promote, in its members, the development of copyright and related rights and ensure that copyright and related rights contribute to the economic, social and cultural development of members and of the region as a whole; and (j) to do all such other things as may be necessary or desirable for the achievement of these objectives.

662 See a VIbis of the *Lusaka Agreement*. 
Council. The Council is also responsible for other matters which might improve the Organisation. The Council of Ministers meets once every two years.

The Administrative Council consists of Heads of Office dealing with the administration of intellectual property. The Administrative Council meets annually. A finance committee was set up in November 1993 to assist the Administrative Council to review the income, programmes and budget of the Organisation.

The Council of Ministers, at its 21st session held in Lesotho, decided to establish a Board of Appeal. The functions of the Board of Appeal are to review any final administrative decision of the ARIPO Office relating to the implementation of the Harare and Banjul Protocols. The Board comprises five persons well versed in intellectual property matters.

6.3.1.1.3 Protection of expressions of folklore: The Swakopmund Protocol

This section considers the protective framework of the African Regional Intellectual Property Organisation (ARIPO) for expressions of folklore articulated in the Swakopmund Protocol. Objectives and criteria for the protection of expressions of folklore

The preamble to the Protocol is important because of its clear policy guidelines which, it is submitted, represent its objectives. These are to: enhance the value of folklore; recognise the importance of folklore as part of the innovation systems of society; emphasising the role of customary laws and practices in a protective framework; as well as the communal basis of the creation of expressions of folklore. In detail, the preamble recognises the intrinsic value of traditional knowledge, traditional cultures, and folklore, including their social, cultural, spiritual, economic,

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663 Lusaka Agreement a VII: The functions of the Administrative Council include, inter alia, the formation and direct execution of policy with respect to the activities of the Organisations; the approval of the programme of activities, annual report, budget and accounts of the Organisation; the operations of the Secretariat; and the promotion, research and study on, and the implementation of, the objectives of the Organisation.

intellectual, scientific, ecological, agricultural, medical, technological, commercial and educational value. Furthermore, the preamble also recognises that folklore constitutes part of the diverse frameworks for ongoing innovation, creativity, and distinctive intellectual and creative life that benefit local and traditional communities and all humanity in enhancing a diversity of cultural contents and artistic expressions.

The preamble acknowledges the need to respect the customary use and custodianship of expressions of folklore in the context of their gradual disappearance, erosion, misuse, unlawful exploitation, and misappropriation. The importance of an effective and efficient protection framework that maintains an equitable balance between the rights and interests of those who develop, preserve and maintain traditional knowledge and expressions of folklore, and those who use and benefit from such knowledge and expressions, is affirmed in the preamble. It further identifies unique characteristics of expressions of folklore as including their collective or community context; the intergenerational nature of their development; their preservation and transmission; and their link to a community’s cultural and social identity, integrity, and beliefs.

Article 16 of the *Swakopmund Protocol* defines an expression of folklore by providing that protection shall be extended to expressions of folklore, whatever the mode or form of their expression, which are: (a) the products of creative and cumulative intellectual activity such as collective creativity or individual creativity where the identity of the individual is unknown; and (b) characteristic of a community’s cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.

It would appear that existence of a community is a critical criterion for identifying expressions of folklore. Even though the criterion admits of individual creativity it insists that the individual creator should be unidentifiable. This creates the impression that when an individual creator is known, the work cannot be regarded as an expression of folklore except, of course, that the customary laws and practices
of the community designate the individual creator as a representative of the community so that his work is regarded as being on behalf of the community.\textsuperscript{665}

The criteria place fundamental importance on the customary laws and practices of the community as the process for the identification of folklore. This criterion assumes that the community is an identifiable group within a state. This may be true, even though it is far more realistic to point out that in the states considered in this study, ethnic communities are not easy to identify. Where, however, there are more than a one community who own an expression of folklore in the same or different countries, article 17(2) of the \textit{Swakopmund Protocol} provides that the relevant national authorities in contracting states together with the ARIPO Office shall register the owners of the rights in those expressions of folklore.

There is no requirement providing for the artistic quality of the expression of folklore which suggests that, irrespective of artistic merit, the expression of folklore will be recognised if there is evidence that a community regards it as a communal creative output.

The identification of the community as the fundamental basis for the protective model is further buttressed by the express provisions of the Protocol\textsuperscript{666} in terms of which the owners of the rights in expressions of folklore shall be the local and traditional communities: (a) to whom the custody and protection of the expressions of folklore have been entrusted in accordance with the customary laws and practices of those communities; and (b) who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage. This provision conflicts with the position in Kenya and Ghana where expressions of folklore are the property of the state.\textsuperscript{667}

\textit{Formalities in the protection of expressions of folklore}

\textsuperscript{665} A very good example would be an individual member of a community who is in no leadership or representative position creates a derivative work based on the expression of folklore on his own without the knowledge and consent of the community. A specific example is the production of 'Adinkrafi and 'Kente\' cloth in Ghana discussed in Chapter 2.

\textsuperscript{666} See a 18.

\textsuperscript{667} See Chapter 4.2 for Ghana and 4.4 for Kenya.
From the tenor of article 17 of the *Swakopmund Protocol* there are no formalities for the creation of expressions of folklore. In other words, folklore need neither be written, nor qualify as an oracular expression to qualify for protection. It further means that a registration system is inappropriate as a basis for acquiring rights over expressions of folklore. The lack of formality is akin to copyright protection where there are no formalities for the creation of copyright because copyright protection begins as soon as the criteria for a valid copyright are present.

However, for purposes of evidence the *Swakopmund Protocol* provides that measures for the protection of expressions of folklore may require that certain categories of the expression for which protection is sought – particularly those with special cultural or spiritual value or significance or those that are sacred in character – be notified to the appropriate authority. The Protocol further states that the notification is merely declaratory and does not in itself create rights or involve or require the documentation, recording, or public disclosure of the expressions of folklore concerned. It would, therefore, appear that the appropriate authorities in ARIPO member states should open a register for special expressions of folklore.

Should the appropriate authority determine the types of expression of folklore to be included in this class, or should the signification of the community be instrumental in this regard? What does notification require? Does a simple letter or evidence of the expression of folklore suffice? These and other questions require clarification.

*Duration of protection of expressions of folklore*

Article 21 of the *Swakopmund Protocol* recognises the infinite duration of expressions of folklore in that it provides that they shall be protected against all acts of misappropriation, misuse, or unlawful exploitation for so long as they meet the protection criteria set out in article 16.

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668 A 17(2).
669 A 17(3).
Third party use of expressions of folklore

A unique feature of the *Swakopmund Protocol* is that despite the recognition of communities as owners of the expressions of folklore, article 22.2 vests the power to issue authorisations to exploit these expressions in the competent national authority which acts on behalf of and in the interests of the community concerned. In addition to the competent national authority, article 22.1 provides that for the purpose of ensuring the effectiveness of the protection and management of expressions of folklore, the competent national authority and the ARIPO Office, acting on behalf of the contracting states, shall be entrusted with the tasks of raising awareness, education, guidance, monitoring, dispute resolution, and other activities relating to the protection of expressions of folklore. How permission is granted to third parties to use expressions of folklore is important because of the commitment of owners to the enforcement of their rights. It was pointed out in Chapter 4 of this thesis, that competent national authorities appear incapable of or unwilling to enforce the protection of expressions of folklore in spite of their statutory ownership of these expressions. It is plausible to argue that communities will be far more eager and willing to operationalise and enforce their rights.

Article 22.3 of the *Swakopmund Protocol* sets out the framework for the grant of authorisations to third parties. Authorisations shall be granted only after appropriate consultation with the communities concerned and in accordance with their traditional processes for decision-making and public affairs management. Such authorisations must comply with the scope of protection provided for the expressions of folklore concerned, including the equitable sharing of the benefits. The benefits shall be transferred directly by the competent national authority to the community. Customary laws and protocols guide the resolution of disputes.

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670 In due course the *Swakopmund Protocol* envisages enabling legislation or administrative measures to provide guidance on matters such as procedures for applications for authorisation, fees that the national competent authority or ARIPO Office may, where necessary, charge for its services, official publication procedures, dispute resolution, and the terms and conditions governing authorisations that may be granted by the national competent authority.
The grant and nature of authorisation to use expressions of folklore depend on the 
type of expression even though section 19.1 of the *Swakopmund Protocol* stipulates 
that all expressions of folklore shall be protected against all acts of misappropriation, 
misuse, and unlawful exploitation.

In this regard, four categories of expressions of folklore are envisaged. The first 
involves expressions considered of particular cultural or spiritual value or significance 
to a community, while the second covers expressions of folklore made up of words, 
signs, names and symbols. The third category includes those expressions of folklore 
that are held in secret, while miscellaneous expressions of folklore fall into a fourth 
category.

For the first category, article 19.2 of the *Swakopmund Protocol* requires contracting 
states to provide adequate and effective legal and practical measures to ensure that 
the relevant community can prevent the following acts from taking place without its 
free and prior informed consent: first, the reproduction, publication, adaptation, 
broadcasting, public performance, communication to the public, distribution, rental, 
making available to the public, and fixation (including by still photography), of the 
expressions of folklore or derivatives thereof; secondly, any use of the expressions 
of folklore or adaptation thereof must acknowledge in an appropriate way the 
community as the source of the expressions of folklore; thirdly, any distortion, 
mutilation, or other modification of, or any other derogatory action in relation to the 
expressions of folklore; and fourthly, the acquisition or exercise of intellectual 
property rights over the expressions of folklore or adaptations thereof. In effect the 
relevant community must give its free and prior informed consent before the 
competent national authority may issue the authorisation to use. Without such 
authorisation, the relevant community can challenge the acquisition of intellectual 
property rights over their expression of folklore. The prohibited acts which require 
the free and prior informed consent of the relevant community are the exclusive 
economic and moral rights which a valid copyright confers on a copyright owner. In 
other words, as copyright is not attended by any formality, it is possible that the
community which owns the expression of folklore can commence an action for folklore infringement against a copyright owner.

The second protective model for expressions of folklore is with respect to words, signs, names and symbols. The relevant communities are entitled, without free and prior informed consent, to prevent any use of the expressions of folklore or derivatives thereof, or the acquisition or exercise of intellectual property rights over the expressions of folklore or derivatives thereof, which disparages, offends, or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute. The protection offered by this article is directed against the infringement of expressions of folklore by trademarks. ARIPO contracting states must provide a means by which communities can oppose or seek cancellation of the registration of trade marks in member states on the basis of geographical indications attaching to communities.

The third category consists of the expressions of folklore that are held in secret. Article 19(4) of the Swakopmund Protocol requires contracting states to provide adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorised disclosure, subsequent use of, and acquisition and exercise of intellectual property rights over "secret" expressions of folklore.

The fourth category covers miscellaneous expressions of folklore for which contracting states should provide adequate and effective legal and practical measures to ensure that: 
(a) the relevant community is identified as the source of any work or other production adapted from the expressions of folklore; 
(b) any distortion, mutilation, or other modification of, or other derogatory action in relation to expressions of folklore can be prevented and/or is subject to civil or criminal sanctions; 
(c) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the expressions of folklore of a community or suggest any endorsement by or linkage with that community.

671 A 19(2)(b) of the Swakopmund Protocol.
community, can be prevented and/or is subject to civil or criminal sanctions; and (d) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the national competent authority in consultation with the relevant community."

The rights which the relevant community can exercise with respect to this category of expressions of folklore would appear to be less extensive than the rights available with respect to the other three categories. There is no mention of the prevention of the acquisition of intellectual property rights. The rights of the community are essentially moral rights which ensure acknowledgment of source and prevent distortion. It is doubtful whether the community can prevent the grant of a design or other intellectual property right.

The fact that competent national authorities are mandated to issue authorisations to third parties, would suggest that the recognition of the ownership by communities of expressions of folklore is more imagined and real. However, the functions of the national competent authorities can respect the ownership of communities if in reality this endowment enables communities to prevent the issuing of any authorisation. It is also important to recognise the incapacity of certain traditional communities adequately to evaluate any proposed use of their expressions of folklore. It is therefore concerning that all that competent national authorities are required to do is to "consult" the communities. It would have been better had the competent national authorities also been required to "obtain" the consent of the communities – even though it can be argued that the consultations should be aimed at ensuring that the community and the prospective user of the expressions of folklore have reached an agreement on the use.

 Exceptions and limitations

Article 20(1) of the Swakopmund Protocol designates certain acts as exceptions and limitations which means that neither authorisation by a competent national authority, nor free and prior informed consent is required from the relevant community.
First, members of the community concerned are free to engage in the normal use, development, exchange, dissemination and transmission of expressions of folklore within the traditional or customary context as determined by customary laws and practices.

Secondly, uses of expressions of folklore taking place within their traditional or customary context, whether or not for commercial gain, constitute permitted use. Thirdly, non-commercial use, such as teaching and research, personal or private use, criticism or review, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions for inclusion in an archive or inventory exclusively for the purposes of safeguarding cultural heritage, and incidental uses are permitted. The proviso to such use is that in each case, the use must it compatible with fair practice, and the relevant community must be acknowledged as the source of the expressions of folklore where practicable and possible. Furthermore, the use must not be offensive to the relevant community.

It has always been felt that it is important to treat nationals of a state differently from foreigners as regards the national protection of expressions of folklore. Article 20(2) of the Swakopmund Protocol appears to have reacted to this observation by the permission given to member states to make special provisions for the use of expressions folklore by nationals of the country concerned. It is not entirely clear what these special provisions mean, although they would seem to point to preferential treatment for the nationals of member states.

Apart from the preferential treatment given to nationals of member states, it would appear that members of the community who are owners of the expressions of folklore are considered as a separate category of user by the Swakopmund Protocol. This should not be surprising because the recognition of communities as owners of the expressions of folklore could mean that the members of the community are entitled to preferential treatment. Accordingly, members of the communities are permitted to engage in the normal use, development, exchange, dissemination, and transmission of expressions of folklore within the traditional or
customary context. What "normal" use means is not very clear. Does it refer to the character of the use or to the decision of a community member to use an expression of folklore to his or her advantage? Would it be normal for a member of the community to engage in the commercial exploitation of expressions of folklore through filmmaking or DVD release of a folk song? There are many who would argue that commercial use is not regarded as normal use. But then if special provision is made for nationals of member states as hinted above, it is plausible to imagine that members of the communities also deserve such consideration?

Sanctions, remedies and enforcement

Two duties are imposed by article 23 of the Swakopmund Protocol on ARIPO member states with respect to sanctions, remedies and enforcement. The first duty is that member states shall ensure that accessible and appropriate enforcement and dispute resolution mechanisms, sanctions, and remedies are available where there has been a breach of the provisions relating to the protection of traditional knowledge and expressions of folklore.

Expressions of folklore in neighbouring communities in ARIPO states

One of the tasks of the regional protection of expressions of folklore is to resolve conflicts between neighbouring states with common communities over entitlements to expressions of folklore. The artificial boundaries of African states occasioned by the 19th century partition of Africa have resulted in some ethnic groups straddling at least two states in Africa. To resolve conflicts arising from claims to entitlement where this straddling occurs, article 24.3 of the Swakopmund Protocol provides that ARIPO may be entrusted by member states with the task of settling cases of concurrent claims from communities of different countries with regard to traditional knowledge or expressions of folklore. To this end, ARIPO must make use of

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672 Examples include the Tswana in South African and Botswana; the Yoruba in Nigeria Togo and Benin Republic; the Ndebele in South and Zimbabwe; and the Hausa/Fulani in Nigeria, Ghana, Benin Republic and Togo.
customary law, local information sources, alternative dispute resolution mechanisms, and any other practical mechanism of this nature, which might prove necessary.

Protection of foreign expressions of folklore

The Swakopmund Protocol treats all foreign expressions of folklore alike in that article 24.1 provides that eligible foreign holders of traditional knowledge and expressions of folklore shall enjoy benefits of protection equal to those enjoyed by the holders of traditional knowledge and expressions of folklore who are nationals of the country of protection. Contracting parties must, so far as possible, take account of the customary laws and protocols applicable to the traditional knowledge or expressions of folklore concerned.

Furthermore, article 24.2 of the Swakopmund Protocol enjoins member states to institute measures through the competent national authority and the ARIPO Office, to facilitate, so far as possible, the acquisition, management, and enforcement of such protection for the benefit of the holders of traditional knowledge and expressions of folklore from foreign countries.

It is clear, therefore, that the definition of foreign applies only to ARIPO state parties and no distinction is made between member states and others.

Recognition of communities as creators of expressions of folklore

The importance of communities as owners of expressions of folklore is affirmed in the Swakopmund Protocol which declares expressly in article 18 that the communities are the beneficiaries of the protection of expressions of folklore. It is to be remembered that in our discussions in Chapter 4 of the thesis, we found that folklore is vested in the Ghanaian and Kenyan state. It could be argued that ultimately communities are the beneficiaries of the protective framework. Therefore, while it may seem that the positions of the Swakopmund Protocol and the legislation of Kenya and Ghana are similar, it must not be forgotten that the competent national authorities are currently mandated to issue authorisations to use
expressions of folklore to third parties on behalf of the communities. This would appear to represent the position in Ghana and Kenya in so far as competent national authorities are also mandated to issue authorisations to use expressions of folklore. The difference appears to lie in the fact that the competent national authorities are bound to consult the communities under the *Swakopmund Protocol*. The object of the consultation should be to enquire whether free and prior informed consent has been granted by the community. If it were not so, it may be open to the competent national authorities to consult but disregard the views of the communities.

It is clear, therefore, that in conforming to the *Swakopmund Protocol* Kenya and Ghana will have to undertake substantial constitutional amendments to recognise communities as the owners of the expressions of folklore. In addition, it is also clear that there is a complete reliance on the customary laws and practices of a community as a basis for the identification of an expression of folklore. Even though an alleged expression of folklore must be a product of creative and cumulative intellectual activity, it is the customary laws and practices that give the context to cultural identity, and traditional heritage that recognises an expression of folklore.

*Moral rights*

A consistent theme running through the *Swakopmund Protocol* is the requirement that third parties attribute the source of expressions of folklore to the relevant communities, and that there must be no distortion, mutilation, or other derogatory action in relation to the expressions of folklore. It has been noted that the Kenyan and Ghanaian protection of expressions of folklore is lacking when it comes to of moral rights’ protection.

*Exceptions and limitations in the use of expressions of folklore*

It would appear that the permitted uses in the *Swakopmund Protocol* are more extensive than the permitted uses in the *CA Ghana* and *CA Kenya*. This means that there will be more uses available to third parties in these two countries. As a policy goal it is important that the scope of permitted uses continue to grow to enable
access to expressions of folklore that are important for innovation and creativity. This will result in a more balanced protection that will enhance the quality of the **Swakopmund Protocol**.

*Preferential treatment of members of communities that own expressions of folklore*

The **Swakopmund Protocol** adopts preferential treatment for natives of communities that are owners of expressions of folklore. On the other hand, in Ghana and Kenya members of the communities that own folklore and other nationals of these states, are treated no differently from foreigners when it comes to the protection of expressions of folklore. As noted above, the **Swakopmund Protocol**, turns a new leaf for members of communities who, in accordance with their customary laws and practices, are not to be hindered or restricted in the normal use, exchange, dissemination, and transmission of expressions of folklore within the traditional or customary context. Even though the meaning of this provision is not very clear, it would appear that the Protocol has made an advance that is not found in the legislation of the countries of study. Members of the communities are entitled to an unregulated usage of the expressions of folklore provided that this usage is "normal" and as stated above, this is a result of the recognition that communities are owners of expressions of folklore.

*Ability to intervene in the grant of intellectual property rights*

It is important that in appropriate cases the **Swakopmund Protocol** recognise the rights of communities to intervene in the grant and maintenance of intellectual property rights over their expressions of folklore. Effectively, ownership rights over expressions of folklore by communities is possible when communities are given clear rights in the registration process to enable them to oppose or cancel third-party intellectual property rights which enhance the negative protection of expressions of folklore. For Ghana and Kenya this will entail an amendment to their intellectual property legislation.

*Economic benefits of third-party use of expressions of folklore*
One of the consequences of vesting the ownership of expressions of folklore in the state in Nigeria, Kenya and Ghana is a commitment that the economic benefits derived from authorising the use of expressions of folklore will be used for cultural development. This goal appears to be loosely constructed and would not appear clearly to recognise that communities should receive monetary benefits from their folklore. One of the exciting developments of the Swakopmund Protocol is the fact that communities are to receive any monetary or non-monetary benefits directly from the competent national authority. To have provided otherwise would render the ownership rights by communities meaningless.

The Swakopmund Protocol and national legislation for the protection of expressions of folklore

It would appear that unlike other ARIPO Protocols on industrial property – the Harare Protocol, and the Banjul Protocol – the Swakopmund Protocol is a framework protocol which lays down minimum standards in broad norms for state parties to follow. The Harare and Banjul Protocols, on the other hand, enable third parties to obtain, patents, designs and trademarks – within the ARIPO territories through the grant of ARIPO patents, designs and trademarks. There are no rights granted by ARIPO for the protection of expressions of folklore because the Swakopmund Protocol is a defensive protection mechanism and an example of the negative protection of expressions of folklore. While traditional communities are enabled to consent to the use of their expressions of folklore, these communities are not granted a right in their expressions of folklore. Third parties may, therefore, acquire intellectual property rights over expressions of folklore with the consent of traditional communities.

It is important to note that the negative model of the Swakopmund Protocol is similar in general terms to the defensive protection of expressions of folklore offered by Kenya and Ghana. In specific terms, there are differences which impose an obligation on Ghana and Kenya to ensure a more substantive recognition of the communities that produce expressions of folklore. For Kenya, it may well be said
that the *Swakopmund Protocol* will apply in its legal system as soon as it ratifies the Protocol in accordance with the terms of the *Kenyan Constitution*. For Ghana there must be national legislation that domesticates the Protocol before it can be applied domestically.

6.3.1.2 African Intellectual Property Organisation (OAPI)

6.3.1.2.1 Introduction

In the 1960s many Francophone African states felt the need for a common body to assist them in dealing with their patent rights. In pursuance of article 19 of the *Paris Convention*, these states decided to create a single body to act as the national patent rights authority for each of them. This organisation was established initially pursuant to the *Agreement relating to the Creation of an African and Malagasy Office of Industrial Property*, at Libreville on 13 September 1962, and was signed by twelve African countries.\(^{673}\) The *Libreville Agreement* only covered patents, trademarks, trade names, and industrial drawings or models.

OAPI was created at a revision conference in Bangui, Central African Republic, on 2 March 1977. The headquarters of the Organisation is at Yaounde, Cameroon, and it has sixteen members.\(^{674}\) The OAPI countries are all French-speaking, save for Equatorial Guinea and Guinea-Bissau where Portuguese is spoken. The agreement covers a territory of 7 755 967 square metres with a population of some 100 million inhabitants. On 24 February 1999, the *Revised Bangui Agreement* was signed and it came into force on 28 February 2002.

6.3.1.2.2 Objectives of OAPI

The objectives of OAPI are set out in article 2(1) of the *Revised Bangui Agreement* and include: contributing to the promotion of the protection of literary and

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\(^{673}\) These countries are: Cameroon, Central African Republic, Republic of Congo, Cote d'Ivoire, Benin, Burkina Faso, Gabon, Mauritania, Senegal, Chad, Malagasy and Niger.

\(^{674}\) Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal and Togo.
artistic property and to the recognition of the cultural and social values of artistic and literary property; and promoting the economic development of member states, notably by means of effective protection of intellectual property and related rights. The Revised Bangui Agreement has a number of annexes which elaborate on the protection of intellectual property rights. The protection of expressions of folklore is found in Annex VI which is titled "Literary and Artistic Property".

6.3.1.2.3 Protection of expressions of folklore by OAPI

OAPI defines expressions of folklore as meaning the literary, artistic, religious, scientific, technological, and other traditions and productions as a whole created by communities and handed down from generation to generation. The protection of expressions of folklore proceeds along two lines: that the expression of folklore is considered a part of the national cultural heritage; and that folklore can be protected by copyright.

Article 67(1) of the Revised Bangui Agreement provides that the cultural heritage of member states comprises all those material or immaterial human productions that are characteristic of a nation over time and space and includes folklore. Article 72 imposes on the state the obligation to protect, safeguard and promote the cultural

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675 The Annexes under the Revised Bangui Agreement are as follows: Patents (Annex I); Utility Models (Annex B); Product or Service Marks (Annex III); Industrial Designs and Models (Annex IV); Trade Names (Annex V); Geographical Indications (Annex VI); Literary and Artistic Property (Annex VII); Protection against Unfair Competition (Annex VIII); Layout-Designs (Topographies) of Integrated Circuits (Annex IX); and Protection of New Plant Varieties (Annex X).

676 See a 68 of the Revised Bangui Agreement. Examples of expressions of folklore contemplated by the definition are listed in article: (a) literary works of all kinds, whether in oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles; (b) artistic styles and productions: (i) dances, (ii) musical productions of all kinds, (iii) dramatic, dramatico-musical, choreographic and pantomime productions, (iv) styles and productions of fine art and decorative art by any process, (v) architectural styles; (c) religious traditions and celebrations, (i) rites and rituals, (ii) objects, vestments and places of worship, (iii) initiations; (d) educational traditions, (i) sports, games, (ii) codes of manners and social conventions; (e) scientific knowledge and works: (i) practices and products of medicine and of the pharmacopoeia, (ii) theoretical and practical attainments in the fields of natural science, physics, mathematics and astronomy; and (f) technical knowledge and productions, (i) metallurgical and textile industries, (ii) agricultural techniques, (iii) hunting and fishing techniques.
heritage of a state party. To perform out this obligation states are to carry out an inventory, determine, classify, place in security, and illustrate elements that make up the cultural heritage. Article 73 requires authorisation from a competent national authority for a number of acts when performed with the object of making a profit. The first category includes the publication, reproduction, and distribution of copies of any cultural property, whether classified or not, listed or not, ancient or recent, and considered by this Act as part of the national cultural heritage. The second category includes any "recitation, public performance, transmission by wire or by wireless means, and any other form of communication to the public of any cultural asset, whether classified or not, identified or not, ancient or recent, and considered by this Act as an element of the national cultural heritage".

There are a number of free uses to which elements of the natural cultural heritage may be put. These include use for teaching; use as illustration of the original work of an author on condition that the scope of the use remains compatible with honest practice; and borrowings for the creation of an original work from one or more authors.677 It is interesting to note the existence of a right to the cultural heritage of states provided by article 94 of the Revised Bangui Agreement which requires the state to afford to all citizens a right of access to the values of the cultural heritage, and to craftsmen, artists and other creators, a right of assistance and encouragement.

The second part of protection available for expressions of folklore is through copyright protection. Therefore, article 5 of Annex VII of the Revised Bangui Agreement, dealing with literary and artistic property, contemplates expressions of folklore and works derived from folklore as capable of constituting original creations of the mind in the literary artistic and scientific fields. Folklore is defined in the context of this protection as

[t]he production of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community, and includes folk tales, folk poetry, folk songs

677 See a 73 of the Revised Bangui Agreement.
and instrumental music, folk dancing and entertainments as also the artistic expressions of rites and productions of folk art.

It would appear that the provisions of article 68 can be considered as a specific iteration of this definition.

Given the peculiar nature of expressions of folklore it is not surprising that article 5(2) of Annex VII stipulates that the mode or form of expression and the quality and purpose of the work are not determining factors. While article 9 protects the economic rights of an author, article 8 protects his or her moral rights. A number of free uses are listed in Chapter IV of Annex VII and include: free reproduction for private purposes; free reproduction in the form of quotation; free use for teaching; reprographic reproduction by libraries and archive services; free reproduction for judicial and administrative purposes; free use of images of works permanently located in public places; free use and adaptation of computer programs; free ephemeral recording by broadcasting organisations; free public performances; and importation for personal purposes.

There appears to be a contradiction between the protection afforded expressions of folklore as national cultural heritage, and the protection afforded such expressions by copyright. One possible explanation lies in the fact that there is a requirement that expressions of folklore that are considered part of the natural heritage should be listed and classified as such. This classification means that in terms of article 80 of Annex VII, the owner, holder, or occupier must apply to the competent national authority before making any modification with respect to the property. Article 83 of Annex VII requires any person who wishes to dispose of any classified property to inform the competent national authority at least fifteen days before the sale. This would appear to give the state the right of pre-emption to the property provided by

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678 A 9 provides that: "(1) An author shall enjoy the exclusive right to exploit his work in any form whatsoever and to obtain monetary advantage therefrom. Subject to the provisions of Articles 10 to 21, the author of a work shall enjoy, in particular, the exclusive right to perform or authorize the following acts: (i) reproduce his work; (ii) translate his work; (iii) adapt, arrange or otherwise transform his work; (iv) distribute copies of his work to the public by means of sale or any other transfer of ownership or by rental; (v) perform his work in public; (vi) communicate his work (including performance) to the public by broadcasting (or retransmission) or by television; (vii) communicate his work (including performance or broadcasting) to the public by cable or by any other means."
article 76 of Annex VII. Consequently, even though communities own copyright in their expressions of folklore, they lose exclusive control over these as soon as the expressions have been listed as part of the national cultural heritage.

It is clear, therefore, that, as noted above, OAPI is an example of positive protection of expressions of folklore since the communities who own the expressions have a right akin to copyright over them. It must be noted that the possibility that derivative works of expressions of folklore are seen as capable of protection under the Revised Bangui Agreement may serve to restrict the protection of folklore by copyright. Article 6 of Annex VI therefore provides that translations, adaptations, arrangements, and other transformations of expressions of folklore, as well as collections of expressions of folklore receive protection.

Since the nature of OAPI rights are national rights by virtue of article 3 of the Revised Bangui Agreement and the annexes to the Agreement apply to member states, it is clear that the provisions of Annex VII constitute – like the Swakopmund Protocol – a minimum normative framework applicable to OAPI member states.

6.3.2 Regional integration in Africa and the protection of expressions of folklore

The way in which regional integration can affect expressions of folklore is not peculiar to folklore per se. It is when expressions of folklore are considered as articles of trade that regional integration is important because one of the fundamental objectives of regional integration is the creation of markets larger than national markets.

A regional market for expressions of folklore is important because of the absence of barriers which would enables goods and services incorporating expressions of folklore to move easily within the region in a way that could potentially enhance demand. It is, of course, important to note that entry into markets is neither the ultimate nor the only objective of the protection of expressions of folklore. The fact that there are national markets for expressions of folklore has not had any significant impact on their protection. It may therefore be correct to state that
regional integration can affect the protection of expressions of folklore when regional economic communities articulate an understanding on their protection.

It would appear that in the case of expressions of folklore, the nature of the protection could determine how regional economic communities (RECs) are able to affect their protection. Where there is positive protection in the form of either the use of *sui generis* or intellectual property rights, common standards of protection instituted by an REC will be to the advantage of communities who generally seek to benefit from the expressions of folklore. A defensive protection can also affect the movement of goods in the sense that foreign goods and services may become liable to additional legal requirements as mandated by the national protection of expressions of folklore.

It is interesting to note that none of the existing RECs in Africa has a treaty or protocol dealing with expressions of folklore. There is, however, a proposed Tripartite Free Trade Area (T-FTA) comprising 26 member states of COMESA, the EAC, and the SADC which is to be established pursuant to an agreement concluded in October 2008 and which contemplates the regulation of expressions of folklore as part of its enabling treaty. Negotiating texts for the T-FTA include Annex 9 titled "The protection of Intellectual Property Rights" drafted pursuant to article 27 of the *Draft T-FTA Treaty*. Further elaboration of the provisions of article 27 is contained in Draft Annex 9 titled "Annex on Intellectual Property Rights". Article 1 of Draft Annex 9 sets the parameters for the

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679 The existing RECs in Africa include the Economic Community of West African States (ECOWAS); the Southern African Development Community (SADC); the East African Economic Community (EAC); the Central African Economic and Monetary Union (CEAMC); the Common Market for Eastern and Southern Africa (COMESA); the Economic Community of for Central African States (ECCAS); and the Arab Maghreb Union (AMU).

680 "1. Tripartite Member States shall protect intellectual property rights in a balanced manner that promotes the social economic welfare of society through ensuring that the people of the region meaningfully benefit from and participate in advancements in the arts, and science and technology in accordance with Annex 9 on Intellectual Property Rights. 2. Tripartite Member States shall adopt policies on intellectual property rights including the protection and promotion of cultural industries in accordance with international agreements. 3. Tripartite Member States shall cooperate and develop capacity to implement and utilise the flexibilities in all relevant international agreements on intellectual property rights."
protection of intellectual property rights. With respect to expressions of folklore, article 4 of Annex 9 indicates a number of objectives. These include the promotion of the use of traditional knowledge, genetic resources and folklore. Member states are to recognise the rights of traditional knowledge, genetic resources, and folklore holders, and actively ensure they are duly rewarded; secure the protection of traditional knowledge, genetic resources and folklore through intellectual property or *sui generis* systems to prevent misappropriation, misuse, and exploitation. Member states are also to create systems to govern the protection, promotion, utilisation, and further development of traditional knowledge, genetic resources and folklore such as the creation of databases, development of guidelines for access to benefit-sharing, and prior informed consent. Finally, they are to ensure the acknowledgment and recognition of the sources of traditional knowledge, genetic resources, and folklore by the users and obtain prior informed consent from the holders of traditional knowledge, genetic resources and folklore.

It is clear that without a specific articulation of a regime for the protection of expressions of folklore by RECs, it is only the obligations incurred by member states in the intellectual property area that are important for goods and services that may contain expressions of folklore. The promise of the T-FTA is significant if a regional framework for the protection of expressions of folklore exists in addition to national frameworks. What appears from the *Draft T-FTA* is an emphasis on national IPR systems. It is, of course, plausible that the T-FTA will seek regional harmonisation of the national systems for the protection of expressions of folklore. To summarise, a regional framework for expressions of folklore is important if RECs are to play a significant role in the regional protection of folklore. Unfortunately, as noted above, is no African REC has articulated this framework. What we do find, however, is that

681 "(a) Promote, encourage and facilitate the generation, innovation, creation, development, use, exploitation, commercialization, and licensing of Intellectual Property Rights, as well as effective protection of Intellectual Property Rights (IPRs); (b) Promote and facilitate the mainstreaming of IPR into all policies, structures, systems, programs and activities of the Tripartite Member States; (c) Promote and encourage the mainstreaming of IP into the economic, industrial, technological, social and cultural policies, systems, structures, programmes and activities of the Tripartite Member States; (d) Take urgent steps to transform Tripartite Member States' economies to 'knowledge-based and innovation-driven economies ' so as to be more competitive in the global economy". 

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members of different African RECS are also members of regional intellectual property communities in Africa which envisage the protection and promotion of expressions of folklore.

6.4 *International perspectives in the protection of expressions of folklore*

6.4.1 *Introduction*

In this section of the chapter I examine multilateral normative frameworks which directly or indirectly affect the protection of expressions of folklore in Africa. These normative frameworks result from treaties both concluded and proposed that potentially affect the protection of expressions of folklore examined in previous chapters of this thesis. The international dimensions of the protection of expressions of folklore are important because of globalisation and the way people and multinational companies are able to appropriate and use expressions of folklore where their domestic legal systems do not prohibit such use. An international framework ensures uniform default rules important to the protection of expressions of folklore. In this regard the following frameworks will be considered.

The first normative framework is located at the World Intellectual Property Organisation (WIPO) and includes the *Berne Convention*; the *WPPT*; the *Rome Convention*; and the *Paris Convention*. The proposed WIPO international treaty on traditional cultural expressions will also be discussed.

The second framework is the *World Trade Organisation (WTO) Agreement*, while the third normative framework is made up of the UNESCO treaties. The fourth framework involves the international protection of indigenous peoples and communities which, although appropriate in this chapter, will be discussed in Chapter 7.

The importance of international protection for expressions of folklore lies in the articulation of minimum standards of protection which ensures that expressions of
folklore are protected in accordance with these minimum standards in all states party to the framework. One of the difficulties in the international protection of folklore lies in a consensus as to these minimum standards which is still being sought in the proposed WIPO international treaty on the protection of expressions of folklore. At present, even though there are national frameworks for protection of expressions of folklore such as those in Nigeria, Ghana and Kenya, many countries in Europe and North America have no such protection making them likely sites for the misappropriation, distortion and mutilation of expressions of folklore.

6.4.2 Protection of expressions of folklore by the treaties managed by the World Intellectual Property Organisation (WIPO)

The World Intellectual Property Organisation is charged by the WIPO Convention with the primary objective of promoting and protecting intellectual property throughout the world through cooperation amongst states and, where appropriate, in collaboration with any other international organisation. In discharging this mandate WIPO has assisted in the conclusion and management of a number of treaties which directly and indirectly impact on the protection of folklore. This section of the chapter deals with a number of intellectual property treaties which impact on the protection of folklore, before considering the emergent international treaty on the protection of expressions of folklore.

6.4.2.1 Berne Convention for the Protection of Literary and Artistic Works

Article 15(4) of the Berne Convention appears to have been the first attempt to protect expressions of folklore by copyright. Introduced at the 1967 Stockholm Diplomatic Conference, the Berne Convention Acts of Stockholm (1967) and Paris (1971) provide that:

(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.
(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

It is to be noted that the designation of a national authority is optional and Berne states could decide not to designate such an authority. In addition there must be legislation that makes provision for the protection of expressions of folklore. Without such provisions protecting folklore, seeking international protection will be meaningless.682 It is also important to note that publication in many respects nullifies the protection offered by article 15(4) which applies to many published expressions of folklore. It is also a condition that a designated national authority who would manage the protection of expressions of folklore must be communicated to the Director-General of WIPO. As it appears that only one country683 has submitted this communication, the conclusion that this procedure is not attractive to Berne states in general and developing countries in particular is justified. All the countries of study are party to the Berne Convention.

6.4.2.2 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)

The Rome Convention extends protection to performers who are defined in article 3 as actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play, or otherwise perform literary or artistic works. It is generally thought that performers of expressions of folklore would qualify for protection under the Rome Convention since some expressions of folklore would qualify as literary or artistic works. It was the specific omission of expressions of folklore that created some doubt as to whether expressions of folklore are contemplated by the Rome Convention. Of the countries of study, only Nigeria is party to this convention.

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682 See Farley 1997 Connec L Rev 43.
683 See Berryman 1993 J Intell Prop L 315.
6.4.2.3 WIPO Copyright Treaty

Article 5 of the WIPO Copyright Treaty, 1997, (hereafter WCT)\(^{684}\) protects compilers of data or other material which by reason of the selection or other arrangement of their content constitute intellectual creations. Consequently, a compilation of expressions of folklore receives protection as a database. The protection of expressions of folklore does not extend to the expressions of folklore but only to their compilation as a database. Again this affords very limited protection. Ghana is the only state under study which is party to this Convention. The other countries – Kenya, Nigeria and South Africa – have, however, signed the Convention.

6.4.2.4 WIPO Performances and Phonograms Treaty

Whatever doubt existed under the Rome Convention with respect to the protection of expressions of folklore, has been dispelled by the WPPT. Article 2(a) of this treaty defines performers to include actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary and artistic works or expressions of folklore. Performers of expressions of folklore, therefore, enjoy protection – which includes a number of exclusive rights – under the WPPT.\(^{685}\)

It is to be noted that the protection offered performers by the Rome Convention and the WPPT involve only certain expressions of folklore in the area of literary and artistic works. Therefore, while traditional plays, songs and folktales are covered, many other types of expression of folklore are not protected because they cannot be performed. Again it is to be noted that the protection is for the performers who are individuals in a community where ownership of the expressions of folklore resides in the community. The protection of expressions of folklore is, therefore, indirect as in protecting the rights of performers, the expression of folklore is protected. Again, of the countries of study only Ghana has ratified the WPPT.

\(^{684}\) 1997 (36) ILM 65.

\(^{685}\) See for example a 5 (moral rights), 6-10 (fixation, reproduction, public communication, distribution and rental; and 15 (a right to remuneration).
6.4.2.5 Paris Convention for the Protection of Industrial Property

A number of provisions in the *Paris Convention* serve as a means of protecting certain expressions of folklore. First, article 7bis provides:

1. The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.
2. Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.
3. Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.

Secondly, article 5quinquies provides that: "Industrial designs shall be protected in all the countries of the Union". Thirdly, article 10bis requires convention states to afford protection against unfair completion.686

6.4.2.6 Proposed WIPO Treaty on the Protection of Traditional Cultural Expressions

It is generally assumed that the shortcomings of the international intellectual system in providing adequate protection of expressions of folklore evident in the WTO *TRIPS Agreement*687 led to the establishment of Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) during the 26th WIPO General Assembly in 2000 to analyse "inter alia

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686 "(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (3) The following in particular shall be prohibited: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

intellectual property issues that arise in the context of the protection of expressions of folklore.\textsuperscript{688} In September 2003, the 30\textsuperscript{th} session of the WIPO General Assembly decided to extend the mandate of the IGC, to accelerate its work programme, and to focus in particular on the international dimension of folklore protection.\textsuperscript{689} The IGC has conducted extensive consultations, meetings, and hearings.\textsuperscript{690}

Important milestones in the work of the IGC include the elaboration and discussion of draft provisions on the protection of expressions of folklore. The draft provisions were commissioned by the 6\textsuperscript{th} session of the IGC in March 2004 and arose from the work of the previous five sessions. The 7\textsuperscript{th} session of the IGC in November 2004 reviewed the first draft of the draft provisions.\textsuperscript{691} Periods for comment followed during which stakeholders including member states, indigenous peoples, as well as other communities commented on the draft provisions. An open commenting process ran between the 7\textsuperscript{th} and 8\textsuperscript{th} sessions of the IGC and formed the basis for a revised draft which was extensively reviewed by the 8\textsuperscript{th} and 9\textsuperscript{th} sessions. The second commenting process reviewed the revised drafts for consideration by the 10\textsuperscript{th} IGC session in November/December 2006. At its 15\textsuperscript{th} session during December 2009, the IGC established an intersessional written commenting process for the period between the 15\textsuperscript{th} and 16\textsuperscript{th} sessions to allow for comment on drafting proposals and other comments on the draft provisions. Following its 16\textsuperscript{th} session which took place during May 2010, the IGC’s first Intersessional Working Group (IWG 1) met from 19-23 July 2010, under the chairmanship of Savitri Suwansathit (Thailand). IWG 1 addressed TCEs. Experts worked intensively and produced a draft set of articles on TCEs which was transmitted to the 17\textsuperscript{th} session of the IGC (6 - 10 December 2010).

At its 17\textsuperscript{th} session the IGC considered the results of the first IWG on TCEs. It accepted the first text on TCEs as the basis for ongoing work, and an open-ended informal drafting group further streamlined and improved the text.

\textsuperscript{688} See WO/GA/26/6 para 13.
\textsuperscript{689} See WO/GA/20/8 paras 94 and 95.
\textsuperscript{690} A comprehensive discussion of the work of the IGC can be found in Wendland "It’s a small world (After All)" 150-181.
\textsuperscript{691} The first review is contained in WIPO/GRTKF/IC/7/3.
The 19th IGC session (18-22 July 2011) developed a text for an international legal instrument aimed at ensuring the effective protection of traditional cultural expressions and submitted it to the WIPO General Assembly 2011. The work of the IGC continued and the Committee met to consider the text of an international treaty, which was scheduled to be transmitted to the WIPO General Assembly, at the IGC’s 22nd session in July 2012.692 Work on the draft articles continued until the IGC’s 27th session (24 March – 4 April 2014) where the Committee decided that draft articles for the protection of traditional cultural expressions693 should be transmitted to the WIPO General Assembly to be held in September 2014 subject to any agreed adjustments and modifications arising on crosscutting issues at the 28th session of the IGC (July 2014).

With the caution that the eventual text of a treaty protecting traditional cultural expressions may change over time, it would appear worthwhile to review draft articles for the international treaty for the protection of TCES as prepared at the 27th session of the IGC as they clearly point to the general perspectives and policy options for the protection of traditional cultural expressions.

6.4.2.6.1 Draft articles on traditional cultural expressions as at the 27th session of the IGC

A number of principles for the protection of expressions of folklore are listed in Draft IGC 27. These objectives include the recognition that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial, and educational values, while acknowledging that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as humanity as a whole. Another objective is the promotion of respect for
traditional cultures and folklore, the dignity, cultural integrity, and philosophical,

692 See "The Protection of Traditional Cultural Expressions: Draft Articles" WIPO/GRTKF/IC/22/4 of 27 April 2012 (hereafter Draft IGC 22.)
intellectual, and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore.

Other objectives include: meeting the actual needs of communities; preventing the misappropriation and misuse of traditional cultural expressions; empowering communities effectively to exercise their rights and authority over their own traditional cultural expressions. Supporting customary practices and community cooperation, contributing to safeguarding traditional cultures, encouraging community innovation and creativity, promoting intellectual and artistic freedom, research and cultural exchange on equitable terms, are other objectives. The promotion of intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities and traditional and other cultural communities, is also an objective, as are a recognition of a vibrant public domain and a body of knowledge available for everybody to use, the recognition of existing third party rights, contribution to the promotion and protection of the diversity of cultural expressions; the promotion of the development of indigenous peoples and communities and traditional and other cultural communities, as well as legitimate trading activities. The treaty should also preclude unauthorised intellectual property rights and improve certainty, transparency, and mutual confidence.

A number of more specific objectives are listed in Draft IGC 27. The first objective is to provide a legislative or policy means by which: (a) to prevent misappropriation and misuse of traditional cultural expressions; (b) control ways in which traditional cultural expressions are used beyond a cultural and traditional context; (c) promote the equitable sharing of benefits for the use of traditional cultural expressions; and (d) encourage tradition-based creation and innovation. The second objective is to prevent the grant, exercise, and enforcement of inappropriately acquired intellectual property rights, while the third objective is the promotion of intellectual and artistic freedom. The fourth objective is to secure existing third-party rights.
Specific articles in the Draft IGC 27 will now be examined more closely as they expose many of the issues still subject to discussion that point to the shape of the possible treaty.

The first substantive issue dealt with by Draft IGC 27 appears in article 1 which covers the subject matter of protection. This provision is somewhat unique in that it contains no enumeration of the types of expression of folklore.

Article 2 of Draft IGC 27 recognises alternative beneficiaries. The first is indigenous peoples' local communities and nations. The second is the nation state. Deference to national law in the determination of beneficiaries should be carefully considered as it opens the way to the vesting of folklore in competent national authorities as is currently the position in Ghana, Kenya and Nigeria. On the other hand, there is a need for an administrative solution to deal with instances where it is not possible to identify the community which own expressions of folklore in cases of disagreement or a lack of evidence. This possibility is strengthened by article 2.2 of Draft IGC 27 which recognises that member states may act for indigenous peoples and local communities if this is permissible under national law.

The scope of protection of expressions of folklore provided for in article 3 of Draft IGC 27, introduces a tiered approach to the protection of folklore based on the nature of the expression. Where the expression of folklore is sacred or secret, article 3 recognises the importance of a form of positive protection of the collective and exclusive rights against third-party use. If the expression is in the public domain but not widely known, a number of options are available. One option requires only a respect for the moral rights of communities coupled with fair and

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694 The subject matter of [protection]/[this instrument] is traditional cultural expressions: (a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities [or nations] [whether they are widely spread or not]; [and]/[or] (b) that are [the unique product of] [directly] [linked with]/[distinctively associated with] the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations]; [and]/[or] (c) that are transmitted from generation to generation, whether consecutively or not; [and]/[or] (d) that have been used for a term as has been determined by each [Member State]/ [Contracting Party] [but not less than 50 years]; [and]/[or] (e) that are the result of [creative intellectual activity]/[creative activity of the intellect]]; [and]/[or] (f) which are/may be dynamic and evolving.]
equitable compensation for the use of the expressions of folklore. While this is an example of negative protection, the other option leans towards positive protection in terms of an agreement based on the prior informed consent of the community. However, where the expression of folklore is widely known, there are again alternatives. The first is that only respect for the moral rights and the payment of a user fee to a state-constituted fund is permitted. The second regards such an expression of folklore as part of the public domain with the result that it suffers a lack of protection.

Article 4 of Draft IGC 27 provides for an agreed understanding on the administration of protection of expressions of folklore. There is a requirement for the establishment of a competent national authority with an alternative that entrusts the management of these rights to the authority. A further option requires communities to decide whether they want the service or not. Exceptions and limitations are found in article 5 of Draft IGC 27. Article 5(1) contains alternatives which revolve around the three-step test. The difference between the alternatives is that one requires the exceptions and limitations to be at the instance of the communities. Article 5(2) empowers member states to determine whether exceptions and limitations are to be created in the case of secret or sacred expressions of folklore. A number of specific exceptions are listed in article 5(3), while article 5(4) protects existing rights.

The term of protection of expressions of folklore is addressed by article 6 of Draft IGC 27 which offers three options. One option limits protection to the ability of the

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5.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [with the prior informed consent or approval and involvement of the beneficiaries] [in consultation with the beneficiaries] [with the involvement of beneficiaries]], provided that the use of [protected] traditional cultural expressions: (a)[acknowledges the beneficiaries, where possible;] (b) [is not offensive or derogatory to the beneficiaries;] (c)[is compatible with fair use/dealing/practice;](d)[does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and] (e)[does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]] Alternative 5.1[[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]: (a) are limited to certain special cases; (b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;] (c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;] (d) [ensure that the [use] of traditional cultural expressions: i. is not offensive or derogatory to the beneficiaries; ii. acknowledges the beneficiaries, where possible;] and iii. [is compatible with fair practice.]"
expression of folklore to meet the criteria for protection – with the exception of moral rights which shall be indefinitely protected. The second option aligns the term of protection with the tiered framework of protection in article 3 of Draft IGC 27. The third option stipulates time-limited protection for the economic aspects of traditional cultural expressions.

As a general principle, Draft IGC 27 contains two options. On the one hand, that the protection of traditional cultural expressions shall be subject to no formalities, while on the other it may be subject to certain formalities.696 Sanctions, remedies, and the exercise of rights are also provided for in Draft IGC 27.697 One option recognises the need for member states to take national measures against the wilful or negligent infringement of the economic and/or moral interests of the beneficiaries which are adequate so as to constitute a deterrent to further infringements. The second option is far more detailed and requires that accessible, appropriate, and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions, and remedies including criminal and civil remedies, should be available in cases of breach of the protection of traditional cultural expressions. There is a proposed article 8(2) which deals with the possibility of alternative dispute resolution. In terms of this provision, where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognised by international and/or national law. Article 8(3) provides that national law should govern the means of redress to safeguard the protection offered for expressions of folklore. Article 8(4) recognises the rights of member states to revoke any IPR right made up of expressions of folklore obtained without prior informed consent.

A number of transitional measures for traditional cultural expressions on the coming into effect of the treaty are recognised by the Draft IGC 27.698 Two options are provided for in terms of this article. Option one requires the state to ensure the necessary measures to secure the rights, acknowledged by national law, already

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696 A 7.
697 A 8.
698 A 9.
acquired by third parties. Option two requires continuing acts in respect of traditional cultural expressions that commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable time after their entry into force, subject to respect for rights previously acquired by third parties qualified by paragraph 3. Where, however, traditional cultural expressions have special significance for the relevant communities having rights thereto and have been taken without consultation the communities shall have the right to recover the traditional cultural expressions.\textsuperscript{699}

The relationship between a TCE treaty with intellectual property protection and other forms of protection, preservation, and promotion is addressed by \textit{Draft IGC 27} where it provides that "protection under this instrument should take into account and operate consistently with other international legal instruments, including those dealing with intellectual property and with cultural heritage".

The principle of national treatment is recognised in \textit{Draft IGC 27},\textsuperscript{700} as is the principle of trans-boundary cooperation.\textsuperscript{701} Article 13 provides for capacity-building and awareness-raising of beneficiaries, as well as the development of institutional capacities to implement a protective framework.

\textbf{6.4.2.6.2 Assessment of \textit{Draft IGC 27} as regards the protection of expressions of folklore}

Given the difficult and lengthy negotiations towards an international draft treaty for the protection of expressions of folklore, it is clear that the \textit{Draft IGC 27} will be one of many to emerge from the process. With that caution in mind, there are trends and perspectives that emerge from this draft which demand further evaluation as they signpost issues that will confront any treaty on the protection of expressions of folklore.

\textsuperscript{699} A 9(3).
\textsuperscript{700} A 11.
\textsuperscript{701} A 12.
It would appear that the *Draft IGC 27* at present offers two approaches. One approach reflects a consensus amongst WIPO stakeholders on certain issues. This results in a treaty which will require detailed and exhaustive norms. This is evident in the different options addressing beneficiaries and the scope of protection. Also evident in *Draft IGC 27* is the recognition of the diversity of approaches on policy issues when it comes to the protection of expressions of folklore. This has resulted either in state parties being accorded the discretion to choose policy issues at national level, or casting the articles at highly abstract level which reflects a consensus of a diversity of state parties.

One of the structural challenges facing a draft treaty for the protection of expressions of folklore is the extent to which domestic courts of state parties will be required to defer to foreign national law, especially determinations made by foreign courts. This challenge is based on the strict rules of territoriality which underlie international intellectual property. There are a number of issues in which the determination of foreign law will be crucial. These issues include the nature of the subject matter, the beneficiaries, the scope of protection, and the nature of formalities required for the entitlement to the protection of the treaty.

Another challenge is the extent to which a treaty for the protection of expressions of folklore will be affected by the WTO Agreement in general, and the *TRIPS Agreement* in particular. The impulsive response to this challenge is that the two treaties are different and will not affect each other. Our evaluation later in this chapter will indicate that even though the *TRIPS Agreement* is silent on expressions of folklore, the as the possibility exists for positive protection through the grant of exclusive rights, this may well have an effect on intellectual property rights and therefore the *TRIPS Agreement*. Accordingly, this is one of the challenges that await the conclusion of a treaty.
Of importance is the phrasing of exceptions and limitations. Will a resort to the three-step test\textsuperscript{702} be meaningful in the protection of exceptions of folklore? One of the key concerns of the protection of expressions of folklore is the fear that significant swathes of the public domain will be sequestered from the public thereby hindering innovation and creativity. Accordingly, a regime of exceptions and limitations that identifies the works that are freely available to the public, is important in any intellectual property protective framework. How exceptions and limitations are phrased in a treaty protecting expressions of folklore is, therefore, of considerable importance. This is because of the possibility that the three-step test could severely constrain exceptions and limitations in copyright legislation which draws attention to the fact that using this procedure to assess the legitimacy of national exceptions and limitations in the protection of expressions of folklore, will result in a negative assessment. The available interpretations of the three-step test appear to strike down numerous exceptions and limitations. It is, therefore, important to stress that the three-step test should not be included in any treaty protecting expressions of folklore.

It would appear from Draft IGC 27 that a central position is accorded communities as is evident from the definition of the subject matter of protection, the customary laws and protocols of communities in the protection of expressions of folklore, the beneficiaries of protection, as well as the process of seeking assistance from competent national authorities. However, the recognition of nations as possible beneficiaries in the eventual treaty would undermine the status of communities.

What are the implications for the national treatment standard and rights of members of the communities who produce expressions of folklore? Two options seem possible. On one hand, state parties who do not accord a better treatment to members of a folklore-producing community than to other citizens of their state and

\textsuperscript{702} The three-step test is a governing principle in the design and interpretation of exceptions and limitations to ensure that exceptions and limitations do not affect the economic exploitation of intellectual property rights. An example is found in a 13 of the TRIPS Agreement which provides that: "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."
to foreigners, would significantly challenge what membership of a community entails in that a key benefit of membership of a community is egalitarian access to and participation by its members in communal resources and protocols. The other option which Draft IDC 27 proposes is the recognition that the traditional or non-commercial participation of members of a community falls beyond the protective model for expressions of folklore. Without such an acknowledgment, the usual processes of collective creativity will not be sustainable.

One of the most critical issues in Draft IGC 27 is the tiered protection of expressions of folklore. A sticky point is how to determine the different status of expressions of folklore, and how to prove that an expression of folklore is secret/sacred, well know, or public. The fact that communities will suffer as a result of initial misappropriation is also a cause for concern. Therefore a secret or sacred expression of folklore is made available to the public and loses its proprietary character through third-party use rather than as a result of the conscious decision of the owner.

6.4.3 WTO TRIPS Agreement and the international protection of expressions of folklore

The fact that expressions of folklore can be articles of trade and form the subject of intellectual property protection makes the World Trade Organization (WTO) Agreement an important multilateral treaty that could significantly impact on expressions of folklore. How this could be so is explored below.

The World Trade Organisation became operational on 1 January 1995 following the success of the Uruguay-Round negotiations which resulted in the Marrakech Agreement on the Establishment of the World Trade Organisation signed in April 1994. For the preceding almost fifty years, the General Agreement on Tariffs and Trade, 1994,703 (the GATT 1994) functioned as the international organisation for trade, but was concerned largely with the harmonisation of tariffs. The WTO was conceived as a more encompassing trade organisation and the vehicle for free trade.

703 1967 UNTS 187.
The principal source of the WTO law is the *Marrakech Agreement* which is the basic agreement. There are many other agreements and understandings included as annexes. Annex 1 is made up of three parts: Annex 1A which contains thirteen multilateral agreements on trade in goods; Annex 1B which contains the *General Agreement on Trade in Services* (the *GATS*); and Annex 1C containing the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the *TRIPS Agreement*). Annex 1A contains agreements such as the *GATT 1994*; the *Agreement on Technical Barriers to Trade* (the *TBT Agreement*); the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the *Anti-Dumping Agreement*); and the *Agreement on Subsidies and Countervailing Measures* (the *SCM Agreement*). The WTO dispute settlement mechanism and trade policy review are contained in Annexes 2 and 3 respectively. It is to be noted that agreements in Annexes 1 to 3 are binding on all WTO members.

There are four key principles and rules underpinning the WTO. They are, first, the principles of non-discrimination achieved by the obligations of most favoured nation (MFN) treatment and national treatment. The MFN treatment obligation requires a WTO member that grants favourable treatment to one country to grant that same treatment to all other WTO members. The MFN treatment ensures equal opportunity in export and import for all WTO members. The national treatment obligation, on the other hand, requires a state to treat foreign products in the same way it treats local products.

Secondly, there are rules governing market access including rules on customs duties and quantitative restrictions. The rules on market access seek to ensure that foreign goods are not impeded by tariff barriers like customs duties, or non-tariff barriers like quantitative restrictions such as quotas. Thirdly, there are rules on unfair trade which includes rules on subsidies, and fourthly, there are rules embodying general exceptions. These exceptions are recognised to protect other important societal values. In this regard the most important exception is article XX(f) of *GATT*

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704 See a 1:1 of *GATT 1994*.
705 See a III of *GATT 1994*.
706 See a XX *GATT 1994*.
which provides that nothing in *GATT 1994* shall prevent the adoption or enforcement of any measure "imposed for the protection of national treasures of artistic, historic or archaeological value".

In the main, the *TRIPS Agreement* requires WTO member states to implement minimum standards of intellectual property protection with certain flexibilities in national legislation. The *TRIPS Agreement* allows member states the flexibility to determine how to implement these minimum national standards.\(^{708}\) Again, as the *TRIPS Agreement* requires only minimum standards, it follows that WTO member states can enact higher standards of intellectual property protection.

Another key component of the *WTO Agreement* is the compulsory dispute settlement mechanism for disputes relating to the interpretation of provisions of the Agreement. Consequently, disputes over whether national legislation violates the *TRIPS Agreement* may become a subject matter of the WTO dispute settlement mechanism. It is therefore plausible to imagine a complaint that national legislation protecting expressions of folklore breaches the *TRIPS Agreement* because it breaches the minimum standards of intellectual property required by the *TRIPS Agreement*.

Given the nature of the *TRIPS Agreement* it is important to determine whether or not expressions of folklore are protected as part of the minimum standards of intellectual property protection in the Agreement. The *TRIPS Agreement* does not mention traditional knowledge or expressions of folklore and does not provide minimum standards for expressions of folklore. To conclude, however, that for this reason the *TRIPS Agreement* does not affect expressions of folklore would be too hasty an assumption. There may indeed be a connection in that the minimum standards of intellectual property protection mandated by the *TRIPS Agreement* impact on subject matter that may also qualify as an expression of folklore. Therefore, if a WTO member were to implement copyright reform on the basis of the

\(^{707}\) Note also a XX(d) of *GATT 1994*.

\(^{708}\) See a 1.1 of the *TRIPS Agreement* which provides that: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system or practice."
TRIPS Agreement, the effect of the national legislation could also affect certain expressions of folklore which are eligible for copyright. In this regard there are many provisions in the TRIPS Agreement which apply to expressions of folklore and the nature of these provisions may indicate a link between the TRIPS Agreement and expressions of folklore.

The possibility that the TRIPS Agreement’s provisions on copyright and related rights will apply to expressions of folklore would appear to be indirect because, as noted above, the content of the expression of folklore is protectable as copyright. Article 9(1) of the TRIPS Agreement incorporates articles 1 – 21 of the Berne Convention 1971 and the Appendix thereto. The other provisions of the TRIPS Agreement with respect to the availability, scope, and use of copyright and related rights include article 10(1) which stipulates that computer programs shall be protected as literary works; article 10(2) which recognises databases; and article 11 which recognises rental rights. Article 12 stipulates that the term of protection for copyright – other than photographic work or work of applied art – shall not be less than 50 years. Article 13 stipulates that members shall confine limitations or exceptions to exclusive rights to certain special cases which neither conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the right holder. Since this is a minimum standard, WTO members may well be concerned if national legislation or an international treaty protecting expressions of folklore were to lower these standards. If national legislation chooses to use copyright and related rights to protect expressions of folklore it will be difficult to sustain an argument that the TRIPS Agreement does not affect to the legislation. The matter may not be straightforward if the national legislation is sui generis, but in many ways appears to lower the minimum standards imposed by the TRIPS Agreement.

The nature of protection mandated by the TRIPS Agreement for geographical indications is such that any national legislation on geographical indication is likely to fall within the ambit of the TRIPS Agreement. WTO member states are obliged to provide the legal means for interested parties to prevent the use of geographical

709 WTO members are not to have rights and obligations emanating from a 6bis of the Berne Convention which makes provisions for moral rights.
indications that constitutes unfair competition. Arguably, a misappropriation of a geographical indication would constitute unfair competition. Along this line of reasoning, it would seem that because the obligations imposed by the *TRIPS Agreement* are broad, most national legislation seeking to protect geographical indications as expressions of folklore would satisfy the obligations with respect to the protection of geographical indications. It may well be that national legislation protecting expressions of folklore is within the purview of the *TRIPS Agreement*. Consequently, legislation such as the South African *Merchandise Marks Act* and the Ghanaian *Geographical Indications Act* discharge the obligations imposed by the *TRIPS Agreement* and become a basis for international protection through the ability to register the geographic indication or prevent third parties from registering it.

It is, however, the extension of multilateral protection for geographical indications beyond wines and spirits as currently found in the *TRIPS Agreement* that would ensure the effective national protection of geographical indications.

The obligation to ensure that undisclosed information is protected from unfair competition would attract the same comments as the obligation to protect

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710 A 22(2) of the *TRIPS Agreement* provides that: "In respect of geographical indications, Members shall provide the legal means for interested parties to prevent (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)."

711 See Chapter 5.2.2.

712 See Chapter 5.3.4.

713 See, for example, European Union Council Regulation 510/2006 of 20 March 2006 under which a geographic indication could be registered in the European Union. See, however, Ngokkuen and Grote 2012 *Asia-Pacific Development Journal* 93-123 for an account of the unsuccessful attempts by Thailand stakeholders to register jasmine rice.


716 See a 39(2) of the *TRIPS Agreement* which provides that: "Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been
geographical indications. Most national legislation which seeks to protect undisclosed information would satisfy the requirements of article 39 of the TRIPS Agreement. This fact may cast such national legislation within the purview of the TRIPS Agreement. Again, as stated above, these provisions mandate minimum standards for intellectual property and not expressions of folklore.

On the other hand, it may be concluded that the TRIPS Agreement does not apply to expressions of folklore.\(^{718}\) It is often pointed out in furtherance of this view that in terms of paragraph 19 of the Doha Ministerial Declaration,\(^{719}\) the TRIPS Council was instructed to examine the protection of expressions of folklore, a mandate it has not taken seriously.

The argument that the TRIPS Agreement does not apply to folklore may be attenuated if a WTO state were to choose a positive protection of expressions of folklore through the grant of intellectual property rights or rights akin to intellectual property rights.\(^{720}\) It may well be argued that choosing this route of protection, necessarily draws in the TRIPS Agreement because to hold otherwise would unduly prejudice national intellectual property rights. The implications of the application of the TRIPS Agreement to expressions of folklore require that national legislation implementing the Agreement conform to its structure. For example, it is clear that the main thrust of the protection of expressions of folklore is to restrict their misappropriation by intellectual property rights except with the consent of and benefit to the owners of the expressions of folklore. In large measure, the content from which copyright is created is fundamentally affected by the protective regimes of expressions of folklore.

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718 See, for example, Van den Bossche The law and policy of the World Trade Organization 747.
719 Para 19 of The Doha Ministerial Declaration: "We instruct the Council for TRIPS, in pursuing its work program including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, [...] the protection of traditional knowledge and folklore [...]. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension." (WTO-Ministerial 2001).
In the event of subsequent developments in the protection of expressions of folklore the practical effect of the protection of these expressions will be that what was ordinarily available for creative activity is in a sense sequestered. To proceed to regard expressions of folklore as a restraint upon copyright and other intellectual property rights is not entirely correct – though inevitable – given the fact that the TRIPS Agreement is silent on expressions of folklore. One of the difficulties of this line of enquiry is that expressions of folklore will naturally be regarded as an exception and a limitation within the TRIPS Agreement structure, requiring an assessment of its provisions for compliance with the three-step test as set out in article 13 for copyright, and article 17 for trademarks. If the literature and case law on the interpretation of the three step test, considered in Chapter 5 is anything to go by, it is clear that national legislation protecting expressions of folklore may not survive the three-step test. On this score it would appear better to regard expressions of folklore as a distinct intellectual property right.

A further implication implicit in the view that expressions of folklore are contemplated by the TRIPS Agreement, is that rules of non-discrimination – for example, national treatment – apply to national legislation protecting expressions of folklore. It can be asserted as a first proposition in this line of inquiry that the nature of expressions of folklore may render national treatment difficult. This is because of national frameworks that confer benefits on members of the communities who own the expressions of folklore. When members of communities are treated differently from fellow citizens of a WTO state, or foreigners, it is likely that a complaint of breach of national treatment guaranteed by article 3 of the TRIPS Agreement will lie.\textsuperscript{721}

\textsuperscript{721} "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS."
In conclusion of this section, it is evident that at the least national and international frameworks that grant exclusive rights over expressions of folklore will pose some challenges to the WTO Agreement in general, and the TRIPS Agreement in particular.

6.4.4 Protection of expressions of folklore at the United Nations Educational Social and Cultural Organisation (UNESCO)

The United Nations Educational Social and Cultural Organisation (UNESCO) has been active in the field of the protection of expressions of folklore as part of its work on mainstreaming culture as a tool for sustainable development. The first article of the Constitution of UNESCO provides that its functions include to

...contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law, and for human rights and fundamental freedoms which are affirmed for peoples of the world...by the Charter of the United Nations.

It is to be remembered that the Model Law was a joint effort between UNESCO and WIPO. In its work so far two conventions affect the protection of expressions of folklore. The first is the CCH and the second is the CCD. In the main, the two Conventions deal with the cultural rights of states, communities, and individuals in a way that is explored below.

6.4.4.1 Convention on the Safeguarding of Intangible Cultural Heritage (CCH)

Article 1 of the CCH declares that its purpose is to safeguard the intangible cultural heritage; to ensure respect for the intangible cultural heritage of the

722 See, for example, UNESCO Universal Declaration on Cultural Diversity 2001.
724 There are over 200 state parties which include many African states such as the countries of study.
725 A 2 of the CCH defines intangible cultural heritage as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to
communities, groups, and individuals concerned; to raise awareness at the local, national and international levels of the importance of intangible cultural heritage, and of ensuring mutual appreciation thereof; and to provide for international cooperation and assistance. A number of points need to be clarified with respect to the objectives of the CCH.

First, it is clear that the definition of intangible cultural heritage contemplates expressions of folklore and is therefore of importance in understanding the protection of the latter. This definition highlights the fact that communities are at the heart of intangible cultural heritage and it is what is significant to them that matters in identifying intangible cultural heritage.726

Secondly, the meaning of safeguarding as set out by the CCH would indicate a remit larger than mere protection

...measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

Of the countries of study only Nigeria is a state party to the CCH.

6.4.4.1.1 Key features of the CCH

One of the key provisions in the CCH is the establishment of an Intergovernmental Committee for the Safeguarding of the Internal Cultural Heritage.727 The functions of the Intergovernmental Committee include to: promote the objectives of the

their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. A 2 of the CCH further defines intangible cultural heritage as (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship".

726 See Coombe and Turcotte "Indigenous cultural heritage in development and trade" 272-285.
727 See a 5 of the CCH.
Convention and to encourage and monitor its implementation; provide guidance on best practices; make recommendations on measures to safeguard intangible cultural heritage; and prepare operational directives for the implementation of the CCH.²²⁸

A number of provisions impose obligations on state parties. Article 11 of the CCH requires each state party to take the necessary measures to ensure the safeguarding of the intangible cultural heritage within its territory. These measures are to include identifying and defining the various elements of the intangible cultural heritage present in its territory with the participation of communities, groups and relevant non-governmental organisations. To ensure identification with a view to safeguarding, article 12 of the CCH requires each state party to draw up, in a manner geared to its own situation, one or more inventory of the intangible cultural heritage present in its territory. These inventories must be updated regularly.²²⁹

While article 14 imposes a number of obligations with respect to education, awareness-raising, and capacity-building,²³⁰ article 15 requires the widest possible participation by communities, groups and individuals.

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²²⁸ See a 7 of the CCH.
²²⁹ Other measures for safeguarding are provided for by a 13 and require each state party to endeavour to: (a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and to integrate the safeguarding of such heritage into planning programmes; (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory; (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger; (d) adopt appropriate legal, technical, administrative and financial measures aimed at fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof; ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage; and establishing documentation institutions for the intangible cultural heritage and facilitating access to them.
²³⁰ A 14 of the CCH provides that: "Each State Party shall endeavour, by all appropriate means, to: (a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society, in particular through: (i) educational, awareness-raising and information programmes, aimed at the general public, in particular young people; (ii) specific educational and training programmes within the communities and groups concerned; (iii) capacity-building activities for the safeguarding of the intangible cultural heritage, in particular management and scientific research; and (iv) non-formal means of transmitting knowledge; (b) keep the public informed of the dangers threatening such heritage, and of the activities carried out in pursuance of this Convention; (c) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage."
6.4.4.2 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions (CCD)

On 18 March 2007 the CCD entered into force three months after the 30th instrument of ratification was deposited. Adopted in 2005 by a vote of 148 to 2,\textsuperscript{731} the Convention is made up of many African countries.\textsuperscript{732} The CCD is the culmination of long-standing efforts to treat culture as a unique category in international trade.\textsuperscript{733}

The CCD enables state parties to adopt trade and cultural policies at national level in order to develop and sustain a cultural industry that is able to energise and participate in the global trade in cultural goods and service. In this regard the CCD supports the development of an effective policy regime for the protection and promotion of expressions of folklore.

Since a key element in the CCD is that it enables member states to protect and promote the diversity of cultural expressions within the territories of member states, there is no doubt that the Convention is protectionist in that it favours local cultural industries over their foreign counterparts. Most of the CCD state parties are also WTO member states. Given the WTO’s essence of free trade, a fundamental bone of contention is how the protectionist rules of the CCD can interface with the free trade rules of the WTO. At the global level, the CCD could be said to challenge a key process in globalisation: the standardisation of markets, products, and processes based on the neo-liberal ideal that states are equal and that the market is the best way for states to maximise their resources and global wealth. Free trade emphasises the commercial aspects of cultural goods and in a globalised world there is a very strong chance that foreign cultural goods marketed by powerful monopolistic multinational companies could swamp local cultural goods and ultimately impose foreign cultural values.

\textsuperscript{731} Israel and United States voted against the Convention.
\textsuperscript{732} All the countries of study except Ghana have become state parties.
\textsuperscript{733} See a 29 of the CCD.
The CCD further represents a rejection of the idea that free trade is an end in itself and more important than non-trade values such as culture, which are equally important. In this way it can be understood that it is the inability of the WTO to accommodate national non-trade concerns that led to countries with a common interest seeking protection outside of the system.

6.4.4.2.1 Key features of the CCD

Article 1 of the CCD lists the objectives of the Convention. The rights and obligations of state parties are set out in article 6 and seem ideally suited to guide the articulation and development of a state's cultural policy and measures. Each state party is permitted to adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory. It is important to note that these measures are not restricted to cultural policies but include all measures.

734 These objectives are to: "(a) to protect and promote the diversity of cultural expressions; (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner; (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace; (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples; (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels; (f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link; (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning; (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory; and (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expression."

735 A 4(6) provides that "Cultural Policies and Measures" refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution and access of cultural activities, goods and services. These measures may include the following: (a) regulatory measures aimed at protecting and promoting diversity of cultural expressions; (b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services; (c) measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services; (d) measures aimed at providing public financial assistance; (e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists
Article 7 of the Convention permits state parties to adopt measures to promote cultural expressions which should provide an environment in their countries which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expression, paying due regard to the special circumstances and needs of women, as well as various social groups, including persons belonging to minorities and indigenous people. A related provision in the Convention is article 13 which encourages state parties to endeavour to integrate culture within their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

Attention must be drawn to article 8 of the Convention which provides that in peculiar situations a state party may adopt special measures to protect cultural expressions in its territory which are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

6.4.4.2.2 Assessment of the UNESCO CCD

First, there is no doubt that the Convention is a strong tool for the countries of study, like all other developing countries, to develop their national cultural capacity. In this regard, it must be noted that the Convention permits states to use "all" measures to develop their cultural industries and their creative capacity. Consequently, these measures may fall within any sector provided they impact on the cultural sector.

Secondly, it is important to assess the Convention to determine whether it created an exclusive and obligatory legal regime of trade in cultural goods and services. In other words, is the Convention a trade regime parallel to the WTO and other bilateral and multilateral agreements, such that members of the latter can rely on and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities; (f) measures aimed at establishing and supporting public institutions, as appropriate; (g) measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions; (h) measures aimed at enhancing diversity of the media, including through public service broadcasting.
the Convention to govern trade in cultural goods and services? For a number of reasons, the answer appears to be in the negative. The Convention does not create a compulsory dispute settlement mechanism. Its members are free to reject the conciliation provided for in article 25 of the *CCD*. Moreover, state parties have a wide discretion as to what measures they can adopt in their territories even if the Convention grants them the right to do so. State parties are consequently under no obligation to take those measures and there may be nothing much that can be done if a state party does not take all or any of these measures. This is largely due to the use of the word "may" in the relevant articles. Furthermore, this discretion is evident in the relevant parts of the *CCD* which provide for international cooperation. All in all, it is clear that there are no obligations on the parties to take any capacity-building measures and therefore there may be little basis for disputes. Even if disputes do arise, there are is no compulsory dispute settlement mechanism. Clearly the standards of the *CCD* are lower than those of the WTO. When it is remembered that the *CCD* stresses that it does not modify existing treaty obligations – including those arising from the WTO agreements – it may be concluded that it is not a legal substitute for the WTO and cultural goods and services may not be out of the reach of the WTO on the basis of the Convention.

However, on deeper reflection the relationship has far reaching legal significance. It can be asserted that implementing any or all of the measures set out in articles 6, 7 or 8 of the *CCD* is sure to warrant allegations of breach of WTO Principles and Rules because many of the measures would appear to be contrary to national treatment obligations, in that they discriminate in favour of domestic artists and producers. If these policies contemplate other countries such as fellow African artists and producers, then they will also breach most-favoured-nation treatment obligations.

Even though the legal relationship between the WTO and *CCD* is a complex one, it is important to note a general indication of possible trajectories for reconciling the two Conventions. First there is the possibility that as a result of the *CCD*, far more detailed examination of the procedural and substantive exceptions contained in the

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737 See Nwauche "The UNESCO Convention" 248-274.
WTO will be undertaken. Secondly, the CCD could become an interpretative tool in WTO dispute settlement. Thirdly, the CCD could be used as a defence to a WTO dispute. Fourthly, WTO parties could incorporate the CCD into the WTO by influencing the on-going GATS negotiations on the audio visual services.\footnote{See Acheson and Maule 2004 \textit{Journal of Cultural Economics} 251.}

It is important to remember that while article 6 of the Convention sets out numerous measures which state parties may take which appear strictly protectionist and perhaps for the benefit of developed countries, they are also promotional in that in different combinations they assist in the development of significant cultural capacity.

\textbf{6.5 Conclusion: An assessment of regional and international protection of expressions of folklore}

The application of international law in municipal legal systems lies at the heart of the ability of regional and international frameworks to influence national legal systems. There are two ways by which the effect of regional and international protection of expressions of folklore can be accessed. The first is to examine the effect of existing and proposed protective frameworks within the countries of study which could be termed the internal effect. The second way, which could be termed the external effect, would be to assess the likely effect of the juridical status of international law in national systems as regards foreign state expressions of folklore. The external effect would therefore address how the expressions of folklore of the countries of study would fare in foreign states.

We turn now to an assessment of the protection of expressions of folklore by ARIPO and OAPI as examples of inter-regional cooperation followed by an assessment of proposed and existing international protective frameworks.

The foregoing analysis of the protection of expressions of folklore by OAPI and ARIPO clearly reveals that as frameworks of interregional cooperation both have far reaching effects in the national protection of expressions of folklore. Therefore, while Annex VII of the \textit{Revised Bangui Agreement} applies directly in OAPI states, the
Swakopmund Protocol will, once in force and ratified by Ghana and Kenya, have considerable effect on the Kenyan and Ghanaian protective frameworks for expressions of folklore. Our discussion of the Draft TCE Bill in Chapter 4 is evidence of the effect of treaty obligations on states.

There are differences between ARIPO and OAPI. The Revised Bangui Agreement is an example of the positive protection of expressions of folklore as it recognises the exclusive rights of communities to protect their expressions of folklore thereby enabling them to use intellectual property rights in this regard.

The Swakopmund Protocol, on the other hand, is a strong example of the negative protection of expressions of folklore in that it reserves the right of communities to object to third-party use of their expressions of folklore. Therefore, for the countries of study the OAPI protective framework offers their expressions of folklore an intellectual property protection that may not be available in their countries. The need for South Africa and Nigeria to join ARIPO has always been on the table. Given their size and economic strength there is no doubt that these two countries will significantly affect the reach and influence of ARIPO.

For South Africa, the Swakopmund Protocol appears to align with the Wilmot Bill rather than IPLAA 2013 because the provisions of the former are less extensive than those of the latter were it an Act of Parliament. The Swakopmund Protocol will entail a substantive change to the CA Nigeria. For example, it will recognise the ownership of expressions of folklore by communities and their rights of enforcement rather than the present position where the rights of control are vested in the Nigerian Copyright Commission. For both countries, however, the Swakopmund Protocol offers a useful legal framework for the protection of their expressions of folklore.

Another effect of the Swakopmund Protocol is that its framework for the settlement of intra-community disputes over straddling expressions of folklore could become a preferred means of dispute resolution, even for non-members of ARIPO such as Nigeria and South Africa, as these states are neighbours to ARIPO states.
We shall now turn to an assessment of the international perspectives in the protection of expressions of folklore. So far the treaties managed by WIPO have had little impact on the protection of expressions of folklore. It is clear from the foregoing analysis that the proposed WIPO treaty on traditional cultural expressions will have a profound effect on the national frameworks for the protection of expressions of folklore. As *Draft IGC 27* indicates, there appears to be consensus on a number of issues, including the subject matter of protection and the beneficiaries of protection. On the other hand, the rights of beneficiaries of protection are likely to remain in contention for long to come. In issue is whether communities should be entitled to exclusive rights or whether they should be entitled only to consent to the use of their expressions of folklore. The recognition of communities is the major contribution of the UNESCO treaties. In combination with the *DRIP* and the *Swakopmund Protocol*, the idea that communities can and should protect their expressions of folklore has come to stay.

The proposed WIPO treaty will set minimum standards for state parties which will result in a situation where a divergent national protection, in the sense of being of a different nature to the WIPO treaty, will be of little assistance for the former. Let us assume that any of the countries of study protect expressions of folklore in a positive framework – such as South Africa through *IPLAA 2013* – while the proposed WIPO treaty is built around a negative framework. This would mean that the rights sought to be exercised by South African owners of expressions of folklore could be attenuated. This notwithstanding, the proposed WIPO treaty would enable communities and/or their representatives to assert the rights available under the treaty as applicable or incorporated in national laws.

We turn now to the extent of the application of international law in the domestic legal systems of the countries of study. The lack of a domestic legislation with respect to an international treaty in a dualist country poses significant challenges to the ability of that state to keep faith with accepted international norms. However, we have seen that dualist countries such as South Africa and Ghana use international law as an aid to statutory interpretation in general and in human rights
litigation. It is certain that since the expressions of folklore have a serious human rights dimension, customary international law and international treaties protecting expressions of folklore will have significant effects in the countries of study.

For a monist country, however, treaties and protocols become a significant law-making mechanism. In this regard it is gratifying to note that Kenya is a monist country and that on its ratification of the Swakopmund Protocol, the Protocol will, when it comes into effect, have direct effect on the protective framework for the protection of expressions of folklore. Many provisions of the CA Kenya will need to be amended essentially highlighting the centrality of folklore-owning communities rather than the state and the Kenyan Copyright Board as the custodians of expressions of folklore.

In sum, therefore, this chapter has shown that regional and international frameworks are relevant in designing an optimum framework for the protection of expressions of folklore.
CHAPTER 7

A FUNDAMENTAL HUMAN RIGHTS FRAMEWORK FOR THE PROTECTION OF EXPRESSIONS OF FOLKLORE IN AFRICA: KENYA, SOUTH AFRICA, GHANA AND NIGERIA

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CHAPTER 7

A FUNDAMENTAL HUMAN RIGHTS FRAMEWORK FOR THE PROTECTION OF EXPRESSIONS OF FOLKLORE IN AFRICA: KENYA, SOUTH AFRICA, GHANA AND NIGERIA

7.1 Introduction

In this chapter I argue that fundamental human and peoples’ rights protection will significantly enhance both the negative and positive protection of expressions of folklore, a point which is explored in other sections of this thesis. It is indeed the final complement in the objective of articulating an optimum framework for the protection of expressions of folklore.

Protection of expressions of folklore under the banner of human and peoples' rights significantly enhances the capacity of communities to act as legal subjects in the protection of their rights.

The analysis of the negative protection of expressions of folklore in Chapter 4 revealed an attenuated capacity of communities in the countries of study to protect their expressions of folklore because the protective framework is, in the main, facilitated by national institutions. Communities are therefore hampered in their ability to protect their expressions of folklore. A peoples' and human rights framework acknowledges the entitlement of communities to protect their expressions of folklore and therefore complements the legislative models for the positive and negative protection of folklore.

With respect to the positive protection of expressions of folklore, it is evident from the discussions in Chapter 5 that only South Africa – by virtue of the IPLAA 2013 – has a credible framework for protecting folklore. Even so, a peoples' and human rights framework acts as a default standard which, at the very least, will guide and enhance the development of IPLAA 2013. For the other countries, a peoples' and human rights framework acts as a default standard which, at the very least, will guide and enhance the development of IPLAA 2013.

739 The terms "human" and "fundamental human rights" are used interchangeably.
human rights framework is potentially capable of entitling communities positively to protect their expressions of folklore. For countries which protect expressions of folklore in the negative sense, human and peoples' right protection will also facilitate and guide the development of these frameworks.

The proposition which this chapter explores is that expressions of folklore can be protected indirectly through both collective rights and a number of specific human rights. This proposition is based on the principle that only individuals can directly enforce human rights. The fact that communities can enforce rights directly to protect expressions of folklore is an emerging idea that is not generally accepted.

The focus of this chapter is the Bill of Rights in the national Constitutions of the countries of study as well as extant jurisprudence. This chapter is organised as follows. An overview of human rights and expressions of folklore is explored in the following section. In the third section the nature and extent to which collective rights can be used to enforce expressions of folklore is considered. In the fourth section specific human rights such as the right to property, the right to life, the right to human dignity, and the right to privacy are examined to establish if and how national courts in the countries of study have used or suggested them as vehicles for the protection of expressions of folklore.

**7.2 Fundamental human rights and the protection of expressions of folklore**

The dominant conception of rights as human-based and individual-oriented would ordinarily exclude communities as beneficiaries. However, the fact that certain rights are conceived as collective human rights means that when exercised in conjunction with other members of a community, they provide some protection – albeit indirect – to a community and its expressions of folklore. In this regard certain human rights are conceived as capable of being exercised in concert with other members of a community.
The social context of human rights recognises that individuals thrive and develop in a community and should be allowed to protect those rights which are enjoyed in concert with others. These individuals would usually advance a community interest by exercising or defending the right alone, in concert with others, or as a representative of the community.\textsuperscript{740} It is the capacity to defend the enjoyment of such a right or promote its protection even if no personal interest is in issue, that makes these types of right "extremely beneficial...".\textsuperscript{741} The types of right envisaged in this rubric would include freedom of association, the right to religion, and the right to culture.

It is also important to determine whether there are other specific human rights distinct from collective rights, to which communities in our countries of study are entitled as primary beneficiaries which can protect expressions of folklore. Plausible examples would include the right to life, the right to property, and the right to privacy.

Yet another important consideration is the enforcement of fundamental human rights. Issues of standing and other practical obstacles are important determinants of how communities are able to protect their expressions of folklore through a fundamental human rights framework.

\subsection{7.3 Collective rights and the protection of expressions of folklore}

Collective rights are rights exercised by individuals in concert with other members of their community. Collective rights are, therefore, individual rights which are exercised communally and therefore envisage the protection of rights which have both an individual and a communal dimension.

Collective rights are similar in many respect to peoples' rights. Both set of rights seek ultimately to protect communal interests. They differ, however, in the way in which they are enforced. While a peoples' right is enforced by the community as a

\textsuperscript{740} See Buchanan 1993 \textit{Transnat'l L \& Contemp Probs} 89.

\textsuperscript{741} Buchanan 1993 \textit{Transnat'l L \& Contemp Probs} 94. See also Ramcharan 1993 \textit{Int'l J Group Rights} 27.
primary beneficiary, a collective right is enforced by an individual and the community benefits indirectly.

The existence and protection of the community are important if the individual is to be protected. Consequently, article 27 of the ICCPR provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Even though the juridical origin of article 27 of the ICCPR is the protection of minorities, it has developed as ensuing discussion show into a right available to all individuals and groups whether they are minorities or not. Of the countries of study, Kenya and South Africa protect expressions of folklore.

It would appear that the Kenyan Constitution recognises collective rights and that Kenyan human rights jurisprudence recognises communities as beneficiaries. With regard to collective rights, section 44(2) provides that a person belonging to a cultural or linguistic community has the right, with other members of the community, to enjoy his or her culture and use his or her language, or to form, join and maintain cultural and linguistic associations and other organs of civil society.

As regards South Africa, section 31 of the South African Constitution could assist a community wishing to protect its expressions of folklore on the basis or its being a collective right. Section 31 provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion, and use their language, and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

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See UN Human Rights Committee (HRC), *CCPR General Comment No 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, available at http://www.refworld.org/docid/453883fc0.html. (Accessed 4 January 2015.) A 6.2 provides: "Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion."
The South African Constitutional Court decision in *MEC Education KZN v Pillay*\(^{743}\) recognised that section 31 of the *South African Constitution* is based on article 27 of the *ICCPR* and involves associative practices and not individual beliefs.\(^{744}\) These associative practices point to a collective right exercised by individuals in community with others. In *Pillay*, however, while the majority judgment considered individual belief as central to the section 31 right, the minority judgment commendably pointed out that:

> In the anthropological sense, all human beings have a culture. Human beings live in communities and ordinarily share practices that make life meaningful to that community. Sections 30 and 31 of the Constitution protect the rights of individuals within communities to pursue cultural practices. There can be no doubt that these are important rights which protect diversity within our country. The rights, like all others in our Constitution, must be interpreted in light of the founding value of human dignity which asserts the equal moral worth of human beings and the right of each and every person to choose to live the life that is meaningful to them. Understanding the right to cultural life against the background of human dignity emphasises that the rights in sections 30 and 31 are associative rights exercised by individual human beings and are not rights that attach to groups.\(^{745}\)

Perhaps on this minority reading it may be fair to argue that recognising a group's right to the protection of its expressions of folklore can only manifest if the individual members seek protection.

What is significant about the minority judgment is the recognition that the correct way to approach culture is not the sincerely-held beliefs of the individual as urged by the majority, but on the basis of "... an understanding of what the cultural community considers to be a cultural practice".\(^{746}\) Accordingly, if the cultural community asserts a right over its intellectual property, this will be entirely consistent with section 31 on the reading of the minority judgment. The individual disposition urged by the majority judgment downplays the role of the community in the enjoyment of the section 31 right.

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\(^{743}\) 2008 1 SA 474 (CC).

\(^{744}\) 2008 1 SA 474 (CC) para 144.

\(^{745}\) 2008 1 SA 474 (CC) para 150.

\(^{746}\) 2008 1 SA 474 (CC) para 154.
In *Christian Education SA v Minister of Education of the Government of SA* the nature of the right granted in section 31 of the *South African Constitution* is explained by Sachs J:

The rights protected by section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism... the protection of diversity is not affected through giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language).

On the basis of the majority judgment in *Pillay* it would appear that the determination of the nature and extent of the protection of expressions of folklore would depend on the sincerely-held beliefs of members of the community. There would appear to be an assumption that all members of a community would share this sincerely-held belief. Were they to differ as regards a practice, establishing the existence of an expression of folklore would become problematic. It is also possible to interpret the majority judgment as restricted to the situation arising when a member of a community seeks to justify a belief as part of a communal culture. When, however, a community seeks to establish a claim against third parties, how communal practice is identified should naturally change. It would appear normal to rely on communal identification of expressions of folklore. In this regard the minority opinion in *Pillay* appears more suited to such an exercise. In line with this reasoning, a number of cases have recognised the right of cultural, linguistic and religious communities to assert their norms in their dealings with third parties.

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747 1999 2 SA 83 (CC).
748 1999 2 SA 83 (CC) para 239.
Religious communities have been prominent in this regard. For example, the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* can be said to have decided that religious communities are permitted to engage in work-related discrimination to protect their core beliefs. Again in *Taylor v Kurstag* the court recognised the right of a religious organisation to excommunicate its members in order to safeguard the tenets of its faith. The court said: "The members of the faith exercising their own rights in terms of section 31 have the right to protect the integrity of their common bond by disciplining others who do not conform." In *Mohammed v Jassien* the court recognised the right of orthodox Muslims to discriminate and treat members of the Ahmadiya sect as apostates. Though little jurisprudential reasoning in the form of fundamental human rights featured in the judgment, the decision of the Kwa-Zulu Natal High Court in *Smit NO v King Goodwill Zwelithini* to reject any interim interdict to stop a cultural practice of the Zulu Kingdom clearly shows that section 31 could form a credible basis for protecting the cultural norms of the Zulu people. The cases discussed above suggest that South African courts will recognise the rights of linguistic, cultural and religious communities to rely on communal norms to protect their expressions of folklore.

An important question is whether the IPLAA 2013 could conceivably fall within the ambit of section 31 of the *South African Constitution*? The answer would appear to be "yes" because of the obligations of the South African state arising from section 31. There is no doubt that the *IPLAA 2013* represents a fundamental way of giving expression to the obligations of the South African government in ensuring the identity, dignity and existence of the different South African cultural communities.

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749 See the following: Lenta 2009 *SALJ* 827; Woolman 2009 *SAJHR* 280; Bilchitz 2011 *SAJHR* 219; Lenta 2012 *SAJHR*: Religion and Human Rights 231; Woolman 2012 *SAJHR*: Religion and Human Rights 273; Bilchitz 2012 *SAJHR* 296; De Freitas 2012 *SAJHR* 258; Lenta 2013 *SAJHR* 429.

750 2009 4 SA 510 (T).

751 2005 1 SA 362 (W).

752 2005 1 SA 362 (W) para 58.

753 1996 1 SA 673 (A).


In terms of the structure of the Bill of Rights, the *IPLAA 2013* can limit rights in terms of section 36 of the *South African Constitution* which provides that:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. \(^{756}\)

Generally, a limitation analysis is a two-stage process. In the first stage the court determines whether the alleged conduct has breached the right. In the second stage the court determines whether there is justification for the breach. It is important to point out that a cumulative assessment of all the factors in section 36, the *IPLAA 2013* would, for many of the rights in the Bill of Rights, be found to constitute a reasonable and justifiable limitation in an open and democratic society.

As section 31 is a human rights anchor for the protection of expressions of folklore, it it must be evaluated to determine how other legislation can limit the operation of the right in terms of section 36. In this regard is important to realise that intellectual property legislation in South Africa such as the *SACA* and the *SA TMA* and *SADA* can be used as a means of limiting the indirect collective protection of expressions of folklore by section 31. In effect, the intellectual property rights acquired by virtue of these statutes would be argued to trump the protection offered to expressions of folklore by section 31. For example, a copyright owner could in appropriate circumstances claim that the copyright limits the acquisition of traditional works on the basis of a cumulative interpretation of section 36 of the Constitution. While it has been pointed out repeatedly that a limitation analysis is based on the circumstances of each case, it is important to draw attention to a case which involved the limitation analysis of a piece of intellectual property legislation and a right protected under the Bill of Rights to establish whether any lessons could be identified as to how a court would evaluate a limitation of the collective protection of expressions of folklore by intellectual property legislation.

\(^{756}\) See *S v Makwanyane* 1995 3 SA 391 (CC).
In *Laugh-It-Off Promotions v South African Breweries Ltd* the South African Constitutional Court considered the interface between trade mark infringement and freedom of expression. In this case the respondent, a trader in alcoholic and non-alcoholic beverages, had acquired trademarks relating to Carling Black Label from a South African firm. At the end of November 2001 the respondent became aware that the applicant had produced and was offering for sale T-shirts which bore a print that was markedly similar in lettering, colour, scheme and background to that of the respondent's Carling Black Label trademarks. The only difference was in the wording. The words "Black Label" were replaced on the T-shirt with "Black Labour"; the respondent's "Carling Beer" was replaced by "White Guilt"; and where they proclaimed "American Lusty Lively Beer" and "enjoyed by men around the world", the applicant had printed "Africa's lusty lively exploitation since 1652" and "No regard given worldwide". The calls by the respondent to the applicant to desist from using the trade marks elicited no response. Consequently, the respondent sought and was granted an interdict in the High Court. The applicant appealed to the Supreme Court of Appeal and lost, leading to the appeal to the Constitutional Court where he succeeded. The Constitutional Court held that the proper approach when freedom of expression – a constitutionally guaranteed human right – interfaced with legislative anti-dilution provisions, which in this case was section 32(4) of the *Trade Marks Act*, is to balance the interests of the owner of the trade marks against the claim of free expression, for the very purpose of determining what is unfair and materially harmful to the trade marks in these circumstances.

Since the relevant South African anti-dilution provisions seek to oust certain expressive conduct, the court assumed that this could be a limitation of freedom of expression reasonable and justifiable in an open and democratic society. The court required, therefore, an interpretation of the anti-dilution provision that is most compatible with, and least destructive of, the right to free expression. Accordingly, the court determined the appropriate interpretation was that the owner of a trade mark seeking protection of anti-dilution provisions to oust expressive conduct

\[757 \quad 2006 \text{ 1 SA 144 (CC).} \]
protected under the Constitution, must demonstrate a likelihood of substantial economic harm or detriment to the trade mark owner.

*Laugh-It-Off* appears to establish that while it is possible for intellectual property legislation to trump a right, it would require a lot for this to happen. As regards the trumping of the collective protection of expressions of folklore by intellectual property legislation, it would be an uphill task for an individual owner of copyright or a trademark to prove better title if there is proof of the communal ownership of the expressions of folklore.

The possibility of collective rights is not evident in Ghana, despite the provisions of section 26 of the *Ghanaian Constitution* which provides that every person is entitled to enjoy, practise, profess, maintain and promote any culture, language tradition or religion, and that all customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited.

Of the countries of study, Nigeria appears the most unlikely to offer any meaningful possibility of communities protecting their expressions of folklore by collective human rights. Even though Chapter four of the *Nigerian Constitution* protects only civil and political rights, there appears to be little understanding that collective rights exist in Nigeria. On the other hand, Nigeria is a signatory to the *African Charter* and the possibility exists that through article 8 of the *African Charter* collective rights protecting the free exercise of religion can be enforced in Nigeria.\(^{759}\)

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758 The chapter contains the following rights: s 3 – right to life; s 34 – right to dignity of human person; s 35 – right to personal liberty; s 36 – right to fair hearing; s 37 – right to private and family life; s 38 – right to freedom of thought conscience and religion; s 39 – right to freedom of expression and the press; s 40 – right to peaceful assembly and association; s 41 – right to freedom of movement; s 42 – right to freedom from discrimination; s 43 – right to acquire and own immovable property in any part of Nigeria; s 44 – rights arising from compulsory acquisition of property. S 45 provides for restrictions and derogations from fundamental rights while s 46 provides for the special jurisdiction of the High Courts to enforce fundamental human rights.

759 In 1983, the *African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act* A9 of 2004, was promulgated by the National Assembly, making the *African Charter* enforceable in Nigeria. The extent of the application of the *African Charter* was one of the issues dealt with by the Supreme Court in *Abacha v Fawehinmi* ILDC 21 (NG 2000); 2000 6 NWLR (Pt 660) 228. The Supreme Court was unanimous that the Constitution is superior to the *African Charter* but that the *African Charter* is superior to municipal legislation. In many cases Nigerian courts have struck down municipal legislation that breaches rights protected by
7.4 Specific fundamental human rights and the protection of expressions of folklore

In this section the possibility that expressions of folklore can be protected through specific human rights by communities as primary beneficiaries is explored. Two challenges confront this proposition. The first is whether intellectual property rights are protected as a human right or cognisable as part of other specific rights. The second challenge is whether communities can enforce these human rights directly.

For long a controversy raged as to whether intellectual property and human rights are the same or different; whether there is a right to intellectual property; and whether some individual human rights could conceivably contemplate intellectual property rights. The controversy as to whether intellectual property and human rights represent the same or different values was also fuelled by the absence of such a right in Bills of Rights of national Constitutions. Without such presence in a national Bill of Rights, the right to intellectual property found juridical support in treaties such as article 15 of the ICESCR and in article 27 of the UDHR.

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the African Charter. See, for example, Ubani v Director of State Security Services (1999) 11 NWLR (Pt 625) 129; Abiodun v Attorney General of the Federation 2007 15 NWLR (Pt 1057) 359.


Note, however, that in the certification process leading up to the adoption of the South African Constitution there was a proposal to include the right to intellectual property in the 1996 Final Constitution. When the Constitution came before the Constitutional Court the court was urged to recognise the right to hold intellectual property because it is a universally accepted human right. The court – In re: Certification of the Constitution of Republic of South Africa 1996 10 BCLR 1253 (CC) -- held that the right to hold intellectual property is not a universally accepted fundamental human right and that the Final Constitution is not defective thereby (para 75). See Dean 1997 Journal of Contemporary Roman-Dutch Law 105.

A 15(1) of the ICESCR provides that: "The State parties recognize the right of everyone (a) To take part in cultural life (b) To enjoy the benefits of scientific progress and its applications (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

A 27(1) of the UDHR provides that: "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."
Fortunately, recent jurisprudence\textsuperscript{764} from national courts, the European Court of Human Rights, and the European Court of Justice has at least established that intellectual property is protected by the right to property,\textsuperscript{765} and that intellectual property and human rights represent, in many circumstances, the same value.\textsuperscript{766} While we are still far from establishing a right to intellectual property, it is no longer possible completely to regard intellectual property as different from human rights. At very least, it can be concluded that communal intellectual property, such as expressions of folklore, fall within the ambit of the right to property.\textsuperscript{767} It is still an open question whether other human rights can be seen to include communal intellectual property such as expressions of folklore.

Given the development of human rights as a liberal conception and protection for individual rights, it is difficult to establish whether communities can enforce the right to property. I turn now to jurisprudence from our countries of study which recognise that a number of human rights may be called into service in protecting expressions of folklore.

\textit{7.4.1 Right to property}

The right to property appears by far the most viable human right in the protection of expressions of folklore. Accordingly, the provisions of the Constitutions of our countries of study are considered to identify how these Constitutions protect

\textsuperscript{764} See Helfer 2008 \textit{Harv Int'l LJ} 1.
\textsuperscript{765} See a 1 of the Protocol 1 to the \textit{European Convention for the Protection of Human Rights and Fundamental Freedoms} 1952, (hereafter \textit{European Convention on Human Rights}) 213 UNTS 262: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." See Helfer and Austin \textit{Human rights and intellectual property}. In the United States there are a number of \textit{dicta} which recognise intellectual property as property at least within the due process clause. See, for example, \textit{Chavez v Arte Publico Press} 204 F.3d 601, 605 n.6 (5th Cir. 2000): "Since patent and copyright are of a similar nature, and patent is a form of property [within the meaning of the Due Process Clause] . . . copyright would seem to be so too". See also \textit{Lane v First Nat'l Bank} 871 F.2d 166, 174 (1st Cir. 1989).
\textsuperscript{766} See, for example, Geiger 2008 \textit{Intellectual Property and Human Rights} 101.
\textsuperscript{767} See Du Bois 2013 \textit{European Property Law Journal} 144-170.
property and the extant jurisprudence which would reveal or suggest how expressions of folklore can be protected.

In Kenya property is protected by article 40 of the 2010 Constitution. Article 40(5) provides that the: "State shall support, promote and protect the intellectual property rights of the people of Kenya." This section has three components: "support", "promote" and "protect". These three components impose an obligation that can be discharged by intellectual property legislation as well as robust administrative measures designed to support, promote and protect intellectual property rights. To a large extent this obligation is being discharged through an intellectual property framework in the form of the numerous statutes that currently protect a number of intellectual property rights in Kenya. It is also possible that the common law provides a measure of protection emanating from the unregistered nature of intellectual property such as the tort of passing off with respect of marks and signs related to trade. It is also plausible that the protection of confidential information would discharge the obligation in question. It is therefore feasible that the right to property presents a credible framework for the protection of expressions of folklore in Kenya.

Property held alone or in association with others is protected by article 18 of the 1992 Ghanaian Constitution, which also protects the right to privacy of the home, property, and correspondence. Article 20 prohibits the compulsory acquisition of property except where it is for the public benefit, and there is prompt payment of fair and adequate compensation. It is clear that real property such as land will be recognised under this section as property which means that the principles governing communal and family land holding in accordance with customary law would qualify. In addition, the 1992 Constitution recognises customary land tenure. It is plausible that communal intellectual property would also qualify.

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768 See Chapter 5.5.
769 See Woodman Customary land law in Ghanaian courts.
770 See, for example, s 257(4) of the Ghanaian Constitution. An example of such tenure is "stool/skin lands".
Even though communal holding of immovable property is not justified on the basis of the right to property protected by section 43 of the 1999 \textit{Nigerian Constitution}, it is entirely feasible to justify communal landholding under this section, especially as the \textit{Land Use Act} in which it is recognised, represents a fundamental feature in the customary law of Nigerian communities, namely that communities and families hold land communally.\footnote{See, for example, \textit{Lukan v Ogunnusi} 1972 5 SC 40; \textit{Ekpendu v Erika} 1959 4 FSC 79.}\footnote{See Chapter 5.2.5.2.} It is, however, an open question whether Nigerian courts would interpret the right to property to include communal intellectual property under this section.

In South Africa, section 25 of the \textit{South African Constitution} is the property clause. The analysis of this section earlier in Chapter 5\footnote{Civil Case No 238 of 1999 eKLR 1.} establishes clearly that expressions of folklore, like other intellectual property, form part of the constitutional property clause. It follows therefore that communities can seek to protect their expressions of folklore especially in light of the \textit{IPLAA 2013}.

\subsection*{7.4.2 Right to life}

Of all the countries of study, Kenya has the best potential of using the right to life to protect expressions of folklore. In \textit{Kemai v Attorney General}\footnote{\textit{Civil Case No 238 of 1999 eKLR 1.}} the applicants, members of the Ogiek ethnic community, sought a declaration that their eviction from Tinet Forest by the government contravened their right to life,\footnote{S 71 of the repealed \textit{Constitution of Kenya}.} the right to protection of the law, and the right not to be discriminated against.\footnote{S 82 of the repealed \textit{Constitution of Kenya}.} Even though their case was dismissed for other reasons, a question arose as to whether a community can enjoy the right to life, dignity, and freedom from discrimination. In fact, the court adopted the reasoning of the Indian High Court in \textit{Tellis and Others v Bombay Municipal Corporation and Others},\footnote{[1987] LRC (Const) 351.} that the right to life was a wide and far reaching right and that communities whose means of livelihood are threatened could find protection under the right to life. When the expressions of folklore of Kenyan communities are used without consent and compensation, it may well be
that their right to life is threatened. Since in many cases expressions of folklore significantly support the economic life of many communities, it may well be argued that lives of members of the communities are threatened by the misappropriation of expressions of folklore.

7.4.3 Right to dignity

The right to dignity, like the right to life, presents a possible route for a court to use in protecting expressions of folklore. Respect for human dignity is protected by section 15 of the 1992 Ghanaian Constitution. Nigerian courts broadly recognise the horizontal application of human rights. In particular, the case of Uzoukwu v Ezeonu II777 recognised that communities are entitled to the protection of the right to human dignity pursuant to section 34 of the Nigerian Constitution.

Through the protection of the inherent dignity of members of a community under section 28 of the Kenyan Constitution, the dignity of a community can be protected through adequate protection offered to their expressions of folklore.

Under section 1 of the South African Constitution,778 human dignity is a foundational value and is also protected by section 10. Therefore, human dignity is a human right and a value that would impact on the interpretation of the Bill of Rights, including the constitutional property clause in section 25.779 While it is acknowledged that the meaning of dignity is broad, it can be argued that for a community, the protection of expressions of folklore is central to its existence, identity and dignity. Certainly if the dignity of individuals is of paramount importance, it should follow that the dignity of the community in which individuals thrive is of comparable value.780

779 See Dawood v Minister of Home Affairs 2000 8 BCLR 837 (CC) 860.
780 See a Canadian court in Law v Canada (Minister of Employment and Immigration) 1999 1 (SCR) 497 para 53: "Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individual and groups within...society."
7.4.4 Right to privacy

The right to privacy can be used to benefit communities. Our discussion will revolve around South African law. Neethling, Potgieter and Visser state that:

Privacy can be infringed only by the acquaintance with personal facts by outsiders contrary to the determination and will of the person whose right is infringed, and such acquaintance can take place in two ways only, namely through intrusion (or acquaintance with private facts) and disclosure(revelation of private facts).\(^{781}\)

At the heart of the right to privacy is the autonomy of an individual and his or her desire, express or implied, to keep facts from the public. Juristic persons such as companies have been recognised as enjoying the right to privacy, though not at the same level as natural persons in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors*.\(^{782}\) It is therefore plausible that communities will be recognised as entitled to a right to privacy. Section 14 of the *South African Constitution* which provides that: "Everyone has the right to privacy, which includes the right not to have (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."\(^{783}\)

Communities could successfully rely on section 14 as entitling them to prohibit access to expressions of folklore which contain facts which they legitimately expect to be kept way from third parties. Unauthorised access to some expressions of folklore especially those considered secret sacred or confidential is regarded by these communities as sacrilegious disrespectful and an affront to their dignity. A right to privacy for these communities enhances their dignity because it enables these communities to determine if and when access is to be granted to third parties. Accordingly, the right to privacy becomes the basis on which the dignity of communities is protected.

\(^{781}\) Neethling, Potgieter and Visser *Neethling's law of personality* 243.

\(^{782}\) 2001 1 SA 545 (CC). See also *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A); *Dhlimo v Natal Newspapers (Pty) Ltd* 1989 1 SA 945 (A).

\(^{783}\) See *Bernstein v Bester NO* 1996 2 SA 451 (A).
7.5 Enforcement, limitation, and balancing of rights

I turn now to practical issues in the enforcement of human rights in the countries of study to establish the extent to which communities can enforce the collective and individual human rights explored above. In addition, the limitation and balancing of human rights which ultimately affect the scope of available human rights are also considered.

Kenya is the first country to consider. In order to facilitate a rigorous enforcement of human rights, section 22 of the Kenyan Constitution introduces liberal rules of standing in Kenya enabling persons acting in their own interest to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Other persons who may institute proceedings include: (a) a person acting on behalf of another person who cannot act in his or her own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members. The liberal standing rules in the Constitution are to be preserved and facilitated in rules to be made by the Chief Justice of Kenya.\textsuperscript{784} In addition, formalities relating to proceedings, including commencement of the proceedings, are kept to the minimum and, in particular, the court shall, if necessary, entertain proceedings on the basis of informal documentation; no fee may be charged for commencing the proceedings; the court shall not be unreasonably restricted by procedural technicalities; and an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

From these provisions it would appear that communities can successfully bring an action to protect their expressions of folklore. In the event that communities are prevented from bringing actions to protect their expressions of folklore, it would be easier for their representatives or associations acting on their behalf, as this would

\textsuperscript{784} See s 22(3)(a) of the Kenyan Constitution.
easily qualify as actions in the public interest.\textsuperscript{785} Chapter 4 of the Kenyan Constitution contains a limitation clause in section 24 whose content can be summarised as follows: A right or fundamental freedom in the Bill of Rights shall be limited by law, and only to the extent that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors."\textsuperscript{786} In addition, the legislation must specifically express the intention to limit that right or fundamental freedom, and the nature and extent of the limitation. In addition, the limitation shall not limit the right or fundamental freedom to an extent that derogates from its core or essential content.

In South Africa, certain features and principles underlying the South African Constitution render it possible for expressions of folklore to be protected through the exercise of the section 31-right.\textsuperscript{787} Some of these features and principles include principles developed in the course of the horizontal application of human rights and principles governing standing.

The horizontal application of human rights\textsuperscript{788} is fundamental to the collective protection of expressions of folklore based on sections 30 and 31 of the South African Constitution because individuals and corporate entities are likely to be proceeded against in the enforcement of the section 30 and 31 rights. It is trite that

\begin{flushright}
\textsuperscript{785} See Njuguna v Registrar of Trade Unions [2013] eKLR where the Kenyan Industrial Court recognised a liberal understanding of the public interest as anything affecting the public.

\textsuperscript{786} These factors include: (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

\textsuperscript{787} The discussion in this part of the chapter draws largely from an earlier work. See Nwauche 2005 http://www.law.ed.ac.uk/ahrb/script-ed/vol2-2/folklore.asp.

\textsuperscript{788} S 8(2) and (3) of the South African Constitution provides that: "(2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court – in order to give effect to a right in the Bill, must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36." See also Du Plessis v De Klerk 1996 3 SA 850 (CC). See the following representative literature on this rather unique principle of South African constitutional law: Botha 2004 SAJHR 249; Woolman and Davis 1996 SAJHR 361; Cheadle and Davis 1997 SAJHR 44.
\end{flushright}
the Constitution applies to all contracts and would therefore apply to a contract involving expressions of folklore.

Good faith and public policy have been recognised as values which underlie the application of the *South African Constitution* to contracts between private parties. The concept of good faith or *boni mores* could very well play a significant role in the assessment of contracts involving the exploitation of expressions of folklore. This is because the concept contemplates the inequality of the bargaining power of parties to a contract. Accordingly, it may well be that by its tenor courts would be able to assess the terms of the contract to determine whether they can be reconciled with the interests and aspirations of the owners of the expressions of folklore. For example, the commercial success of an expression of folklore could play a part in the determination of royalties payable to the community.

The application of the concept of good faith in South Africa is, however, of a limited pedigree. It is recognised but controversial in its application. The principle of good faith was used to challenge an exemption clause in *Afrox Healthcare v Strydom*. In *Napier v Barkhuizen* the constitutionality of a time limitation clause in a short term insurance contract was in issue because it limited the right to access to the courts guaranteed by section 34 of the *South African Constitution*. The Constitutional Court held that at common law a term in a contract which deprives a party of the right to seek redress in a court is against public policy and that section 34 of the Constitution also constitutes public policy. Whether there is a general rule of fairness to be complied with in the term of a contract or in its exercise, is still not entirely clear after the Supreme Court of Appeal judgment in *Bredenkamp v Standard Bank SA*. The court held that there is no overarching requirement of fairness. According to the court there must be some reference to a public policy consideration in the Constitution or elsewhere before a contractual term or the

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789 See *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C); *Janse van Rensburg v Grieve Trust* 2000 1 SA 315 (C); *Hoffman v South African Airways* 2001 1 SA 1 (CC).  
790 2002 6 SA 21 (SCA) (hereafter *Afrox*). See also *Brisley v Drotsky* 2002 4 SA 1 (SCA) (hereafter *Brisley*).  
791 2007 5 SA 323 (CC).  
792 2010 9 BCLR 892 (SCA).
exercise of a valid contractual term can be held to be unfair or unreasonable. It would appear that a free-standing requirement of fairness in contractual terms and their enforcement was introduced into South African contract law after the Constitutional Court judgment in *Napier v Barkhuizen*. It is not difficult to imagine contracts governing folklore being struck down for being unconscionable due to public policy either in its terms or in its enforcement.

The provision for standing in the enforcement of rights in the Bill of Rights found in section 38 of the 1996 Constitution interpreted by the Constitutional Court in *Ferreira v Levin NO* as a broad-standing rule. Apart from the communities and their representatives whose standing is unimpeachable, the public-interest standing option can be used effectively to develop the jurisprudence for the protection of expressions of folklore by many groups notable among whom should be the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities whose function is set out in section 185(1) of the Constitution as including "to promote respect for the rights of cultural, religious and linguistic minorities."

I turn now to the balancing of rights in the Bill of Rights. Even though there is no constitutionally mandated procedure for the balancing of rights, the Constitutional Court has not shied away from doing so as is evident from cases such as in *National Media v Bogoshi* and *South African Broadcasting Corporation v The

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793 See Kerr 2008 *SALJ* 241; Glover 2007 *SALJ* 449.
795 "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."
796 1996 1 SA 984 (CC) (hereafter *Ferreira*).
797 Emphasis supplied.
798 See Currie "Balancing and limitation of rights" 251.
It appears that even though the nature and content of all rights define the public interest, the freedom of expression is most instructive. Section 16(2) serves as an internal limitation of the freedom of expression. Only the forms of expression listed in section 16(1) constitute protected expression. The expressions there listed show a form of interaction with copyright. For example, it would be difficult to claim copyright over war propaganda, incitement to imminent violence, or the advocacy of hatred based on race, ethnicity, gender or religion which would constitute incitement to cause harm.

What does freedom of expression entail? It is submitted that it means the ability to engage in protected expression and also the ability to obtain the information that will form the basis for the expression. As the Constitutional Court put it in the SABC case:

Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.

Freedom of expression is also critical in the enjoyment of other rights including the right to education. Two types of expression afforded specific constitutional recognition – the freedom of artistic creativity, academic freedom and freedom of scientific research and to receive and impart ideas – support one another and the right to education, and justify access to copyrighted works. It is a standard feature

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800 2007 1 SA 523 (CC) (hereafter SABC).
801 S 16 of the South African Constitution provides that: (1) Everyone has the right to freedom of expression, which includes a) freedom of the press and other media; b) freedom to receive or impart information or ideas; c) freedom of artistic creativity; and d) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to a) propaganda for war; b) incitement of imminent violence; or c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.
803 See Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 4 SA 295 (CC).
804 SABC 2007 1 SA 523 (CC) para 28.
805 See Mokgoro J in Case v Minister of Safety and Security 1996 3 SA 617 (CC) (hereafter Case).
806 The right to education is recognized in s 29 of the Constitution. It is important to understand the critical importance of the right to education as it is a precondition for the exercise of other rights.
of the freedom of expression that it inheres to both the speaker and the listener. Section 16(1)(b) of the Constitution protects the freedom to receive or impart information or ideas.\textsuperscript{807} The ability to receive "ideas" and "information", should in some way entitle people to access expressions of folklore. Consequently, any legislation in that makes it difficult for the listeners to receive what is contained in expressions of folklore implicate the freedom of expression.\textsuperscript{808}

It is therefore clear that freedom of expression could be used as a basis for seeking access to expressions of folklore. South African courts would be required to balance the right to freedom of expression and the right to property. One credible way to proceed in balancing rights is to treat all rights as equal and deserving of protection.\textsuperscript{809} If this is the point of departure, the way to proceed is to identify the different interests ventilated by each right and to strike a balance by an interpretation which preserves the essential interests embodied in each right. This is often not an easy exercise because at the end of the day neither of the rights remains what it was at the beginning of the balancing exercise. Some of the features of a right may be changed, removed, or altered depending on interest involved. Indeed, as the Constitutional Court recognised in the \textit{SABC} case, "[t]here are circumstances in which one right will take precedence over others".\textsuperscript{810} What is important is that the rights are not approached on an implicit understanding that one will trump the other. In a sense, this is what may take place in a limitation exercise. When rights are balanced, however, this need not and should not happen. When a court employs a wrong methodology and engages in a limitation exercise when it should be balancing the rights, it arrives at a result that appears to favour one right over another. In many cases the right to freedom of expression is used to secure access to information to be used to access expressions of folklore. The relationship between privacy and freedom of expression was explored by the

\begin{footnotesize}
\begin{enumerate}
\item See the case of \textit{De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)} 2004 1 SA 406 (CC).
\item See Tushnet 2004 \textit{Yale LJ} 535.
\item See generally Alexy and Rivers \textit{A Theory of Constitutional Rights} Chapter 3.
\item \textit{SABC} 2007 1 SA 523 (CC) para 55.
\end{enumerate}
\end{footnotesize}
minority judgment of O'Regan J in *NM v Charlene Smith*811 where she recognised that at some point the two rights pull in opposite directions.812 In her opinion

...[t]he appropriate balance between privacy and expression requires the legal rules which provide for redress for breaches of privacy to be developed in a manner that recognizes both the importance of privacy and the importance of freedom of expression.813

Whether an expression of folklore can be sequestered on the basis of the right to privacy would depend on a number of factors and the circumstances of each case.

It is also important to bear in mind the internal limitation in sections 30 and 31 of the Constitution which provides that the section 30 and 31 rights may not be exercised "in a manner inconsistent with any provision of the Bill of Rights". It would appear that in the balancing of rights the possibility that cultural rights in sections 30 and 31 may not be regarded as truly equal, may have serious consequences for the ability of this right to protect expressions of folklore. It is further important to remember that in the South African Bill of Rights, cultural rights can be seen as a concession given the individualistic cast of the Bill of Rights.814 This could be the reason why the internal limitation in sections 30 and 31 is unique and not found in any other type of right in the Bill of Rights. Coupled with the interpretation of the majority in *Pillay*, it can be predicted that sections 30 and 31 will not be of significant assistance in protecting expressions of folklore.

In Ghana it would appear that certain of the freedoms in section 21 of the *Ghanaian Constitution* could be important in ensuring access to expressions of folklore and thereby limiting any right to communal intellectual property. In this regard the freedoms of speech and expression; thought, conscience and belief; to practise any religion and to manifest such practise; and freedom of information are relevant. A combination of sections 33(1), 130(1) and 140(2) of the *Ghanaian Constitution*

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811 2007 5 SA 250 (CC). (*Charlene Smith*)

812 See *Charlene Smith* 2007 5 SA 250(CC) para 144: "In understanding the scope of privacy, it is important to recognize that, at times, the right to privacy might suggest that certain facts should not be published while at the same time the right to freedom of expression might suggest those same facts should be able to be published."

813 *Charlene Smith* 2007 5 SA 250 (CC) para 147.

together with other statutory provisions, provide that where a person alleges that a provision of the Constitution dealing with fundamental human rights and freedoms has been, is being, or is likely to be contravened in relation to him or her, he or she, without prejudice to any other action that is lawfully available, may apply to the High Court for redress. It is important to note that section 2(1) of the Ghanaian Constitution provides that a person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment, or any act or omission by any person, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

It is interesting to note that the Ghanaian Supreme Court held in New Patriotic Party v Attorney General that all classes of person (including natural and corporate persons) have the capacity to seek a declaration under section 2(1) for the enforcement of the Constitution. Recent cases favour a liberal interpretation of standing to sue for breach of human rights. Accordingly, a number of cases have interpreted the 1992 Constitution as recognising public-interest litigation and that in defending the public interest or the interests of other persons, any person may bring an action before Ghanaian courts even if there is no personal injury to that person or group of persons. It would be difficult to contend that communities in Ghana cannot sue to protect their expressions of folklore.

The protection of fundamental human rights in Nigeria is based on section 46 of the Nigerian Constitution and the Fundamental Rights (Enforcement) Procedure Rules 2009. The flexible tenor of these rules suggests a less rigorous procedure for the enforcement of fundamental human rights. A major obstacle in the enforcement of fundamental human rights in Nigeria is the requirement of standing to sue. In

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815 See also s 15(1)d of the Courts Act 459 of 1993 as amended by the Courts Amendment Act 620 of 2002.
818 See Nwauche 2010 AHR LJ 502-514.
Adesanya v President of the Federal Republic of Nigeria,⁸¹⁹ the Nigerian Supreme Court recognised the requirement of personal standing as fundamental for any action, including complaints against human rights abuses on the basis of section 6(6)(b) of the 1979 Constitution.⁸²⁰ The Supreme Court held that standing will be accorded to a plaintiff who shows that his civil rights and obligations have been, or are in danger of being, violated or adversely affected by the act complained of.

7.6 Remedies

The remedies that can be granted to protect human rights play an important role, and in grey areas such as the protection of expressions of folklore this is exacerbated. Many courts will have to be creative if they are to protect expressions of folklore.

The relief that may be granted by a Kenyan court as recognised by section 23(3) of the kenyan Constitution, includes a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified as a limitation of rights; an order for compensation; and an order of judicial review. This range of relief indicates that where a Kenyan court entertains an action by a Kenyan community, it would be able to use remedies that would address the concerns of that community. For example, a public apology can be ordered by a court to assuage the infringement of the moral rights of communities. This assertion is made in the light of section 20(3) of the Kenyan Constitution which requires Kenyan courts to develop laws to ensure the protection of the rights and freedoms in the Bill of Rights as well as adopting an interpretation of the Bill of Rights which best suits the rights and freedoms in the Kenyan Bill of Rights.

⁸¹⁹ (1981) 1 All NLR 1.
⁸²⁰ S 6(6)b of the Nigerian Constitution provides that the judicial powers vested by the Constitution on different courts: "(b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil lights and obligations of that person." There is an identical provision in the Nigerian Constitution.
South African courts have wide latitude to fashion appropriate remedies for constitutional infractions. In *Fose v Minister of Safety and Security* the Constitutional Court noted the need for courts to be creative in forging new tools and shaping innovative remedies to ensure effective relief for the breach of constitutional rights. It is therefore possible, given our analysis above, to state that the courts should recognise remedies for breach of the protection of folklore to include: (i) damages; (ii) injunctive relief; (iii) account of profits; (iv) destruction or removal of offending materials; (v) acknowledgment of source; and (vi) criminal remedies such as imprisonment, fines and community service. The possibility that a trading and non-trading corporation could be entitled to a remedy of apology for defamatory conduct evident in *Mcbride v The Citizen* and in *Media 24 v Taxi Securitisation (Pty) Ltd* can be said to justify a prediction that in time South African courts will recognise that communities have a reputation to protect and that an apology is an appropriate remedy in this regard. A community’s sense of dignity could be offended by a disparaging use of its expressions of folklore and assuaged by an appropriate apology.

Ghanaian courts may, pursuant to section 33(1) of the Ghananian Constitution, issue such directions or orders or writs, including in the nature of *habeas corpus, certiorari, mandamus*, prohibition, and *quo warrant* as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms for which the person concerned is entitled to protection.

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821 See, for example, *Sanderson v Attorney General of the Eastern Cape* 1998 2 SA 38 (CC); *Government of Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Residents of Joe Slovo Community, Western Cape v Thembesila Homes* 2010 3 SA 454 (CC). S 172(1)(b) of the *South African Constitution* provides that when deciding a constitutional matter within its power, a court may make an order that is just and equitable.

822 1997 3 SA 786 (CC).

823 See Milo 2012 *Journal of Media Law* 11.

824 2011 4 SA 191 (CC).

825 2011 5 SA 329 (SCA).
7.7 Conclusion: An evaluation of human rights in the protection of expressions of folklore

The preceding analysis of human rights relevant in the protection of expressions of folklore reveals that Kenya, South Africa and Ghana recognise collective human rights that can indirectly protect expressions of folklore. Even though there are no known cases in which the human rights framework in these countries have been called in to aid in the protection of expressions of folklore, it is easy to surmise that communities would have a reasonable prospect of success if they were to seek to protect their expressions of folklore. There appears to be a tenuous claim to collective rights in Nigeria making it unlikely that the Bill of Rights will be of any assistance in protecting expressions of folklore. The prospects of using a human rights framework appears even more likely because of recent jurisprudence that recognises communities as bearers and beneficiaries of human rights.

This seems all the more likely in that African regional human rights jurisprudence has embraced the idea of communities as beneficiaries of human rights. Accordingly, communities are not only bearers of peoples’ rights under the African Charter, but can also be bearers of human rights that would ordinarily be regarded excluded because they are a "people". The nature and extent of these rights were in contention in Endorois.\textsuperscript{826} It is interesting to note the affirmation of the cultural rights of the Endorois as provided for in article 17(2) of the African Charter which states that every individual may freely take part in the cultural life of his community.\textsuperscript{827} In effect article 17 which would ordinarily pass as an individual right, was interpreted as providing protection to a people. As Pentassuglia notes:

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{826} See Lynch 2012 African Affairs 24.
  \item \textsuperscript{827} The African Commission agrees in its ruling that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the respondent state did not adequately provide for the Endorois in the development process. It finds against the respondent state that the Endorois community has suffered a violation of a 22 of the Charter.
\end{itemize}
\end{footnotesize}
Classic individual rights, including the right to property, have been re-read to accommodate communal perspectives in ways that challenge rigid dichotomies between the individual and the group within human rights law.\textsuperscript{828}

This interpretation recognises that many peoples' rights find concrete manifestation within individual human rights. The capacity of human rights to protect expressions of folklore will be significantly enhanced if the idea of communities as bearers of human rights becomes entrenched.

\textsuperscript{828} Pentassuglia 2010 *UCL Human Rights Review* 159.
CHAPTER 8

PEOPLES' RIGHTS AND THE PROTECTION OF EXPRESSIONS OF FOLKLORE IN AFRICA: KENYA, SOUTH AFRICA, GHANA AND NIGERIA

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CHAPTER 8

PEOPLES' RIGHTS AND THE PROTECTION OF EXPRESSIONS OF FOLKLORE IN AFRICA: KENYA, SOUTH AFRICA, GHANA AND NIGERIA

8.1 Introduction

This chapter examines a peoples' rights framework for the protection of expressions of folklore in Africa generally, and in the countries of study – Kenya, South Africa, Ghana and Nigeria – in particular.

The chapter builds on Chapter 7 which explored the feasibility of protecting expressions of folklore through human rights. It is contended in this chapter that the protection of a peoples' right will significantly complement the human rights protection explored in Chapter 7 and therefore significantly enhance the negative and positive protection of expressions of folklore, a point explored in other sections of this thesis.

A peoples' rights framework enhances the ability of a human rights framework to protect expressions of folklore. A focus on communities ensures that the challenges of an individually oriented human rights framework can be addressed.

Protection of expressions of folklore based on a peoples' right significantly enhances the capacity of communities to act as legal subjects to protect their rights. As stated in Chapter 7,\(^{829}\) the analysis of the negative protection of expressions of folklore in Chapter 4 revealed an attenuated capacity of communities in the countries of study to protect their expressions of folklore because, in the main, a protective framework is facilitated by national institutions.

An attenuated capacity of communities also applies with respect to the positive protection of expressions of folklore. The same comment may be made of the positive protection of expressions of folklore examined in Chapter 5. Even where, as

\(^{829}\) Chapter 7.1.
in South Africa, there is legislation in the form of the *IPLAA 2013* protecting expressions of folklore through intellectual property rights, a peoples' rights framework is crucial in elaborating the content of the legislation and ensuring that communities are not significantly hampered in their ability to protect their expressions of folklore.

The broad assertion that undergirds the discussions in this chapter is that communities in Africa are entitled to a peoples' right to expressions of folklore, first on the basis of the provisions of the *African Charter* to which all countries of study are party, and secondly through customary law recognised by the national constitutions of the countries of study. In discharging this objective, this chapter examine the entitlement of communities to their expressions of folklore and argues that communities in Africa are entitled to a peoples' right to the expressions of folklore that they create. It is acknowledged that no such right can be found in its exact form in any treaty national constitution or international instrument even though the recognition of peoples' right in the *African Charter* by rules of customary law in a constitutional context facilitates the articulation of this right.

The analysis of human and intellectual property rights in Chapter 7 revealed that it is the recognition that communal intellectual property is part of the constitutional property which provides a link between communities, expressions of folklore, and the right to property. That connection is indirect, tenuous, and appears questionable in Ghana and Nigeria, while it appears to be a possibility in Kenya, and is clear in South Africa. Yet there is some doubt as to whether communities can enforce the constitutional property clause, at least in South Africa. The argument could be cast in the following terms: If the right to intellectual property is a human right (as is argued in Chapter 7), this raises problems for communities as, not being human, they cannot be the bearers of human rights. It is important to remember, however, that the *IPLAA 2013* recognises communities as juristic persons, and section 8(2) of the *South African Constitution* applies to and binds juristic persons.

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830 See, for example, s 28D(1) of the *SACA*; s 43D(3) of the *SA TMA*; and s 53D(3) of the *SADA*. 
Accordingly, communities in South Africa can enforce the constitutional property clause.

If communities were to assert a right, it appears that a right suited to groups and communities would be the best means of doing so. Accordingly, a peoples' right to expressions of folklore appears to be better suited to protecting communities and their expressions of folklore. Assuming that there is a peoples' right to expressions of folklore, another conceptual obstacle relates to the location of this right. The matter is a lot easier if such a right is located in the Bill of Rights of a national constitution as is the case with Kenya. Where there is no such corresponding right in national Bill of Rights the provisions of a peoples' right in a regional treaty such as the African Charter is crucial for Nigerian, Ghana, and South Africa. For this reason I considered the implementation of international law in national legal systems in Chapter 6. However, it is also important to point out that the absence of direct mention of a peoples' right in a national Bill of Rights is not fatal in that customary law can be regarded as a manifestation of a peoples' right and, as such, as encompassing the right to expressions of folklore.

This chapter is organised as follows. The nature of the peoples' rights in the protection of expressions of folklore is explored in the following section followed by an examination of the peoples' right to expressions of folklore in part three. The fourth section examines customary law as an expression of a peoples' right to expressions of folklore in the countries of study. In section five this chapter explores the possibility that communities other than 'ethnic' communities qualify to bear the peoples' right to expressions of folklore. In section six, there is a reconciliation of the content of customary law considered in section three and jurisprudence emanating from international soft law to set out a plausible and coherent content of the peoples' right to expressions of folklore. In section seven the balancing of a peoples' right to expressions of folklore and other human rights is considered. Concluding remark close the chapter.

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831 See Chapter 6.2.
8.2 Peoples' right and the protection of expressions of folklore

Peoples' rights are entitlements of a community or a group because they are borne by a community or group *qua* group or community. While the dominant conception of rights is that of human rights, especially in their individual narrative, it is also true that rights can exist on a communal level. Indeed, it is trite that human rights have both an individual and a group dimension. The importance of a social context for the identity and development of individuals has resulted in the recognition of collective rights exercised by individuals in concert with other individuals. This was explored in Chapter 7. In addition, group entitlements – even though less recognised – exist at international, regional, and national levels and complement collective rights.

The right of communities over their intellectual property, including expressions of folklore, is a people's right for the simple reason that communities as communities are not human and therefore cannot strictly bear human rights. Properly described what these communities have is a peoples' right. The peoples' right to communal intellectual property is a right held by communities over their intellectual property including expressions of folklore, and arises because the creation, maintenance, enhancement, and transformation of expressions of folklore is done by the community. The peoples' right to expressions of folklore does not detract from the fact that individuals are the physical agents in the creation of communal intellectual property. However, that they do so in the communal context, values, environment, and often with the vision and authority of the community.

8.3 Peoples' right to expressions of folklore

This section addresses the extent to which the countries of study regard the entitlement of communities to protect and preserve their intellectual property in the

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832 See Jones 1999 *HRQ* 80.
form of expressions of folklore as a right. Even if the existence of communal intellectual property is universally acknowledged, it is a different matter when it is asserted that communities have a right over their intellectual property. Where a peoples' right does not exist in a constitution, it would be important to identify whether other sources of law such as customary law articulate a peoples' right.

A peoples' right can be found in the constitutions of the countries of study – especially in Kenya – in addition to a recognition that communal intellectual property is part of constitutional property in South Africa\textsuperscript{836} as well as a combined reading of a number of rights in the \textit{African Charter}.

The consideration of the nature of peoples' rights in Chapter 3 of the thesis\textsuperscript{837} revealed that the \textit{African Charter} contains a number of peoples' rights that can be said cumulatively to contain the right to expressions of folklore.\textsuperscript{838} In particular, a combined reading of article 14, which protects the right to property; article 22(1), which recognises the right to development; and the decision of the African Commission in \textit{Endorois},\textsuperscript{839} justify the claim that the right of communities in Africa to communal intellectual property\textsuperscript{840} would be recognised in appropriate circumstances. The same can be said of communities in Latin America.\textsuperscript{841} Article 21\textsuperscript{842} has become

\begin{footnotesize}
\begin{enumerate}
\item See Du Bois 2013 \textit{European Property Law Journal} 144-170.
\item Chapter 3.3.2.
\item The following rights are peoples' rights in the Charter: the equality of all peoples (a 19); rights to existence (a 20); right to freely to dispose of their wealth and natural resources (a 21); right to their economic social and cultural development (a 22); right to national and international peace and security (a 23); and right to general satisfactory environment (a 24). A 22(1) of the Charter which provides that "All Peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind".
\item App 276/03 46th Ord Sess.
\item App 276/03 46th Ord Sess para 238: "[T]he African Commission agrees with the complainant that that the property of the Endorois people has been severely encroached upon and continues to be so encroached upon."
\item See a 21 of \textit{American Convention on Human Rights} 1969 (9) ILM 99.
\item "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."
\end{enumerate}
\end{footnotesize}
the juridical basis for the collective rights of indigenous and tribal peoples,\textsuperscript{843} recognised by the Inter-American Court of Human Rights.

Recent constitutional design in Kenya which is a country of study,\textsuperscript{844} suggests that there is a right to communal intellectual property when interpreted within the jurisprudence of group rights in the \textit{African Charter}.

Kenya recognises a peoples' right to culture in section 11 of the 2010 Constitution. Paragraph 1 of article 11 provides that culture is the foundation of the Kenyan state.\textsuperscript{845} Article 11(2) enjoins the Kenyan state to promote the intellectual property rights of the Kenyan people. Article 11(3)(a) states that parliament shall enact a legislation that ensures that "communities receive compensation or royalties for the use of their cultures and cultural heritage". There is no doubt that article 11 protects the peoples' right to culture. It is instructive that article 11 is not part of Chapter four of the \textit{Kenyan Constitution} which protects a number of human rights. The bearers of this right are communities in Kenya and the only persons who can enforce the peoples' right to culture. In a way the peoples' right to culture is similar to the right to communal intellectual property discussed above especially because article 11(3) requires a legislation to give effect to the duty to ensure that communities receive adequate compensation for the use of their culture and cultural heritage.

It is important to consider further on the nature of legislation required by the \textit{Kenyan Constitution}, and to point out that the 2010 \textit{Kenyan Constitution} appears to have opted for a negative protection of expressions of folklore as it seems that communities in Kenya will not be allowed exclusive rights over the use of their

\textsuperscript{843} See the following cases: \textit{Saramaka People v Suriname}, Inter-Am Ct HR (ser. C) No 172, 79 (Nov. 28, 2007), interpreted by Inter-Am Ct. H.R. (ser. C.) No. 185 (2008); \textit{Mayagna (Sumo) Awas Tingni Cnty. v Nicaragua}, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); \textit{Yakye Axa Indigenous Cnty v Paraguay}, Merits, Reparations and Costs, Inter-Am Ct HR (ser C) No 125 144 (June 17 2005) and \textit{Moiwana Cnty v Suriname}, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (ser C) No. 124 (June 15, 2005).

\textsuperscript{844} See also a 69 of the 2014 \textit{Egyptian Constitution} provides that the state shall protect all types of intellectual property in all fields. See also a 41 of the 2014 \textit{Tunisian Constitution} which provides that intellectual property is guaranteed.

\textsuperscript{845} See \textit{Katam v Chepkwony} [2011] eKLR.
cultures and cultural heritage which would characterise the framework as positive protection. Many models of the negative protection of expressions of folklore give communities the right to prior informed consent to the use of their expressions of folklore. This is designed to ensure that royalties are negotiated and agreed upon before use of the expressions of folklore. In this regard, it may even be possible to introduce an equitable compensation scheme whereby royalties are automatically due for the use of expressions of folklore even where no consent has been obtained.

It is also important to remember that the provisions of section 11(3) constitute – albeit in broad terms – a general standard for the nature of legislation intended to protect expressions of folklore. One may indeed argue that the legislation contemplated by section 11(3) will grant exclusive rights to communities over their expressions of folklore as this is the most effective means of ensuring that they receive royalties from the use. It should be remembered that article 69(1) of the 2010 Constitution places a number of obligations on the state as regards the environment, one of which is to "protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and genetic resources of the communities". Legislation protecting expressions of folklore by vesting exclusive rights to folklore in communities, could point to this provision as a source of authority, especially when the expressions of folklore can be linked to the bio-diversity of community. It is debatable whether the constitutional injunction imposes a threshold against which Kenyan intellectual property legislation can be assessed. Is it enough, it can be asked, that there is legislation protecting different rights or must the legislation actively favour Kenyan people? And what really would favour Kenyan people? Should there be intellectual property legislation that conforms to international intellectual property standards, or that promotes the national interest of Kenyans? Could the "national interest" be defined by the Bill of Rights in such a way that the right to health, for example, would define the contours of patent legislation so that the Kenyan Patent Act would reflect all exceptions and flexibilities which ensure better access to medicines?
Again, would the right to freedom of expression recognised by section 33 of the
Kenyan Constitution, support an expansive reading of exceptions and limitations
promoting access to educational materials? This would appear to be a reasonable
conclusion from the decision of the Kenyan High Court in PAO v Attorney General.846
Another point that demands clarification in the text of section 40(5), is the reference
to the "people of Kenya". Is this a reference to collective intellectual property rights
such as traditional knowledge and expressions of folklore, or does it refer to the
different intellectual property rights of individuals in Kenya?847

Our consideration of the possibility of expressions of folklore as part of the
constitutional property protection under the South African Constitution in Chapter
5,848 suggests that a slight jurisprudential jump is needed to recognise communities
as entitled to the protection of section 25 of the Constitution, and therefore to
constitute section 25 as a peoples' right, at least as regards communal intellectual
property such as expressions of folklore. Without such recognition, section 25
appears suited to individuals and may prove problematic for communities.

A perusal of the Bill of Rights of the other countries of study such as Nigeria and
Ghana, reveals that they do not provide for a peoples' right, even though the
operation of the African Charter in these two countries would suffice as a juridical
basis for a peoples' right. This notwithstanding, it should be remembered that all
the countries of study recognise and apply customary law which is, it is submitted, a
practical manifestation of a peoples' right to communal intellectual property. It is to
a consideration of customary law in the countries of study that this chapter turns to.

846 [2012] eKLR. The court held that the right to life, dignity and health of petitioners who were
living with HIV/AIDS must take precedence over intellectual property rights of patent holders
(para 85). The court noted that while such Intellectual property rights should be protected,
where there is a likelihood that their protection will put in jeopardy fundamental human rights
intellectual property rights must give way to the fundamental rights of citizens in the position of
petitioner (para 86).

847 It would appear that the ongoing constitutional review process in Zambia includes a proposed
constitution which in a 63(4)c copies the provisions of s 40(5)c. There is a little difference
though because the proposed Zambian provision undertakes to "support, promote and protect
the intellectual property rights of the owner or the people of Zambia". The inclusion of the
word "owner" would suggest a distinction between the individual and collective rights to
intellectual property in Zambia.

848 See Chapter 5.5.5.2 and text accompanying Du Bois 2013 European Property Law Journal 144-
170.
8.4 Customary law as a manifestation of a peoples' right to expressions of folklore

The nature of communities as a source of identity and development leads to the articulation, development, and maintenance of norms by the communities which members of the community regard as obligatory. Customary law is, it is submitted, a classic articulation of a peoples' rights in that it is a composite normative entitlement of a community that ordains a community's relationship with third parties in respect of its property, including communal intellectual property. In the absence of a right to communal intellectual property in a national constitution, it seems plausible that recourse should be had to the community's normative framework in a bid to determine how the promotion and protection of expressions of folklore should be determined. The fact that a right to communal intellectual property exists in a national constitution in fact favours the operation of customary law as the operation of customary law would imply an increased legitimacy. Where there is no right to communal intellectual property, it is even more cogent to investigate the plausibility of protecting expressions of folklore through customary law. It is important to realise that it is now trite that customary law is a matter to be proven through evidence in many national legal systems in Africa, including the countries of study.

What is not entirely clear is its interaction with the legal systems in general and human rights in particular. It is therefore important to ensure that these legal systems allow the use of customary law rules and processes to protect expressions of folklore. At one level customary law, as a question of fact, presents an evidentiary challenge. Once a community is able to convince a court of the existence of a rule or process of customary law, it is the legal system that determines how it is to be received and applied. While available evidence of the existence of rules concerning communal intellectual property are not common, it is important to draw attention to extensive rules about real property, such as land, and to suggest that these rules could be indicative of how customary rules of communal intellectual property would

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849 See the Nigerian Supreme Court in Owonyin v Omotosho 1960 1 All NLR 304.
evolve. It has become trite that in most of Africa that land is generally held and owned communally and through family units. Third parties have access to land through rights of use, permission, or participation. It would appear that at the heart of any protective model for communal intellectual property is the access to be granted by the community.

It is important now to turn to a consideration of how customary law can protect expressions of folklore in the countries of study.

8.4.1 Customary law and the protection of a peoples’ right to expressions of folklore in Kenya

Article 174 of the Kenyan Constitution clearly mandates customary law as the basis for, amongst others, the development of the protection expressions of folklore. Ochich asserts that before the dawn of colonialism in Kenya, the various ethnic communities had their own customary laws regulating their lives and social order.

Section 2 of the Kenyan Constitution, provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, has made a significant contribution to the status of customary law in Kenya. This is even more so since section 115(2) of the repealed Constitution is no longer part of the 2010 Constitution. This section provided that "no right, interest or other benefit under customary law shall have effect so far as it is repugnant to any written law". The repealed section 115(2) resulted in much written law trumping customary law, ensured that unwritten customary law enjoyed a significantly inferior status. Furthermore, section 3(2) of the Judicature Act 8 of 2012 require customary law to be applied as a guide and in civil cases in which one or more of the parties was either subject to or affected by customary law. The new constitutional dispensation means that section 3 of the Judicature Act which sets out
the hierarchy of laws in Kenya, no longer applies. Accordingly, customary law can only be subjected to a constitutional test for validity and no longer to either the repugnancy test or the test of written laws.\textsuperscript{854} Customary law enjoys a status equal to Kenyan legislation and the common law so strengthening its status\textsuperscript{855} and enabling Kenyan communities to rely on customary law to protect their expressions of folklore. Furthermore, the provisions of section 2 of the \textit{Magistrates' Courts Act} 10 of 2012, limit the application of customary law to a circumscribed list of civil cases.\textsuperscript{856}

If section 2 of the \textit{Magistrates' Court Act} is still operational, it will be difficult to find a juridical basis to entertain a dispute over expressions of folklore. It is submitted that this provision is no longer tenable under the \textit{Kenyan Constitution} which recognises culture as the foundation of the Kenyan state. Surely disputes over aspects of culture, such as expressions of folklore, should be possible because of the \textit{Kenyan Constitution}. Accordingly, establishing the existence of customary law rules for the protection of expressions of folklore would allow these rules to be applied. Even if such rules are not readily discovered, customary law rules governing land would be indicative of the rules governing communal intellectual property. The \textit{Kenyan Constitution} recognises community land that is vested in and held by communities.\textsuperscript{857} It is interesting that section 63(4) recognises that community land may be disposed of, but requires legislation setting out the nature and extent of the rights of members of each community individually or collectively. It is easy to suggest, therefore, that the legislation which sets the framework for the disposal of community land would act as a model for the customary law rules governing communal intellectual property.

\textsuperscript{854} See, for example, \textit{Rukunga v Rukunga} [2011] eKLR.

\textsuperscript{855} See Wachira \textit{Indigenous Affairs} 6.

\textsuperscript{856} The issues are: (i) Land held under customary tenure; (ii) marriage, divorce, maintenance or dowry; (iii) seduction or pregnancy of an unwanted woman or girl; (iv) enticement of or an adultery with a married woman; (v) matters affecting status, and in particular the status of women, widows, and children, including guardianship, custody, adoption, and legitimacy; and (vi) intestate succession and administration of estates, so far as not governed by any written law.

\textsuperscript{857} See s 63(1). See also \textit{Katana Koi v Protus Evans Masinde} [2013] eKLR.
One of the hallmarks of a plural legal system such as the Kenyan, is that disputes over customary law are ultimately resolved through adjudication before regular courts. In this regard Kenya has established a specialised court to deal with cultural heritage issues in the Environment and Land Court established by the *Environment and Land Court Act* 12A of 2012. What makes this court a possible site for contestation over the use of expressions of folklore, is the definition of "environment" in section 2 of the Act as the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities. Since expressions of folklore are part of the cultural heritage of communities, it is plausible to contend that the Environment and Land Court will adjudicate over such disputes. This is further supported by the provisions of section 13(2) of the Act which give the court original and appellate jurisdiction to hear and determine disputes relating to environment and land. A decision as to whether the court will have jurisdiction over cultural heritage issues is eagerly awaited. Some of the issues that could occupy the court would be the authenticity of communal consent to the use of expressions of folklore, especially when representatives of communities are involved.

In closing, it is important to recognise the far-reaching strides made by the *Kenyan Constitution* in enabling communities to govern and protect their expressions of folklore by exercising their constitutional right to practise their culture, traditional knowledge, and self-governance.

### 8.4.2 Customary law and the peoples’ right to expressions of folklore in South Africa

Although the black communities in South Africa qualify as cultural communities or even as religious communities, it has become an accepted practice to consider...
their normative framework as customary law,\textsuperscript{861} while other cultural, linguistic and religious communities are considered under sections 30 and 31 of the 1996 Constitution.\textsuperscript{862} It should, however, be pointed out that sections 30 and 31 also underpin customary law in that customary law constitutes a normative cultural framework.\textsuperscript{863} This section therefore considers customary law as an additional juridical basis for communities usually regarded as black, as well as for indigenous communities such as the Khoi/San that constitute ethnic groups in South Africa, to protect their expressions of folklore.

Bennett describes customary law as deriving “from social practices that the community concerned accepts as obligatory”.\textsuperscript{864} It is the acceptance that infuses customary law with its normative character. Most, though not all, customary law is oral. It is this oral nature that renders it questionable as law as understood in the western legal tradition. In Africa whatever possibility existed for the systematic study of customary law was destroyed by colonialism, which in its wake brought foreign law and relegated customary law into a matter of tolerance. This is perhaps why Bennett concludes that

\ldots the rules of an oral regime are porous and malleable. Because they have no clear definition, it is difficult to differentiate one rule from another, and, in consequence to classify rules according to type. If rules cannot be classified, they cannot be arranged into a system, and, without the discipline of a system, rules may overlap and contradict one another. In fact strictly speaking, the oral versions of customary law should not be called systems at all. They are probably better described as repertoires, from which the discerning judge may select whichever rule best suits the needs of the case.\textsuperscript{865}

Section 211(3) of the Constitution provides that: "The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

\textsuperscript{861} See Nwauche 2009 Journal of Legal Pluralism 67.
\textsuperscript{862} Nwauche 2009 Journal of Legal Pluralism 67.
\textsuperscript{863} See Bennett Human rights and African customary law 23.
\textsuperscript{864} Bennett Customary law in South Africa 1.
\textsuperscript{865} Bennett Customary law in South Africa 2; Kuruk 2002 eCopyright Bulletin.
In *Bhe v Khayelista* 866 the Constitutional Court clarified the important position of customary law within the constitutional framework of South Africa 867 pointing out that customary law now enjoys the same status as the common law and legislation. 868

The clear words of the Constitutional Court in *Bhe* are such that it is tempting to conclude that the validity of customary law cannot be tested against legislation other than the Constitution. As we noted, customary law is subject to the Constitution. Specifically, customary law cannot apply if it is conflict with any provision in the Bill of Rights. 869

It is, therefore, important to draw attention to the fact that one of the significant hurdles in the application of customary law – as with other common and statutory law – is the constitutional muster of the Bill of Rights. Whenever a customary law rule is urged as applicable in preference to a right in the Bill of Rights, it is possible to treat the customary law as a law of general application within the contemplation of section 36 of the *South African Constitution* 870 for purposes of a limitation analysis. This analysis establishes whether customary law has breached a right, and then proceeds to establish whether the infringement is justified in terms of the criteria laid down in section 36 – that the limitation is reasonable and justifiable in an

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866 2005 1 BCLR 1 (CC) (hereafter *Bhe*).
867 See *Bhe* 2005 1 BCLR 1 (CC) para 41: "... [t]he Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African Law, provided the particular rules and provisions are not in conflict with the Constitution." Ss 30 and 31 of the Constitution entrench respect for cultural diversity. Further, s 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, s 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by customary law so long as they are consistent with the Bill of Rights. Finally, s 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.
868 See *Bhe* 2005 1 BCLR 1 (CC) para 42.
869 In *Bhe* 2005 1 BCLR 1 (CC) the primogeniture rule as applied to the customary law of succession was held irreconcilable with the rights to human dignity (s 10 of the Constitution) and right to equality (s 9) of the Constitution. See Langa DCJ in *Bhe* para 46: "It bears repeating, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights." See also *Moseske and Others v Master and Another* 2001 2 SA 18 (CC).
870 S 36 of the *South African Constitution*. 

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open and democratic society based on human dignity equality and freedom. In this regard, the rights that readily come to mind include the right to freedom of expression recognised by section 16 of the Constitution.\textsuperscript{871} For example, in furtherance of the freedom of artistic creativity, protected by section 16(1)(c), a filmmaker may argue that the restriction or total ban placed on the use of cultural motifs which are part of the folklore of a South African community by its customary law, is in breach of this freedom.

In determining the constitutional validity of the customary law rule, the court will have to conduct a limitation analysis to justify the limitation of the freedom of expression by customary law. It is easy, therefore, to see that even though customary law has an elevated constitutional status in the \textit{South African Constitution}, it is somewhat predicated on compliance with an individually-oriented Bill of Rights. The possibility that many of the group-oriented norms or expressions of folklore will survive a human rights inquiry is slim. However, it is also possible to anchor customary law in sections 30 and 31 of the \textit{South African Constitution} which we examined above\textsuperscript{872} where South African constitutional theory suggests that the two rights should be balanced in the search for a just solution.

Since the customary protection of expressions of folklore could conflict with legislation such as the \textit{SACA} and the \textit{SADA}, it is also important to dwell on this potential conflict, especially from a perspective that statutes are not superior to customary law, and that the \textit{IPLAA 2013} could constitute a juridical basis for the application of customary law as argued below\textsuperscript{873}

Another hurdle which customary law must overcome is that of proof as it is largely unwritten. The existence of customary law can be established through "judicial

\textsuperscript{871} S 16 of the \textit{South African Constitution} provides that: "Everyone has the right to freedom of expression, which includes – (1) (a) freedom of the press and other media; (b) freedom to receive and impart ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in subsection 1 does not extend to (a) propaganda for war; (b) incitement to imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

\textsuperscript{872} Chapter 7.3.

\textsuperscript{873} Chapter 7.3.
notice; by expert evidence; and through textbooks and case law.\textsuperscript{874} It is clear from the provisions of section 1(1) of the \textit{Law of Evidence Amendment Act 45 of 1988},\textsuperscript{875} that the courts should seek "sufficient clarity" of a fact that might be a matter of evidence and disputation.\textsuperscript{876} The Act also clearly envisages that the court may engage in this inquiry and that the parties to the case may assist the court in this regard. However, the argument that the only test that customary law must satisfy is that of constitutional muster, is supported by the fact that the Constitutional Court is of the opinion that "in view of the constitutionalisation of indigenous law, there are substantial doubts whether the first proviso still applies".\textsuperscript{877} If this is correct, and it is submitted that it is, it means, as stated above, that customary law is not subject to a validity test which would have been the case were it required to comply with public policy and natural justice. The use of textbooks, case law, and codes are themselves a matter of procedure instituted by the courts.\textsuperscript{878} This approach is, however, fraught with difficulty and the need for caution was sounded in \textit{Alexkhor v Richtersveld Community}\textsuperscript{879} and adopted in \textit{Bhe}.\textsuperscript{880} The court in the former case said:

Although a number of textbooks exist and there is considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political administrative and judicial context in which it was applied...The result was that the term 'customary law' emerged with three quite different meanings: the official body

\textsuperscript{874} See Ngcobo J in \textit{Bhe} 2005 1 BCLR 1 (CC) para 150 (footnotes omitted).
\textsuperscript{875} This section provides that: "(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient clarity: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom or lobola or bogadi or any other similar custom is repugnant to such principles. (2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that section which is in issue at the proceedings concerned."
\textsuperscript{876} See \textit{S v Sihlani \\& Another} 1966 3 SA 148 (E).
\textsuperscript{877} See \textit{Mabuza v Mbatha} 2003 4 SA 218 (C). See also \textit{Thibela v Minister van Wet en Orde} 1995 3 SA 147 (T).
\textsuperscript{878} See \textit{Mosii v Motseokhumo} 1954 3 SA 919 (A); \textit{Ex parte Minister of Native Affairs: In re Yako v Beyi} 1948 1 SA 388 (A).
\textsuperscript{879} 2003 12 BCLR 1301 (CC).
\textsuperscript{880} \textit{Bhe} 2005 1 BCLR 1 (CC) para 151. In para 152 Ngcobo states that: "It is now generally accepted that there are three forms of indigenous law: (a) that practised in the community: (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes".
of law employed in the courts and by the administration...; the law used by academics for teaching purposes; and the law actually lived by the people.\textsuperscript{881}

This concept of the "living customary law" has become a consistent feature of South African customary law lived by the people.\textsuperscript{882} Also related to this point is the judicial recognition in \textit{Shilubana v Nwamitwa}\textsuperscript{883} of the capacity of a community to change its customary laws to suit changes in the community. There is no doubt that the living customary law with respect to expressions of folklore will emerge from the response of communities to the misappropriation of their communal intellectual property. It is plausible to argue that that IPLAA 2013 is a legislative enhancement of customary law with regard to the protection of expressions of folklore. It is even more true when one considers that key sections of the IPLAA 2013 recognise the importance of customary protocols and customary law with respect to negotiations to secure the prior informed consent of communities; the representatives of communities; and the benefits of the appropriation and commercialisation of expressions of folklore.

While further discussion of the capacity of customary law to protect expressions of folklore continues below, especially within a human rights paradigm,\textsuperscript{884} it is important to note that the constitutional recognition of customary law significantly enhances the capacity of communities to protect their expressions of folklore when there is proof of the existence of customary law rules and protocols.

An idea of the content of such rules can be gleaned from the rules for communal landholding established by the Constitutional Court in \textit{Alexkhor Ltd v Richtersveld Community}.\textsuperscript{885} The court found here that the nature of a customary-law interest in land is "... a right of communal ownership under indigenous law, including communal ownership of the minerals and precious stones".\textsuperscript{886} Third parties acknowledged the

\textsuperscript{881} 2003 12 BCLR 1301 (CC) para 54.
\textsuperscript{882} See Himonga and Bosch 2000 \textit{SALJ} 306.
\textsuperscript{883} 2007 5 SA 620 (CC).
\textsuperscript{884} Chapter 7.3.2.
\textsuperscript{885} 2003 12 BCLR 1301 (CC).
\textsuperscript{886} 2003 12 BCLR 1301 (CC) para 64.
communal ownership of communities by obtaining the permission of communities to engage in mining.  

8.4.3 Customary law and the peoples’ right to expressions of folklore in Ghana

Customary law is defined by section 11(3) of the Ghanaian Constitution as meaning the rules of law which are, by custom, applicable to particular communities in Ghana. This definition implies that the communities have a significant influence in what constitutes customary law, and that it is their acceptance of a custom as obligatory that lends normative character to the custom.

In Ghana customary law is constitutionally recognised as a source of law. Section 11(1) of the Ghanaian Constitution provides that the laws of Ghana shall comprise the Constitution; enactments made by or under the authority of the Parliament established by the Constitution; any Orders, Rules and Regulations made by any person or authority under a power conferred by the Constitutions; the existing law; and the common law. Section 11(2) Ghanaian Constitution defines the common law of Ghana as the rules of law generally known as the common law, the rules generally known as the doctrines of equity, and the rules of customary law including those determined by the Superior Court of Judicature. A key issue in this definition is that it locates the community as the legitimating factor for customary law. This has a number of implications, principal of which is that evidence can always be led to show that a particular customary law has changed. If this is so, the courts can use this to change the law and thereby circumvent the negative effects of the doctrine of judicial precedent. This definition further characterises custom as the foundation of customary law. There is, of course, a difference between custom and customary law. Not every rule of social relation is a custom. But there is no standard in the definition, or in any other law, by which to differentiate a custom from a customary law. The question is how to recognise what a community regards as law and what a community regards as a custom. In essence, when does a custom

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commence having the effect of a law? It often occurs that what is advanced as customary law may reflect a dominant minority or a simple majority, and that a significant part of a community is opposed to a particular rule. In effect, it is clear that customary law is often uncertain.

At present customary law in Ghana is a question of law in terms of section 55 of the Ghana Courts Act 459 of 1993. By regarding customary law as a question of law, it is presumed that the judges know the law and have a number of tools to be used in establishing the content of the law – just as a court would to ascertain the content of the received English common law. Ultimately, all the processes a court undergoes when customary law is a question of fact, including the use of the concept of judicial notice, are available to a judge who is uncertain about the content of a customary law. Regarding customary law as a question of law assumes that the tools for ascertaining the content of customary law are readily available in the form of textbooks, law reports, and the like. When these tools are not available, as is currently the case, there may not be much difference between regarding customary law as a matter of fact or of law as the discretion of the judge in both instances appears the same. If there were substantial written records of customary law as there are of the received English common law, it would be easier for a judge to ascertain the content of an alleged rule of customary law. The oracular nature of customary law, therefore, makes it imperative that evidence be led to assist the judge in his or her evaluation. It should be pointed out that there are in fact certain differences in that when customary law is a question of fact, the judicial officer is likely to exercise a greater discretion than when it is a question of law. In practice, however, this is not the case – especially not where a custom has been judicially noticed. If the precedent has been set by an appellate court, it may take a while before it is overturned.

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888 See Allott New essays in African law 147.
890 Such as reported cases, textbooks and other sources.
It is therefore clear that rules of the customary law of Ghanaian communities on expressions of folklore are likely to be enforced in Ghanaian courts. In its enforcement of rules of customary law, it is important to note the provisions of section 26(2) of the *Ghanaian Constitution* – which requires that all customary practices which dehumanise or are injurious to the physical and mental wellbeing of a person – are prohibited.

In closing, while there does not appear to be general norm as regards communal intellectual property in relation to customary law, assertions of customary laws protecting expressions of folklore will be independently assessed by the Ghanaian courts of law.

Ghana, like the other countries of study, has extensive rules governing the nature of communal land holding that may be a model for communal intellectual property. It is generally agreed that the highest form of landholding in Ghana is allodial title which recognises land vested in the 'stool' representing the community. Individuals and groups can hold 'freehold' titles and other lesser interests in land which derive from the allodial title.

The record of the Ghanaian legislature in the development of customary law through legislation such as the *Head of Family (Accountability) Act* 114 of 1985, the *Mortgages (Amendment) Decree* 37 of 1979, and the *Intestate Succession Law* 111 of 1981, prompt the prediction that the state would be willing to enact legislation that would enhance the use of customary law to protect expressions of folklore.

8.4.4 Customary law and the peoples’ right to expressions of folklore in Nigeria

In Nigeria, customary law is a question of fact because section 14(1) of the *Evidence Act* provides that it can be proved by evidence unless it can be judicially noticed.

892 See generally Woodman *Customary land law in the Ghanaian courts*; Ollennu *Principles of Customary Land Law*.


894 In *Mami v Paulina* [2005-2006] GLR 1116, the Ghanaian Supreme Court refused to abolish a custom except in circumstances where it encourages people to commit crimes. The court recognised that a custom may be changed by Parliament or by the President.
Section 14(2) of the Evidence Act provides that custom may be judicially noticed if it has been acted upon by a court of superior or coordinate jurisdiction to an extent which justifies the court asked to apply it, to assume that the persons or class of persons concerned in that area regard customary law as binding. Section 59 of the Evidence Act provides that customary law can be proved by opinions of persons having special knowledge of native law and custom; opinions of native chiefs; opinions of native chiefs; any book; and any manuscript. Even though a number of cases were for long required to enable a court to take judicial notice of a custom, it is now the law that one decision of most likely the Nigerian Supreme Court appears adequate for the courts. Being questions of fact, the existence of a rule of customary law is entirely at the discretion of the trial court since it is at liberty to believe or disbelieve the evidence. By making customary law a question of fact, a lot turns on the discretion of the judge. This, in turn, opens the way for the possibility that the content of customary law may be heavily influenced by the insight of the presiding judicial officer. Therefore, the interpretation and conclusion of a judicial officer based on the available evidence of a customary law may differ significantly from the customary law as practised by the people. In *Nzekwu v Nzekwu*, Nnaemeka-Agu JSC brought home the reality of regarding customary law as a question of fact. He said: "It is bad enough that our customary law has to be proved as a fact in our own country nearly thirty years after independence from British rule." In *Ugo v Obiekwu* the same judge continued his lament, calling the fact that customary law is a question of fact, an "...annoying vestige of colonialism".

In Nigeria three validating tests apply before customary law can be applied. First, customary law is to be applied in Nigerian courts if it is not repugnant to natural

896 See *Ojemen v Momodu* (2001) FWLR (Pt 37) 1138.
897 See *Adedibu v Adewoyin* (1951) 13 WACA 411.
898 See *Adeseve v Taiwo* (1956) 1 FSC 84 where the court used Ajisafe Laws and customs.
899 See the case of *Olagbemiro v Ajagunbade III* (1990) 3 NWLR (Pt 136) 37.
900 See *Oyewunmi v Ogunesan* (1990) 3 NWLR (Pt 137) 182.
901 1989 2 NWLR (Pt 104) 373.
902 1989 2 NWLR (Pt 104) 428.
903 1989 1 NWLR (Pt 99) 566.
justice, equity, and good conscience. Secondly, customary law should not be incompatible with any written law in force from time to time. And thirdly, customary law must not be incompatible with public policy. Of all these tests, the repugnancy test is the most widely applied even though the other two tests are of equal relevance to the protection of expressions of folklore.

The application of the repugnancy test in Nigeria has been inconsistent and unreliable leading to a conclusion that, in general, it has a limiting effect. It has been applied to reject a rule of customary law which allowed the head of a house to administer the estate of a former slave. In Edet v Essien the court rejected a custom that granted legal paternity to the man who paid the brideprice in preference to the biological father. In Chawere v Aihenu the customary law rule that an adulterous wife became the wife of an adulterer, was found to be repugnant to natural justice, equity and good conscience. In Egri v Uperi a customary law rule that required a father to send a daughter back to her estranged husband, even in the face of her stout resistance, was regarded by the court as repugnant. One of the more recent cases of the application of the doctrine, is Okonkwo v Okagbue where the Nigeria Supreme Court held that a custom which allows a woman to be married to a dead man is repugnant to natural justice, equity, and good conscience.

There are also examples of customary law rules having survived the test. In the Estate of Agboruja the court applied a rule of customary law which allowed the wife of a deceased person to marry her husband’s brother. In Cole v Akinleye the Yoruba rule of legitimacy by acknowledgment was upheld. In Daudu v Danmole the Judicial Committee of the Privy Council recognised as valid a Yoruba custom which provided that inheritance should be based on the widows of a person.

906 S 14(3) of the Evidence Act.
907 See In re Effiong Okon Ata v Henshaw 1930 10 NLR 65.
908 1932 11 NLR 47.
910 1973 11 SC 299.
911 [1994] 9 NWLR (Pt 368) 301.
912 1949 19 NLR 38.
913 1960 5 FSC 84.
914 1962 1 All NLR 602.
There are two broad views on the application of the repugnancy doctrine in Nigeria. On one hand is opinion that the repugnancy doctrine has been of relative benefit in striking down barbarous customs. 915 Other opinion points to the disastrous effect of the repugnancy doctrine because the test uses a foreign standard to evaluate the customs of a different people. 916 It is plausible to argue that customary rules protecting expressions of folklore would readily pass the repugnancy test because of the customary rules of communal land tenure917 that have become a key part of Nigerian land law. Longstanding rules of communal and family land holding recognise that alienation of family and communal land is possible with appropriate consent of representatives of the community and the family.918 On the other hand, there is little doubt that customary law occupies an inferior position in the Nigerian legal system and that a claim for the protection of expressions of folklore based on a customary law rule may be trumped by fundamental human rights provisions. For example, Nigerian courts have used Chapter four of the 1999 Constitution – which provides for fundamental civil and political rights – to evaluate customary law. An important right is the right to freedom from discrimination protected by section 42(1) of the Nigerian Constitution, on the basis of belonging to a particular community, ethnic group, sex, religion, or holding a particular political opinion. Gender discrimination has been vigorously challenged as breaching this right. In the celebrated case of Mojekwu v Muojekwu,919 Tobi JCA (as he then was) struck down the Nnewi custom of "oli-ekpe" which discriminated against women in that that the daughters of a deceased person could not inherit his property. This view point was also supported by the Court of Appeal in Muojekwu v Ejikeme.920 Even though the Supreme Court of Nigeria in Iwuchukwu921 overruled the decision by Tobi JCA in

917 See, for example, Maishanu v Anchau [2008] 6 NWLR (Pt 1084) 555; Ojoh v Kamalu [2005] 18 NWLR (Pt 958) 525.
918 See, for example, Ali v Ikuseibia [1985] NWLR (Pt 4) 630; Ekpendu v Erika [1959] NSCC 64; Seworuku v Orotosaku [1986] 3 NWLR (Pt 30) 957.
919 [1997] 7 NWLR (Pt 512) 283 (hereafter Muojekwu).
920 [2000] 5 NWLR (Pt 657) 419. See Uke v Iro [2001] 11 NWLR 196 where an Nnewi custom by which a woman is precluded from giving evidence was held unconstitutional as it offended the right to freedom from discrimination. See also Ukeje v Ukeje [2001] 27 WRN 142, where the
Muojekwu, the reasoning in the Muojekwu decision has been reaffirmed in the recent case of Asika v Atuanya.\textsuperscript{922} In Uke v Iro\textsuperscript{923} an Nnewi custom by which a woman is precluded from giving evidence at a trial, was held unconstitutional as it offended the right to freedom from discrimination. Again in Ukeje v Ukeje\textsuperscript{924} the Nigerian Court of Appeal held that an Igbo custom which disqualifies daughters from participating in the division of the estate of their deceased father, was unconstitutional because it discriminated on ground of gender. The right to freedom of association protected by section 40 of the CFRN 1999 has been held to protect individuals from being coerced into community associations such as age grades.\textsuperscript{925} In Salubi v Nwariakwu\textsuperscript{926} the Court of Appeal held that the status of illegitimacy has been abolished by section 39(2) of the Nigerian Constitution which is similar to section 40(2) of the Nigerian Constitution. These examples provide sufficient evidence to conclude that customary law rules may not pass Nigerian constitutional muster. It is likely that the right to freedom of expression recognised in section 36 of the Nigerian Constitution will be advanced as entitling members of the public to access expressions of folklore.

\textbf{8.5 Do 'other' communities qualify to bear the peoples' right to expressions of folklore}

This section explores the possibility that "other" communities in addition to "ethnic" communities are entitled to hold a peoples' right to expressions of folklore. In the previous section it is evident that at present only 'ethnic' communities are regarded as entitled to a "customary law". It would appear that the recognition of ethnic communities as bearers of collective rights is settled for a number of reasons. First, a number of constitutions appear to recognise communities as ethnic communities.

\textsuperscript{921} Court of Appeal held that an Igbo custom that disentitles daughters from participating in the sharing of the estate of their deceased father is unconstitutional.

\textsuperscript{922} [2004] All FWLR (Pt 211) 1406.

\textsuperscript{923} [2004] All FWLR (Pt 433) 1293.

\textsuperscript{924} [2001] 11 NWLR 196.

\textsuperscript{925} See the cases of Agbai v Okagbue 1997 7 NWLR (Pt 204) 391 and Anigbogu v Uchejigbo [2002] 10 NWLR (Pt 776) 472.

\textsuperscript{926} [1997] 5 NWLR (Pt 504) 459. This case was affirmed by the Supreme Court in Salubi v Nwariakwu [3003] ALL FWLR (Pt 154) 401. See Osibanjo 1984-1987 Nigerian J Contemp L 30.
An example can be found in the *Kenyan Constitution* which recognises marginalised communities as inclusive of indigenous peoples, traditional communities, pastoral individuals and communities, as well as communities living at the fringe of Kenyan society. It would appear that ethnic communities are at the heart of the meaning of communities. For example, article 63 provides for vesting of community land in communities identified on the basis of ethnicity culture or similar community of interest. This concept of community is laden with ambiguities and will surely generate considerable controversy. While ethnic groups may be easy to identify, how does one identify communities bound by culture when the word "culture" can be said to contemplate "ethnicity".

The recognition afforded communities is further reinforced by the provisions of article 174 of the *Kenyan Constitution* which in furtherance of devolved government, recognises the right of communities to manage their own affairs and to further their development. This recognition is an affirmation of the importance of communities using their normative frameworks for their development. There is no doubt that the customary law of Kenyan communities is in issue here. Secondly, the jurisprudence of the African Commission recognises "peoples" without any special significance reserved for indigenous peoples. Given the peculiar historical development of Africa, it can be asserted that there are no indigenous peoples in Africa because there are no "first" nations even though the claim to "indigenousness" is functionally designed to draw attention to marginalised communities. As stated earlier in this section it is safe, therefore, to conclude that indigenous communities, including ethnic communities in Africa in general and in the countries of study, are entitled to a right to expressions of folklore.

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927 See s 260 of the *Kenyan Constitution*.
928 See *Advisory Opinion*.
929 See *Advisory Opinion*, paras 1, 15 and 19. It is important to draw attention to the claim by the Khoisan people to be a first nation in South Africa. See "Khoisan Kingdom Policy on Khoisan Recognition of First Nation Status and Related Matters". Available at www.khoisan.net/policy.pdf. It is not exactly clear what the consequences of the recognition of Khoisan communities in the Traditional Affairs Bill pending before Parliament.
It is evident from the consideration of the meaning of "culture" and "communities" in Chapter 3\(^{930}\) that if culture is regarded as an abstraction emanating from beliefs, practices, values, shared understandings, and institutions that give members of a community an identity\(^{931}\) there is a possibility that communities organised other than around consanguinity would qualify to bear a peoples' right to expressions of folklore. It is clear that the definition and meaning of culture recognises that communities are social constructs and can be organised around other social facts such as religion. Thus ethnic communities organised around consanguinity appear not to be intrinsically more important than communities organised around other social facts. Since there is no implicit association of culture with ethnicity, other socially-based communities deserve recognition and the protection of their expressions of folklore.

If we use religion as an example of a social fact, it is important to ask whether a religious community is entitled to claim a right to expressions of folklore over its intellectual creations. Recent scholarship has explored the intersection of religion and intellectual property. For example, Professor Roberta Kwall explores the possibility that certain Jewish traditions, such as the *mesorah*, could be regarded as intellectual or cultural property,\(^{932}\) and it is clear that Jewish law is considered the collective "property" of the Jewish people. It is easy to conclude that an assertion that Jews have a right to expressions of folklore in Jewish law is conceivable. Another example is the strident public opposition to the copyrighting and patenting of yoga rights\(^{933}\) to the extent that yoga constitutes some form of religious expression in India, points to a belief that Indians have a right to expressions of folklore over yoga postures and techniques, even if these are available in the public domain. In the countries of study, it was noted in Chapter 4\(^{934}\) that the decision of South Africa's Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v The City of Cape Town*\(^{935}\) recognised culturally significant graves of Muslims in the Cape Area of

\(^{930}\) See Chapter 3.3.1.


\(^{932}\) See Kwall 2012 *WIPO Journal* 129.

\(^{933}\) See Srinivas 2007 *Economic and Political Weekly* 2866.

\(^{934}\) See Chapter 4.5.3.2.

South Africa. As the court noted, these graves are important cultural symbols of the Moslem community. It is therefore entirely plausible to recognise the right of Muslims in the Cape Area to the expressions of folklore surrounding these graves.

8.6 **Content of the peoples' right to expressions of folklore**

In this section there is a reconciliation of the content of customary law considered in section three and jurisprudence emanating from international soft law to set out a plausible and coherent content of the peoples' right to expressions of folklore.

A consideration of how the customary laws of the countries of study protects expressions of folklore in section three of this chapter yields evidence first that the protection of property is organised around the community and the family as a unit of the community. Secondly, it is also evident that the customary law of countries of study have been more adept in protecting real property than intellectual property, a fact that can be traced to the agrarian base of these communities. Even at that, there is also evidence of how traditional guilds and craftsmen developed traditional signs to identify their goods and services to justify a conclusion that the protection of some expressions of folklore is not entirely strange to communities in the countries of study. Fourth it can also be argued that in many communities, citizens and foreigners alike freely used expressions of folklore except those expressions of folklore linked to royalty. In all, it is clear that customary laws operating within a constitutional context have the capacity in the countries of study to articulate refine and develop rules to protect expressions of folklore. These rules therefore form the fulcrum of a peoples' right to the protection of expressions of folklore which may be argued strike a balance between protection and access to expressions of folklore.

It is important to point out that a customary law framework developed around a balance of protection and access is in accordance with treaties and soft law suggest broad parameters of the content of the peoples' right to expressions of folklore to be a balance between protection and access to expressions of folklore. A combined
reading of article 15(1) of the *ICESCR*\(^{936}\) and the *DRIP*\(^{937}\) suggest that on one hand communities are entitled to the protection of their expressions of folklore. On the other hand members of the community and other citizens are also entitled in some respect to have access to expressions of folklore.

### 8.7 Balancing the peoples' right to expressions of folklore and other human rights

The consequence of a peoples' right to expressions of folklore is that this right must be balanced against other rights claimed either by members of a community or by third parties. It is important to remember that a number of specific human rights are allied to the right to take part in cultural life, and we have concluded that access to communal intellectual property is likely to be argued on the basis of these rights. Since there is no hierarchy of rights, balancing of rights is an inevitable exercise in seeking to reconcile competing claims.

The fact that intellectual property rights, including communal intellectual property rights such as expressions of folklore, are contemplated either by the right to property or other human rights, means that a balancing exercise must occur if these rights are to be aligned. Consequently, when European courts recognised that intellectual property is part of article 1 to the First Protocol to the Charter, which protects the right to property, it was inevitable that the courts would be challenged to balance the right to property representing intellectual property, with other human rights including peoples' rights.

One of the strident criticisms of peoples' rights is that these group rights compromise and threaten individual rights.\(^{938}\) In the context of our thesis an

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936 See General Comment No 21: "Right of everyone to take part in cultural life” (a 15 para 1(a) of the *ICESCR*) adopted at the 43rd session of the Committee on Economic Social and Cultural Rights 2-20 November 2009 UN Doc No E/c 12/GC/21. See also General Comment No 17: "The Right of Everyone to benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author" (a 15 para 1(c) of the *ICESCR*) UN Doc No E/c 12/GC/17 (2006).

937 See arts 11, 31(2) and 46.

938 See, for example, Sieghart *The international law of human rights* 368: "If any of the individual rights and freedoms protected by modern international human rights law ever came to be
appropriate question may be cast thus: "Why should the individual who produces intellectual property which the community seeks to claim not be entitled to claim?"

A wholesale recognition of a human rights framework in a state is a rejection of any claim to a peoples' right. Accordingly, in communities of such a state the rights of individuals within a community who have created the intellectual property will be promoted and protected, even if the intellectual property in question is claimed by the community. On the other hand, a peoples' rights paradigm may also detract from human rights on the basis of the primacy of the group or collective rights. It is therefore appropriate to assert that a claim to a right to communal intellectual property is one which recognises the primacy of the group in claiming ownership and control over communal intellectual property. However, it must be pointed out that it does not totally extinguish human rights. Here, two broad sets of human rights must be clarified. First are the human rights concerns of members of the groups; the second set of human rights relate to third parties who are not members of the group but who, in furtherance of their human rights, seek access to the group’s expressions of folklore. For the members of the community, it may be stated that they have an inherent right to the use of communal intellectual property because of their membership of the group.

For non-members of the group a balancing of the right to communal intellectual property and the human rights claimed appears reasonable and inevitable since there is no recognised hierarchy of rights.\textsuperscript{939} The question is how to strike this balance. Should the peoples' right be restrictively and narrowly interpreted to give effect to individual rights as far as possible, or should individual rights be narrowly interpreted to ensure a robust interpretation of a peoples' right? Again the assertion of a peoples' rights favours the former interpretation. However, the manner of interpretation could proceed on the basis of "peoples' rights and human rights which are in a positive and dialectical relationship as mutually supportive and

\textsuperscript{939} See Pentney "The Aboriginal Rights Provisions in the Constitution Act, 1982".
complementary..".\textsuperscript{940} In many cases an \textit{ad hoc} approach to the balancing of rights would be appropriate from this supportive and complementary perspective. This type of approach is evident in Chapter 7\textsuperscript{941} of the thesis where the balancing of human rights related to the protection of expressions of folklore is undertaken. Broadly, the balancing exercise dwells on the right allegedly infringed and considers whether the interference is prescribed by law, pursues the legitimate aim of protecting the rights of others, and is considered necessary in a democratic society.\textsuperscript{942}

8.8 Conclusion: An assessment of the protection of expressions of folklore by a peoples' right framework

The objective of this chapter has been to assess the nature and extent of the protection of expressions of folklore by a peoples' right framework which recognises a peoples' right to expressions of folklore. A peoples' right framework is made up of two parts. The first is the recognition of peoples' rights in the national constitutions of the countries of study as well as in the \textit{African Charter}. The second is the role of customary law as a manifestation of a peoples' right.

It may be concluded that sufficient jurisprudence in the countries of study and other jurisdictions support the assertion that a peoples' right to communal intellectual property, including expressions of folklore, has come to stay – albeit with substantial challenges and obstacles such as an appropriate guide to identifying the communities entitled to such a right, and an elaboration of the content of this right. It is clear that the identification of relevant communities and the elaboration of the content of the right to communal intellectual property will remain a central concern. With respect to the content of such a right, a particular challenge would be "[t]he balance between heritage as a resource for all of humanity and as something that


\textsuperscript{941} See Chapter 7.5.

\textsuperscript{942} See a 10(2) of the \textit{European Convention on Human Rights}. See also the following cases: \textit{Melnychuk v Ukraine} 28742/03 (05/07/2005); \textit{Anheuser-Busch Incl.v Portugal} No 73049/01 (11 October 2005) of the European Court of Human Rights confirmed by the Grand Chamber of the European Court of Human Rights; \textit{Ashby Donald and Others v France} No 36769/08 (10 January 2013). See also \textit{Laugh-It-Off Promotions v South African Breweries Ltd} 2006 1 SA 144 (CC).
properly belongs to and remains controlled by, its communities of origin.” Such a right must strike an adequate and equal balance between the protection of communal intellectual property and access by members of the public to such communal property. Without this balance, an overprotective framework will exclude communal intellectual property and ultimately affect innovation, creativity and development.

With respect to customary law as a manifestation of the peoples' right to communal intellectual property including expressions of folklore, it can be asserted, as a general proposition, that the protection of expressions of folklore is inherent in customary law because of communal dealings with property, especially land. It is entirely plausible to claim that a community would have rules to protect internal and external interaction with its expressions of folklore. For example, the requirement of the consent of the community and heads of the family before the alienation of community or family land, would also apply to expressions of folklore. The World Intellectual Property Organisation (WIPO) argues that:

> Customary laws are central to the very identity of indigenous peoples and local communities, defining rights, obligations and responsibilities of members relating to important aspects of their lives, cultures and world views. Customary law can relate to the use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems...

Where such a rule exists, the community would have the capacity to protect its expressions of folklore. It is also important to draw attention to the recognition of the utility of customary law by the *Swakopmund Protocol* in protecting expressions of folklore and the enabling effect of this fact for Ghana and Kenya. There are numerous examples of customary law protecting expressions of folklore. For example, Ndoye points to the damage done by unauthorised public performances of traditional dances. Amongst the Yoruba of Nigeria certain traditional poetry

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943 See Brown 2005 *Int’l J Cultural Prop* 49.
944 See Kuruk 1998 *Am U L Rev* 769-852, 784: "The leader controls farmland and other property of the group, arbitrates disputes...".
recitations and praise songs were reserved for certain families and office bearers in particular locations, making it imperative that permission be sought for a change in the location and the persons performing them. Boateng carefully discusses the gender restrictions in the making of Kente and Adinkra cloth in Ghana.

In Nigeria, traditional marks served an origin function revealing information about the origin of goods or persons engaged in certain professions. Asein states that:

Though the history of modern trademarks in Nigeria is very recent, the traditional system of branding predates the reception of English law in 1863. Personal knowledge and reputation were characteristics features of the traditional village economy as renowned craftsmen were easily associated with their products. But with the expansion of trade across ethnic boundaries, personal attributes gradually gave way to communal reputation and articles of trade became more readily identified, not so much with individual producers but be reference to their groups and communities of origin.

The reputation of these goods and services grew over time which encouraged third parties to seek the permission of communities to reproduce their goods and services. The organisation of traditional African societies along patriarchal and status lines reserved certain roles exclusively or conditionally for specific genders and groups of persons. The assumption of these roles without permission breached customary laws and protocols. Many of the designated roles and status could only be breached through ritual cleansing involving the cultural norms of a society. Shodipo, who conducted the first systematic examination of the protection of intellectual property in the preliterate era in Nigeria, points out that three systems of enforcement of proprietary rights in intangibles existed. These were through the family/community; the religious orders and cults; and guilds of craftsmen who operated within the framework of customary law. He concluded that communal

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948 See Boateng “Square pegs in round holes” 71-72.
949 See Asein 1994 Trademark Report 64-78.
952 Shodipo Piracy Counterfeiting.
953 At 37-45. See also Adewoye The Judicial System in Southern Nigeria 1854-1954.
property in intellectual property is vested in the community as a whole, or in a section of the community.\textsuperscript{954}

In Kenya there is evidence that even though the Massai pastoralists have a well-developed customary law with fines, penalties, and taboos as sanctions, there is a practice that knowledge and resources – except that held only by the head of the Massai – are accessible to all.\textsuperscript{955} The customary laws of the Mijikenda people of Kenya show a supernatural foundation, and permission to use resources depended on a revelation, through a seer, of acquiescence in such use by the Mijikenda Gods coupled with the temporal consent of the Mijikenda elders termed the \textit{Ngambi}.\textsuperscript{956}

Two reasons can be advanced why doubt as to the potential of customary law in protecting expressions of folklore persists. First, customary law is largely oracular and must be proved as a matter of law and fact in many jurisdictions. The rules of proof present numerous challenges with the result that it is not a foregone conclusion that customary law rules will apply. This means that customary law must be proved by evidence in court. Usually after a number of applications, courts are allowed to take judicial notice of customary law rules. One consequence of the need to prove customary law is that the discretion of the judicial officer is fundamental in the recognition and ascertainment of customary law rules. It is therefore possible that an asserted customary law rule will be rejected, restated, reformed, or created.\textsuperscript{957} In many cases judicial officers have created customary law which has led to the observation of a difference between the peoples' customary law and judicial customary law.\textsuperscript{958} It is important to note that in some African countries such as Ghana and South Africa, customary law is a question of law like other laws. The content of the customary law is presumed to be within the knowledge of the judge.

\textsuperscript{954} Shodipo \textit{Piracy Counterfeiting.} At 37-45. See also Adewoye \textit{The Judicial System in Southern Nigeria 1854-1954.}

\textsuperscript{955} See International Institute for Environment and Development www.pubs.iied.org/pdfs/14590IIED.pdf.


\textsuperscript{957} A good example is how the colonial Nigerian judiciary gradually recognised the individualisation of land holding. See, for example, \textit{Lewis v Bankole} 1908 1 NLR 82.

\textsuperscript{958} See, for example, Woodman "Customary law state courts" 143-163.
However, as customary law is *oral* and largely unwritten, there is also a need to prove customary law as if it is regarded as question of fact.

Secondly, the question of proof is tied up with the fact that legal pluralism in African states subordinates customary law to state law. The recognition, proof and application of customary law in terms of a framework established by common- and civil-law principles is therefore required. The validation of customary law by a court weakens that law in two respects. First, it leads to a homogenisation of customary law by the judiciary in its evaluative function of customary law due to the principles of judicial precedent and judicial notice. Therefore, customary law applied in one case by superior courts, becomes adopted as the customary law of different communities, even when the content, nuance, and application differ in reality between these communities. Secondly, many African judiciaries create new customary law, at least in common-law countries, because the evaluative function of the judiciary in the application of the validity tests is often based on foreign standards and values. An important facet of the validation of customary law is the scrutiny of its compliance with fundamental human rights in national constitutions.

The subordinate position of customary law to fundamental human rights could result in the trumping of customary law, rules and processes. It is, therefore, in the context of the inferior status of customary law that some doubt persists of the capacity of customary law to protect expressions of folklore. Where, however, a peoples’ right to communal intellectual property exists, as is argued above, customary law is strengthened and interacts with other human rights as a right that demands equal treatment.

In conclusion, it appears reasonable to suggest that the analysis of the peoples’ right to expressions of folklore undertaken in this chapter reveals a strong possibility that expressions of folklore can be protected by this emerging right. Together with the specific fundamental human rights and collective human rights considered in Chapter 7, it can be concluded that a fundamental human rights and a peoples’ right

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959 Chapter 7.2.
framework will significantly enhance the protection of expressions of folklore. As contended at the beginning of this chapter, a human and peoples' right framework is the final complement in this thesis of an optimum framework for the protection of expressions of folklore.
# CHAPTER 9

AN OPTIMUM FRAMEWORK FOR THE PROTECTION OF EXPRESSIONS OF FOLKLORE

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CHAPTER 9

AN OPTIMUM FRAMEWORK FOR THE PROTECTION OF EXPRESSIONS OF FOLKLORE

9.1 Introduction

This chapter distils the discussions in Chapters 1 to 8 into an understanding of an optimum framework for the protection of expressions of folklore. The discussions in this chapter reflect conscious choices made from a consideration of different aspects of frameworks for protection considered suitable for the countries of study in particular, and for African states and the developing world in general.

9.2 Optimum framework for the protection of expressions of folklore

This thesis asserts that the optimum framework for the protection of expressions of folklore is best represented by national legislation which is interpreted and developed within a human and peoples' right framework, and multilateral treaties at a regional and global level.

National legislation is important because it is most likely to reflect the consensus emerging from national discussions on how best to protect expressions of folklore. It is within a human and peoples' rights framework that national judiciaries would have an opportunity to interpret the provisions of the national legislation beneficially and cumulatively. Without regional and global understandings that establish minimum standards of protection in the states of the world, national protection would be meaningless because states outside of these understandings would become havens for the misappropriation of expressions of folklore. National legislation would reflect the optimum protection discussed below. Amendments to national legislation would suffice as the need arises and there appears to be normative consensus on difficult problems. In this regard, Ghana, Kenya, and Nigeria would have to engage in the review and amendment of extant legislative
protection for expressions of folklore. South Africa is to be commended in this regard.

The elements of an optimum framework for the protection of expressions of folklore include: a progressive determination of the subject matter of expressions of folklore; dynamic criteria for identifying relevant communities; the positive protection of expressions of folklore effectively interpreted within a human and peoples' rights perspective; and international protection of expressions of folklore. It is to these factors that I now turn.

9.2.1 Subject matter of expressions of folklore

For a protective framework to be meaningful, it is important to identify the subject matter that constitutes expressions of folklore. Without a progressive determination of the nature of appropriate expressions of folklore, the subject matter would be open-ended and worthless in that nothing would be protected since everything is protected. A progressive determination of subject matter would deal with issues of the origin of expressions of folklore; the classes of expressions of folklore; and the cultural context of those expressions.

First, the term "expressions of folklore" is preferred to the description of the subject matter of this thesis as "traditional cultural expressions" or "intangible cultural heritage". The definition of expressions of folklore in the Model Law is also to be preferred as it revolves around the literary, musical, and artistic heritage of a community.\textsuperscript{960} While there are variations on this theme in national, regional and international instruments, the term "artistic heritage" serves as a marker and conforms to "traditional culture and knowledge" which is used in the \textit{WIPO Legal Options}\textsuperscript{961} and the \textit{Swakopmund Protocol}.\textsuperscript{962}

\textsuperscript{960} See Chapter 2.2.\textsuperscript{961} See Chapter 2.2.\textsuperscript{962} See Chapter 2.2.
It is also important to recognise the overlap between "expressions of folklore" and "traditional knowledge". While the latter refers to technical and scientific knowledge, it is acknowledged that there are no strict boundaries between the two concepts. For example, while traditional medical knowledge can be regarded as "traditional knowledge", it is also possible to see it as an "expression of folklore" when, for example, that knowledge represents the essence of goods or services that qualify as a geographical indication.

It is further important that all definitions take the form of a non-exhaustive list of expressions of folklore which assists to identify folklore. While a list of the classes of expressions of folklore is extremely helpful, the identification of particular goods or services as an expression of folklore remains a challenge. Even though all the definitions of expressions of folklore imply communally-mediated goods or services as a key ingredient and, therefore, a subjective criterion, it is clear that an entirely subjective understanding of what constitutes an expression of folklore would not be sufficient. There ought to be, it is submitted, an objective criterion for assessing a claim that an expression of folklore is part of a communal heritage. Using an objective criteria would be a dynamic process that would engage all evidence of the creation, recreation, enhancement and transformation of goods or services to determine whether they qualify as part of the communal heritage, culture, and knowledge. It is predicted that this would be one of the greatest challenges facing a protection framework, particularly in the absence of a registration system for expressions of folklore.

9.2.1.1 Creation and origin of expressions of folklore

Closely allied to the process of the identification of goods or services is their origin. Since individuals are the natural agents of a community, it would appear that individual claims to ownership of expressions of folklore would always challenge communal ownership, even if unintentionally. The issue is how to determine what

963 See Chapter 2.3.
964 See Chapter 3.3.2.
965 See Chapter 3.3.3.
is individual and what is communal. The emphasis in the definition of the culture and heritages of a community requires appropriate evidence of context to make the definition meaningful. It is feasible that such challenges to determining "individual" or "communal" goods or services can be resolved through rules of evidence, including those that indicate custodianship, apprenticeship, and the use of expressions of folklore. For example, a restricted use of certain expressions of folklore could indicate complex rules and rituals for third-party use which could, in turn, affirm communal production of the folklore. Another example is the rules of gender production of expression of folklore which would indicate the communal control of an expression of folklore.

The importance of proving the communal production of folklore lies in ensuring that only deserving expressions are protected. That said, it would appear that a functional list of expressions of folklore is contained in the Model Law. The list includes: "(i) verbal expressions, such as folktales, folk poetry and riddles; (ii) musical expressions, such as folksongs and instrumental music; (iii) expressions by action, such as folkdances, plays, and artistic forms or rituals, whether or not reduced to a material form; and (iv) tangible expressions, such as: (a) productions of folk art, in particular drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basket weaving, needlework, textiles, carpets, and costumes; (b) musical instruments; and (c) architectural forms." 966

9.2.1.2 Classes of expressions of folklore

It is also important to draw attention to the different classes of expressions of folklore and their relative potential for protection.967 The point here is that the different expressions of folklore can be protected along a spectrum beginning with relatively simpler expressions and moving to folklore that is more difficult to protect. For example, it may be easier to protect indigenous terms and expressions than traditional works for a number of reasons, including problems of proof of ownership. I predict that the development of the protection of expressions of folklore will evolve

966 See Chapter 2.2.
967 See Chapter 2 which undertakes a general overview of different classes of intellectual property.
along the lines of the different classes of intellectual property. This is where the interpretation of national legislation will be critical. National judiciaries will over time reveal different paths in the articulation of different expressions of folklore. For example, the development of protection for indigenous terms and signs will likely continue separately because the issues surrounding them are easier to resolve than, say, those surrounding traditional works because of the independent framework that could be used to protect indigenous terms and signs. An example of this trend is how the MMA has revealed the relative ease of protecting expressions of folklore.\textsuperscript{968} Further evidence of this trend is to be found in the IPLAA 2013 which protects expressions of folklore around recognised branches of intellectual property rights.\textsuperscript{969}

9.2.1.3 Cultural context of expressions of folklore

The fact that expressions of folklore represent a manifestation of the cultures of communities, highlights the importance of a proper understanding of culture as regards a protective framework.\textsuperscript{970} The fluidity of culture and the influence of one culture on another, challenge the notion of exclusive ownership of expressions of folklore and how a legal system may best represent this influence. The influence of foreign cultures on the production and development of certain expressions of folklore in the countries of study, offers examples of the mixing of cultures.\textsuperscript{971} The challenge facing every legal system is, therefore, to determine the means of attenuating the notion of the exclusive ownership of expressions of culture based on an acknowledgment of the influence of foreign cultures. It is in the area of access to expressions of folklore that states have an opportunity to acknowledge the mixed nature of cultures. I believe that an appropriate balance between the protection of and access to expressions of folklore ensures that foreign influences in the development of folklore are adequately considered. This balance recognises the importance that exceptions and limitations to the rights of communities ensure that

\textsuperscript{968} See Chapter 5.2.2.
\textsuperscript{969} See Chapter 5.2.3.
\textsuperscript{970} See Chapter 3.3.7.
\textsuperscript{971} See Chapter 3.4.
the public engages in the use of expressions of folklore to enhance creativity and innovation. Such use recognises that cultures use each other as building blocks.

The advent of technology in the production of expressions of folklore challenges the historical folklore trajectories as well as the extent of perpetuity of goods and services that would qualify. It would appear that expressions of folklore are associated with the "traditional" suggesting that practices must reach deep into the past for the expressions to be authentic. There is no indication, however, as to how far back in history one must delve. A logical consequence is the perception that the "modern" is not relevant to expressions of folklore. This presents a challenge when a community changes its methods of food production or the how it delivers a service, to determine whether the goods and services can be regarded as an expression of folklore. In this regard the introduction of machine looms for the production of Kente and the introduction of technology for the production of Rooibos tea, indicate that much deeper thinking needs to be brought to what constitutes expressions of folklore. With respect to the latter, it is important to determine whether the protection of Rooibos tea as a geographical indication refers exclusively to traditional Rooibos tea production. It is submitted that the means of production or delivery of a service which are not fundamental to the expression of folklore, should make no difference to the authenticity the expression. Accordingly, machine-produced Rooibos tea is as deserving of protection as traditional Rooibos tea.

9.2.2 Communities individuals and the national interest

One of the fundamental bases of an optimum framework for the protection of expressions of folklore is the relevant community which should be entitled to available protection. The identification of the relevant communities capable of producing expressions of folklore is an important issue as communities are socially constructed and, therefore, one encounters different communities organised around

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972 See Chapter 3.3.5.
973 See Chapter 3.4.1.
974 See Chapter 3.4.2.
social facts. Consequently, it is important to determine which social fact is relevant in identifying a community with the capacity to produce expressions of folklore. In addition, it is important to reconcile the interests of communities with those of the nation state.

It would appear that the label of "cultural" is not particularly helpful in the determination of communities since the term includes "religious" and "linguistic" communities in that the definition of culture includes the mores, values, processes, and institutions that reflect the behaviour of groups. It may be better to include "ethnic" as an indication that it is part of "cultural" and in this way leave some room for other social facts that may be recognised in the future.

While it is clear that ethnic communities organised around consanguinity would qualify automatically, the definition of communities in the South African IPLAA 2013 is a good starting point in this regard. It is important, however, to remain flexible and open to the idea that the categories of communities are not exclusive or restricted to ethnic communities. This notwithstanding, considerable – albeit not insurmountable – problems surround the identification of ethnic communities. The organic development of "ethnic" communities results in the growth of sub-ethnic groups who, over time, lay claim to a distinct identity that may compound the feasibility of their recognition.

Although religious communities appear easier to identify, it is not generally felt that these communities are entitled to the protection of their expressions of folklore. However, since it would be strange to argue that religious communities are not authentic and easier to recognise that there are certain expressions for folklore important to religious communities, these expressions of folklore should be protected on moral grounds. On the other hand, many ethnic communities are also organised around religion to an extent which allows them to be regarded also as religious communities. Together with ethnic communities, religious communities exhibit a cohesion that underlies an ongoing, closely knit social grouping that is deserving of

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975 See Chapter 3.3.2; Chapter 4.6.1; and Chapter 5.2.4.3.
976 See Chapter 5.2.5.3.
protection. The same applies to language groups. I believe that these three groups should, for the present, represent the relevant communities entitled to protection.

It is submitted that when the focus is firmly on the expression of folklore, all issues of the relevant communities can be rationally resolved. If this proves impossible, the competent national authorities could be mandated to act on their behalf.

It is important to note that the identification of the relevant community assists legislation like the IPLAA 2013 which recognises the juristic status of communities which, in turn, supports the fact that the South African Constitution states that the Bill of Rights applies to juristic persons. While it is true the recognition of the juristic status of communities overcomes conceptual obstacles in the path of communities protecting their expressions of folklore, it is usual for the authenticity of representatives of communities to present a procedural obstacle that consumes and diverts aspirations of protection as parties from the communities are enmeshed in litigation while misappropriation continues.

Problems of representation continue in communities because of the marginalisation of different segments in the communities such as women and children. For example, in patriarchal societies there may be voices in society that are not adequately represented in the decisions of the community. It is important that courts are aware of the need to ensure that the decisions taken by communities represent the collective views of all segments of the society. There is no doubt that rules of evidence can resolve such problems through indications of exclusion in the communities. For example, where rules of customary law point to certain gender exclusions, especially where women are involved, this should be seen as an invitation to the court to hear the excluded gender and establish the authenticity of the rules of customary law.

9.2.2.1 Individuals and their communities

One of the significant challenges facing a protective model for the protection of expressions of folklore is the tension between the rights of members of the
community and the communal interest. This is exacerbated when individual members of a community are the human agency in the production of expressions of folklore, and also use these expressions of folklore for their economic survival – for example, the burgeoning African film industry we considered in Chapter 3. The rights of members of a community to engage in the exploitation of their expressions of folklore should be reconciled with use of expressions of folklore by non-members of the community. Members of the community deserve to be treated differently from non-members and should be allowed to use their expressions of folklore in certain contexts. This will benefit the community by ensuring that expressions of folklore are created and recreated. These contexts would include personal and private use extending to transformative use, even if these members are not the custodians of the folklore. It is important to remember the exceptions and limitations to the use of expressions of folklore, discussed in Chapters 4 and 5 of this thesis, where no distinction is made between the members and non-members of a community. It would appear that such a distinction could be used to interpret exceptions and limitations. For example, private use by a member could be assumed to include certain transformative use which would qualify as use by the community. When the method of manufacture of a geographical indication or a folksong is improved by a member of a community, it may well be regarded as attributable to the community.

9.2.2.2 Communities and the nation state

Apart from members of a community, the interests of the nation state are on occasion at odds with the goal of protecting communities. It is to be remembered that in many African states, the protection of the national heritage of the states was the aim of the first formal protection of expressions of folklore. This objective is manifested in the recognition in some national legislation that states own expressions of folklore, copyright legislation, and the concomitant right to issue authorisations to third parties. Communities who produce expressions of folklore

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977 See Chapter 3.
978 See Chapter 3.
979 See Chapter 3.3.7.
benefit from cultural development programs like everybody else. It is important that the interests of national cultural heritage should be recognised when protecting expressions of folklore. Continuous interaction with communities results in the articulation of national expressions of folklore which should not be claimed by any particular community. This is why an "omnibus" clause of exceptions and limitations may be an important mechanism in recognising the expressions of folklore that have become part of the public domain and are consequently available for all to use. Such an omnibus clause should be similar to the concepts of "fair use" or "fair dealing" which allow national judiciaries adequate space to develop and maintain the public domain as circumstances dictate.

It is important to realise that all communities have customs and norms governing the exchange of goods and services which constitute expressions of folklore that in most cases existed before the introduction of the post-colonial legislative protective framework. Even when a community has no rules governing the exchange of goods or services, or even third-party use of expressions of folklore, it can be said that it regards free use of its expressions of folklore as the governing norm. Such free use in no way implies that there were no norms governing access to expressions of folklore. The focus on protecting the national heritage of African states laid little or no emphasis on customary law since competent national authorities developed rules for third-party use. It is the advent of the recognition that communities are the owners and should control the exploitation of their expressions of folklore that has highlighted the importance of customary law in the protection of folklore. The role of customary law is internal and elaborates the rights of communities over their expressions of folklore. Where there are no registration systems, as in the case of traditional works, customary law serves a number of purposes. For example, it could assist in determining whether an expression of folklore has been communally produced and is therefore deserving of protection. Again, customary law could determine when a community has given its consent to the use of its expressions of folklore and how members of a community may access expressions of folklore.
9.2.3 Legal basis for the protection of expressions of folklore

The third part of an optimum framework for the protection of expressions of folklore is a human rights framework. The capacity of either negative or positive protection of expressions of folklore to protect expressions of folklore effectively is significantly enhanced by the recognition of communities as right-bearing owners of the folklore. A human and peoples' rights framework correctly recognises communities as the principal stakeholders in the protection of the expressions of folklore. This perspective enhances the positive protection of folklore by shifting the focus from states and competent national authorities to communities as owners and managers of expressions of folklore. In many countries, including South Africa, it is doubtful whether legislation was enacted on the basis of a firm belief that it was in furtherance of the entitlement of communities as owners of the expressions of folklore. For example, even though it is true that the preamble to the IPLAA 2013 recounts the provisions of sections 30 and 31 of the South African Constitution, it appears more feasible to argue that it is the use of intellectual property rights as a means of protection that required the identification of a right-holder as the creator and owner of the folklore. Moreover, the recognition that intellectual property is cognisable under the constitutional property clause of the South African Constitution is a recent origin. Be that as it may, a human and peoples' rights framework reinforces the positive protection of expressions of folklore. Even when national legislation, such as the South African IPLAA 2013, is not an amplification of human and peoples' rights, the latter is of considerable assistance in statutory interpretation. The exercise of interpretation within a human rights framework is beneficial to communities since such a framework continuously interrogates whether the objective of protecting communities as owners of expressions of folklore is being met.

It is also possible that the negative protection of expressions of folklore can be enhanced by a desire to align that framework with the entitlements that arise in terms of appropriate human rights. In this regard, the resulting legislation for the
The protection of expressions of folklore in Kenya will inevitably be judged by the recognition of expressions of folklore in the Kenyan Constitution.\footnote{See Chapter 4.4.7.} Because rights and interests clash, the imperative of balance lies at the heart of all human rights systems. The processes of limiting rights, derogating from rights, and of proportionality are a recognition that there must be a process by which rights are reconciled. Accordingly, a human and peoples' rights perspective ensures an appropriate balance between the protection of and access to expressions of folklore since both protection and access are to the benefit of human and peoples' rights. An appropriate balance ensures that significant content of expressions of folklore is not sequestered but is available for innovation and creativity.\footnote{See the discussions in Chapter 5.} The grant of entitlements to citizens arms them to make demands that in some respects constrain the exclusive rights of communities.

Even though the nature of human rights appears unsuited to communities, the exercise of collective rights, as well as a number of other human rights, suggests that national courts in the countries of study will recognise the entitlement of communities to the protection of their expressions of folklore. It would appear that the right to property represents a credible means of protecting expressions of folklore as is evident from the widespread acceptance that expressions of folklore and other traditional knowledge constitute constitutional property in terms of section 25 of the South African Constitution.\footnote{See the discussions in Chapter 3.} Accordingly, a slight jurisprudential leap in recognising communities as beneficiaries of this human right would be significant in the countries of study following South Africa which has recognised communities as juristic persons in terms of the IPLAA 2013.

The exercise of collective rights capable of protecting expressions of folklore is possible in Kenya, South Africa and Ghana.\footnote{See Chapter 7.3.} Of these three countries, South Africa shows considerable promise by allowing members of a community to use the protection of constitutional property in section 25 of the South African Constitution.
to protect their expressions of folklore. In addition sections 30 and 31 of the South African Constitution advance the cause of which seek protection of their folklore. A significant drawback to the use of sections 30 and 31 appears to be the diluted strength of the right when it is involved in a balancing exercise with other rights. The internal limitation clause in the exercise of the right would suggest that it is not a right bearing the same weight as other rights because of its group undertone. In this regard the internal limitation clauses in these sections suggest that an individualistic interpretation of sections 30 and 31 would be preferable. Recent jurisprudence on the legitimacy of a cultural belief underscores this point, and is sufficient reason to question whether South African courts would struggle to recognise communal rules governing expressions of folklore. Be that as it may, emerging jurisprudence on the recognition of communal norms indicates that South African courts are likely to recognise the claims of members of a cultural community to the protection of its expressions of folklore.

Far-reaching jurisprudential possibilities emerge in the countries of study from the protection of specific fundamental human rights, such as the right to life, to human dignity, and to privacy which suggest that a human rights framework is crucial in the protection of folklore. The recognition that individuals can protect their communities in concert with other members, ensures that the exercise of rights which are individual in nature but communal in orientation, is a further tool in the effective protection of expressions of folklore.

The flexible and progressive implementation of human rights in the countries of study makes human rights a very important tool in protecting expressions of folklore. In this regard the liberal standing rules, as well as a commitment to crafting appropriate remedies to address violations of human rights, suggest once more that a human rights framework would significantly enhance the protection of expressions of folklore. For example, it may appear from a human rights analysis that a community is only interested in the protection of its moral rights rather than in compensation for misappropriation.

986 See Chapter 7.4.  
987 See Chapter 7.5.
In addition to human rights, it is clear that a peoples' right is also crucial in the protection of expressions of folklore. A cumulative reading of peoples' rights in the *African Charter* together with certain rights in the *Kenyan Constitution*, would suggest an emerging right to expressions of folklore which is one aspect of a peoples' right, and the entitlement of communities to the protection of their expressions of folklore. The second aspect of a peoples' rights framework is the protection offered by customary law which is a manifestation of the former. Customary law offers the possibility that rules forged by communities to protect their real property can be used to protect their communal intellectual property. It is important to draw attention to the recognition of customary law in the exercise of rights of indigenous cultural expression in the *IPLAA 2013*. The principles of customary law in South Africa as developed within the context of the Constitution, would be of considerable assistance in articulating standards of protection.

The nature of human and peoples' rights protection is, however, significantly influenced by the interpretation of the Bill of Rights in the countries of study. But of even greater importance is a progressive judiciary which is willing to articulate a jurisprudence for the protection of expressions of folklore which enhances the autonomy and dignity of communities to protect their expressions of folklore. This is particularly true of those countries of study where the Bill of Rights is lacking as regards collective or peoples' rights. For example, because there appear to be no collective rights in the Nigerian Bill of Rights it would require an imaginative judiciary to recognise such rights so that they could be called into service in the protection of Nigerian communities' expressions of folklore.

It would appear from our analysis above that Kenya and South Africa have the greatest potential for the use of a peoples' and human rights framework to protect expressions of folklore. Of all the countries of study, Nigeria appears least likely to protect the rights of communities.

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988 See Chapter 8.
989 See Chapter 8.2.
990 See Chapter 8.4.
9.2.4 Preference for positive protection of expressions of folklore and the protection vehicle

The fourth part of an optimum framework for the protection of an expression of folklore is positive protection which operates by granting communities rights that recognise their ownership and management of folklore.

9.2.4.1 Nature of positive protection

Positive protection of expressions of folklore is preferred to negative protection by which the state and competent national competent authorities authorise third-party use of expressions of folklore on behalf of communities. Variants of the negative protection of folklore recognise an elevated involvement of communities in the work of competent national authorities. Positive protection of expressions of folklore, on the other hand, recognises the centrality of communities in the protection process and advances the human and peoples’ rights of communities which, in turn, acknowledges their entitlement to the ownership and management of their expressions of folklore.

Intellectual property rights represent a viable mechanism for the positive protection of expressions of folklore.\textsuperscript{991} It is clear that such a protection framework will involve considerable change to existing intellectual property legislation. The exact ramifications of this upheaval cannot be accurately determined, but arise from the interaction between communally-produced goods and services within an individually-based protective framework. The challenge posed by individual creators claiming the protection of intellectual property rights in preference to communal claims, can be readily imagined. Furthermore, the impact of the protection of expressions of folklore on existing intellectual property rights is not entirely known, even if the legislative cast of such interaction is through the mechanism of equitable compensation. Accordingly, equitable compensation mechanisms recognise the continued exercise of intellectual property rights subject to royalties paid to the

\textsuperscript{991} See Chapter 5.
appropriate communities. There is, of course, potential for controversy with respect to expressions of folklore that are not required to be registered. It is suggested that these issues of validity between the rights protecting expressions of folklore and other intellectual property rights can be resolved through creative solutions. It is evident from these challenges that the South African judiciary will be pivotal in the implementation of the *IPLAA 2013* since the interpretation of how these pieces of legislation interact with existing intellectual property rights is crucial.

### 9.2.4.2 Vehicle of protection

In this section I explore a viable way of expressing the features of positive protection. It is submitted that intellectual property rights represent a feasible means of ensuring that the potential of positive protection is realised. The other countries of study could learn valuable lessons from the jurisprudence resulting from South Africa's break with orthodoxy in protecting expressions of folklore through intellectual property rights. The *IPLAA 2013* is a commendable piece of legislation in that it affirms the dignity of South African communities by recognising their ownership and management rights. South African communities are enabled by the *IPLAA 2013* to exploit their creations commercially for the development of their communities if they so wish. There is little doubt that local economies will benefit from the creative authorisation of third-party use of the communities' expressions of folklore.

In addition, an amendment to the *IPLAA 2013* to enhance the limited protection of moral rights would enable communities to ensure the authentic and respectful use of their expressions of folklore. A further reason why the *IPLAA 2013* can be regarded as progressive is the extent of its exceptions and limitations to expressions of folklore. Exceptions and limitations ensure that communities do not lock up vital parts of knowledge required for creativity and innovation. For example, it is instructive that the exceptions and limitations with respect to traditional works as expressions of folklore are far more extensive than those allowed for copyright protection under the *SACA*. The fear that positive protection of expressions of
folklore would lead to exclusive rights which would, in turn, impact negatively on the public domain, appear exaggerated if the example of the *IPLAA 2013* is to be followed. One of the strident criticisms of traditional intellectual property rights is the extent to which exclusive rights have restricted the public domain. It is to be remembered that the importance of human rights to intellectual property protection arose from a realisation that the former enhanced the public domain because of the entitlements that enable access to the goods and services protected by intellectual property rights. The *IPLAA 2013* shows that a reasonable balance can be struck between protection and access when protecting expressions of folklore. This is all the more true if it is remembered that the *IPLAA 2013* is to be interpreted within a human and peoples' rights framework which ensures that appropriate claims to free use of expressions of folklore are recognised.

A preference for the positive protection as part of an optimum framework for the protection of folklore proceeds from an acknowledgement that negative protection is dominant in the countries of study and many other African states.\textsuperscript{992} It is the dismal performance of competent national authorities in the negative protection of expressions of folklore in many African states that has exposed the inherent weakness of this model. It would appear that under a protective model these authorities are not credible substitutes for communities. It is evident that the role of communities can be enhanced even within a negative protective model. It is to be remembered that the potential of the negative protection of expressions of folklore to protect folklore is severely hampered by conditions such as the lack of ownership and control by these communities.\textsuperscript{993} In this regard, it is clear that the current negative protection of expressions of folklore in Nigeria, Ghana and Kenya has been ineffective in protecting folklore.\textsuperscript{994} Accordingly, it is not surprising that recent variants of the negative protective models recognise a significant involvement of the communities who own the expressions of folklore in their interface with third parties. The legislation proposed by Kenya to protect expressions of folklore and domesticate the *Swakopmund Protocol* reveals that a legislative framework based on the

\textsuperscript{992} See Chapter 4.6.
\textsuperscript{993} See Chapter 4.6.
\textsuperscript{994} See Chapter 4.6.
negative model could be relatively more effective, even where the management of expressions of folklore is entrusted to a competent national authority. In this regard such legislation would have to include provisions that substantially increase the participation of communities in the third-party use of their expressions of folklore. Consequently, the procedures to determine the real and informed consent of these communities to third-party use of their folklore must be extensive and sustainable.

9.2.5 Regional and international protection of expressions of folklore

The fifth part of the proposed optimum framework for the protection of expressions of folklore, is the regional and international protection of expressions of folklore.995 The fact that expressions of folklore are information goods, as well as Africa’s geographical reality that ethnic communities may straddle two or more contiguous states, require regional and international understandings that significantly enhance the national protection of expressions of folklore. The importance of these understandings reflects the role of nation states as primary agents in the enforcement of laws. Civil and criminal liability for a practice in a state depends on the laws of that state and not on what its neighbours have legislated. Consequently, the prohibition on the misappropriation of an expression of folklore in the countries of study would not significantly affect a third party in the United States, Europe, or other countries that do not prohibit such conduct. It is therefore important that a large number of states agree to minimum standards of protection that will ensure that owners and managers of expressions of folklore can expect protection in other states. As a result, the negotiation and conclusion of the Draft WIPO Treaty996 has assumed epic proportions with developing and developed countries locked in negotiations over these minimum standards. It appears that only a treaty articulated within the negative protection model will see the light of the day, even though many would argue that no such treaty will be concluded any time soon. This notwithstanding, such a treaty would protect communities to a large extent since states who domesticate and implement such treaties would enable communities from other states to claim protection for their expressions of folklore.

995 See Chapter 6.
996 See Chapter 6.4.2.
It is important, however, to point out that since international law and national law operate on different planes, how states transform treaty obligations is crucial to how national legal systems protect expressions of folklore. The example of the CCD which encourages national protection for expressions of folklore, does not appear to have served as a catalyst for minimum standards of protection. Many states drag out the process of domestication. While they may be regarded as breaching the international obligations undertaken under the treaty, the crucial national framework transforming the treaty into the legal system remains elusive.

While one may well believe that the absence of an international treaty is a serious blow to the protection of expressions of folklore, it must be remembered that an optimum national framework is crucial and would engage other states in many ways to protect expressions of folklore, even in the absence of a universal treaty. The ways in which such a treaty could assist national frameworks include the following. First, national protection can be used as the basis for bilateral negotiation and on occasion protection of third parties. It would appear that there is a link between the protection of Rooibos tea by the MMA in South Africa, and the inclusion of this fact in the Economic Partnership Agreement initialled between the European Union and Southern African countries. Secondly, national protection of expressions of folklore is likely to form the basis for opposition, objection, and proceedings in foreign states. Thirdly, the recognition that expressions of folklore are constitutional property resonates with a long-standing recognition of intellectual property as contemplated by the European Convention on Human Rights. Along with the extraterritorial jurisdiction of United States courts, many United States and European firms would be wary of breaching clear rules prohibiting unapproved dealings involving expressions of folklore in the countries of study and other African states. Fourthly, where multinational companies are engaged in unauthorised dealings in expressions of folklore, their subsidiaries in the countries of study provide some means by which jurisdiction could be assumed over these companies.
Regional understandings are reactions to geographical realities and provide a framework for resolving intra-ethnic challenges facing the protection of expressions of folklore. In addition, they articulate minimum standards that provide normative guidance for states in enacting, enhancing and improving their legislative frameworks for folklore protection. In this regard it is clear that the Swakopmund Protocol has had a significant influence on the proposed Kenyan legislation to protect expressions of folklore. Even though Ghana has not yet started on her transformation of the Swakopmund Protocol, it is likely that she will recognise the ownership of communities even if the management of the commercial exploitation of expressions of folklore remains with the competent national authority.

It is hoped that extant regional protection by ARIPO and OAPI will encourage Africa's regional economic communities to negotiate rules for the protection of expressions of folklore in a way that establishes regional markets which may, in turn, stimulate economic development of the communities in African states.

9.3 Conclusion

This chapter concludes with a restatement of the position that an optimum framework for the protection of expressions of folklore is reliant on the five elements that have been explored above. The absence of any of these elements will significantly affect the protection of expressions of folklore.

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997 See Chapter 6.3.
CHAPTER 10

CONCLUSION: THE WAY FORWARD

10.1 Introduction
10.2 Research question
10.3 Structure of the analysis
10.4 Hypotheses
10.5 Countries of study and an optimum framework for the protection of expressions of folklore: The way forward
CHAPTER 10

CONCLUSION: THE OPTIMUM FRAMEWORK AND THE WAY FORWARD

10.1 Introduction

In this chapter, I first embark on a retrospective consideration of the central research question. This involves a review of the structure of the analysis and evaluation of the hypotheses that have guided the research. Second, is an overview of how the countries of study perform in relation to the optimum framework for the protection of expressions of folklore set out in Chapter 9. Third, the optimum framework is restated as a means of charting the way forward.

10.2 Research question

The central research question has been the articulation of an optimum framework for the protection of expressions of folklore in African countries through a critical and comparative analysis of existing and proposed protection regimes in selected African countries as found in sui generis and conventional intellectual property legislation considered in the light of human and peoples’ rights.

10.3 Structure of the analysis

I approached this question by setting the context for the thesis in the introduction in Chapter 1. Here I sketched a background to the thesis by presenting the central research question, what I hoped to achieve through the study, the research methodology used, and an outline of the thesis as a whole.

In Chapter 2 I focused on different models and mechanisms for the protection of expressions of folklore concentrating, principally, on the difference between negative and positive protection of expressions of folklore. Each protection mechanism was considered by detailing its advantages and shortcomings, and offering examples.
Chapter 3 examined the protection of expressions of folklore in Africa through the paradigm of positive and negative protection. In addition, the key issues and challenges facing folklore protection in Africa were explored alongside a detailed examination of selected expressions of folklore such as indigenous textiles, Rooibos tea, and traditional literary, dramatic, and musical works as the basis of the African film industry.

In Chapter 4 I offered a critical analysis of the negative (*sui generis*) protection of expressions of folklore by considering existing protection in extant copyright and neighbouring rights' legislation in Nigeria, Ghana, Kenya and South Africa.

Chapter 5 examined the positive protection of expressions of folklore through a critical evaluation of how intellectual property rights can be used to protect expressions of folklore. To this end, significant areas of the thesis are devoted to examining the effect of South Africa’s *IPLA 2013* which protects traditional works, terms, expressions, designs, and performances through extant intellectual property legislation.

In Chapter 6 I turned to regional protection and international perspectives of the protection of expressions of folklore in Africa in response to the spatial manifestation of these expressions of the folklore of contiguous states, and the importance of minimum standards for the protection of expressions of folklore in many states in ensuring that no state becomes a haven for the misappropriation of expressions of folklore.

Chapter 7 considered how a protective model based in human rights can assist in the protection of expressions of folklore; while Chapter 8 examined the role of communal rights in the protection of expressions of folklore and specifically explored the viability of a peoples' right in intellectual property.

Chapter 9 set out the elements of an optimum framework for the protection of expressions of folklore.
10.4 Hypotheses

Here I revisit the hypotheses that framed the inquiry and evaluate the extent to which the work challenges these hypotheses in terms of validation or otherwise. Each hypothesis is set out and evaluated.

The main hypothesis that framed the inquiry in this thesis is that the optimum framework for the protection of expressions of folklore is neither through the negative protection of folklore, nor through its positive protection, but through a combined protection model that brings together both negative and positive protection mediated by a human and peoples' rights framework which recognises and affirms group entitlement to communal intellectual creations and ensures that the knowledge contained therein remains available for creative endeavours. It is submitted that this thesis has significantly confirmed this hypothesis to the extent that instead of a combined protection model for the protection of expressions of folklore, a preference for positive protection mediated by a human and peoples' rights framework is indicated.

This principal hypothesis is supported by a number of assumptions which can be regarded as sub-hypotheses and are evaluated below.

The first sub-hypothesis is that there is no critical engagement of intellectual property law in the protection of expressions of folklore. It is clear that South Africa's IPLAA 2013 demonstrates a critical engagement with intellectual property law in the protection of expressions of folklore. 998

The second sub-hypothesis is that the possibility of using intellectual property rights to protect expressions of folklore holds considerable potential, but demands substantial amendment of intellectual property legislation. This option is already being explored by a number of African countries. The cast of the IPLAA 2013 serves to validate this hypothesis since each of South Africa's pieces of intellectual property legislation in the copyright, trade mark, design, and performance fields, is amended

998 See Chapter 5.
to recognise rights that protect expressions of folklore. Furthermore, these amendments are substantial in that they make inroads into extant protection of intellectual property rights in order to ensure that the new rights can flourish. These amendments further indicate that integration into conventional intellectual property is one way of protecting expressions of folklore. Whether these will be successful remains unclear. On the one hand, they may fail because of a difference in approach. Essentially, while conventional intellectual property rights are individualistic in orientation, material-based and finite, expressions of folklore are communally based, oral and infinite in duration. The conflicts that will be generated by the use of conventional intellectual property could be fatal to their use in the protection expressions of folklore. The success of the use of intellectual property rights to protect folklore depends on the ability of communities to protect their expressions of folklore within a human and peoples' rights framework.

The third sub-hypothesis is that many African countries favour copyright legislation as a means of protecting expressions of folklore. Available evidence of extant protection of expressions of folklore indicates that copyright legislation based on the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions which offers sui generis protection for expressions of folklore, is the preferred model in many African countries.

The fourth sub-hypothesis is that available evidence points to negligible recourse to the protection offered by the sui generis provisions by the African copyright and neighbouring rights legislative environment due to infrastructural problems; weak articulation of the impact of national heritage laws on the protection of expressions of folklore; and the absence of complementary non-proprietary approaches. In Chapter 3 of the thesis there is evidence of sui generis-protected expressions of folklore only in Ghana. There is no evidence of sui generis protection in Nigeria, Kenya or South Africa. Accordingly, this sub-hypothesis can be regarded as valid.

999 See Chapter 5.
1000 See Chapter 3.
1001 See Chapter 3.
The inappropriate recognition of customary norms for the protection of the expressions of folklore in Africa, is linked to the inadequate protection of expressions of folklore and forms the fifth sub-hypothesis. It would appear that this sub-hypothesis is valid and is confirmed by the discussion in Chapter 8 of the thesis where there is no evidence of recent use of customary norms to protect expressions of folklore. It is a generally weakened framework of customary law within the African legal systems that is to blame.

The sixth sub-hypothesis is that as creators of expressions of folklore, communities are entitled to the protection offered by human rights, such as the right to property and the right to culture together with other rights such as the right to privacy, the right to dignity, and the right to equality. This sub-hypothesis is validated to a certain extent with respect to the entitlement of communities to the protection offered by human rights. Rather, it is the protection offered by a peoples' right to expressions of folklore discussed in Chapter 8, coupled with the protection offered by collective and specific human rights in Chapter 7, that appear more appropriate for the protection of expressions of folklore.

That the protection of expressions of folklore has a significant regional and continental dimension in Africa is the seventh sub-hypothesis which is validated by the discussions in Chapter 6 of the thesis. In this regard, the adoption of the *Swakopmund Protocol* is a fitting validation of this hypothesis. The ongoing revision of the protection of expression of folklore in Kenya, which is discussed in Chapter 4, demonstrates the significant regional implications of the protection of folklore. Furthermore, a number of treaties managed by the WIPO and UNESCO reveal an international dimension to the protection of expressions of folklore. In particular, the proposed WIPO *Treaty on Enhanced Protection of Expressions of Folklore* discussed in Chapter 6, reveals a preference for the negative protection of expressions of folklore.

The eighth sub-hypothesis is that regional economic groupings in Africa (ECOWAS, SADC, EAC and COMESA) need to respond to the challenges of folklore-bearing
communities spanning two or more countries in the group. There is no evidence from the discussions in Chapter 6 of the thesis that regional economic groupings in Africa have indicated any intention to engage in the regional protection of expressions of folklore.

The ninth, and final, sub-hypothesis is that the nature of the response from regional intellectual property organisations (ARIPO and OAPI) in Africa to their mandate to protect expressions of folklore, must be critically examined. This critical examination is undertaken in Chapter 4 and reveals the significant impact that regional protection has on national protection. In particular, the Swakopmund Protocol has generated efforts to reform the protection of expressions of folklore in Kenya.

10.5 Countries of study and an optimum framework for the protection of expressions of folklore: The way forward

A review of the elements of an optimum framework for the protection of expressions of folklore reveals that the legal framework of none of the countries of study contains all five elements discussed in Chapter 9.

South Africa satisfies at least four of the elements as, firstly, it can be said to possess criteria for identifying expressions of folklore. Secondly, there is a broad understanding of the relevant communities which qualify for protection. Thirdly, the IPLAA 2013 provides a framework for the positive protection of expressions of folklore. The protection offered by the Bill of Rights, and the emerging consensus that expressions of folklore qualify as constitutional property within the provisions of section 25 of the South African Constitution, broadly satisfy the need for a human and peoples’ rights framework for the protection of expressions of folklore. The fifth element, which is a regional and international understanding of the protection of expressions of folklore, is lacking.

Kenya follows South Africa because the provisions of both the Kenyan Constitution and the CA Kenya, provide criteria for the identification of expressions of folklore, and indicate an understanding of communities as owners of their expressions of
folklore. Kenya's legal framework for the protection of expressions of folklore is an example of negative protection. The proposed reform of this framework in the wake of the *Swakopmund Protocol* also indicates that negative protection is envisaged. Furthermore, the proposed reform recognises deeper involvement of communities in authorising third-party use of expressions of folklore. While Kenya is a state party to the *Swakopmund Protocol*, there is no multilateral treaty for the protection of expressions of folklore to which it can subscribe.

Ghana follows Kenya, and there is no significant indication that it conceives communities as owners and/or managers of their expressions of folklore. While the *CA Ghana* contains a framework for the identification of expressions of folklore, the ownership of these expressions is vested in the state. Ghana's legal framework, like those of Kenya and Nigeria, is an example of the negative protection of expressions of folklore. There is no evidence that legislative reform is planned in the wake of obligations incurred under the *Swakopmund Protocol*, and there is no significant evidence that a human and peoples' rights framework protects expressions of folklore. Even though customary law and the *African Charter* apply in Ghana, the absence of the recognition of communities as owners of expressions of folklore reduces the impact of customary law in the protection of expressions of folklore.

Nigeria follows in the rear because it appears that it satisfies only one element of the optimum framework. The *CA Nigeria* recognises the management and control of rights by a competent national authority – the Nigerian Copyright Commission – with respect to expressions of folklore. There is no evidence of the involvement of communities in this process, just as there is no recognition of the rights of communities in this legislation or in the 1999 *Nigerian Constitution*. The protection offered by the *CA Nigeria* is an example of negative protection of expressions of folklore, and Nigeria is not a party to the *Swakopmund Protocol*. Apart from the potential of customary law and the *African Charter* to protect expressions of folklore, the use of a human and peoples' rights framework to protect expressions of folklore is least likely in Nigeria. This is again because ownership and management of expressions of folklore are vested in the state.
It is obvious that the inability of countries to implement the optimum framework as outlined in this thesis has led to the misappropriation of expressions of folklore and caused significant economic and cultural harm to these communities.

To end, it is submitted that expressions of folklore can be meaningfully protected if the countries of study – and indeed any other country – implement the five elements of the optimum framework for the protection of expressions of folklore as articulated by this thesis. An optimum framework will ensure that communities which own expressions of folklore protect their intellectual property. It is easy to imagine the problems that would arise if individuals who create intellectual property are not able to protect it.
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LIST OF ABBREVIATIONS

ACPHR  
African Commission on Human and Peoples’ Rights

African Charter  
African Charter on Human and Peoples’ Rights

Afr J Int’l & Comp L  
African Journal of International and Comparative Law

AHR LJ  
African Human Rights Law Journal

AHRLR  
African Human Rights Law Reports

All NLR  
All Nigeria Law Reports

ALL FWLR  
All Federation Weekly Law Reports

All SA  
All South Africa Law Reports

ALR  
Australian Law Reports

Am J Comp L  
American Journal of Comparative Law

Am J Int’l Law  
American Journal of International Law
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<td>CCH</td>
<td>UNESCO Convention for Safeguarding Intangible Cultural Heritage</td>
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<td>CEMAC</td>
<td>The Central African Economic and Monetary Union</td>
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<td>Ch</td>
<td>Chancery</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<td>United Nations Declaration on Rights of Indigenous Peoples</td>
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<td>HRLJ</td>
<td>Human Rights Law Journal</td>
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<td>IGC</td>
<td>Intergovernmental Committee on Intellectual and Genetic Resources Traditional Knowledge and Expressions of Folklore</td>
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SACA Copyright Act South Africa
SADA Design Act South Africa
SALJ South African Law Journal
S Cal L Rev Southern California Law Review
SCGLR Supreme Court of Ghana Law Reports
SA Merc LJ South African Mercantile Law Journal
SAHRA South African Heritage Resources Agency
SA NHRA South African National Heritage Resources Act
SAJHR South African Journal on Human Rights
SALJ South African Law Journal
SAPPA Performer’s Protection Act South Africa
SAPL South African Public Law
SARDQ South African Rural Development Quarterly
SA TMA Trade Marks Act South Africa
SAYIL South African Yearbook of International Law
SCR Supreme Court Reports
Swakopmund Protocol Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore
Tenn L Rev Tennessee Law Review
Texas L Rev Texas Law Review
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