LAW SOCIETY
OF SOUTH AFRICA

OFFICE OF THE CHIEF EXECUTIVE OFFICER

31 May 2013

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Secretary to Parliament,
P 0 Box 15
Cape Town
8000

Dear Sirs

DRAFT PROTECTION OF TRADITIONAL KNOWLEDGE BILL (PRIVATE MEMBERS BILL)

Herewith the Law Society of South Africa's (LSSA) comments on the abovementioned Bill.

Please confirm receipt hereof.

Yours faithfully

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COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE DRAFT PROTECTION OF TRADITIONAL KNOWLEDGE (TK) BILL (PMB-2013)

Introductory Remarks

1. At the outset, we wish to advise that we strongly and fully support the broad principle and intention of the TK Bill, viz to provide *sui generis* protection for Traditional Knowledge (TK) in South Africa. This is part of a decision that the LSSA had taken some years ago (in about 2007) namely that TK *et al* should be protected and that the best method of such protection is *sui generis* protection. That decision is hereby confirmed. We therefore re-iterate that the LSSA has consistently and strenuously opposed the principle and the detailed provisions of the earlier Department of Trade and Industry (DTI) Intellectual Property Laws Amendment Bill (the IPLAB) that proposes to protect TK by way of inclusion in, and amendment of, our existing Intellectual Property (IP) Acts. Our view in this regard is that TK simply does not equate with conventional forms of IP and the requirements of the IP Acts for granting protection for IP.

   We also wish to point out that this approach by the LSSA is completely in line with the *sui generis* approach adopted by the developing nations regarding the protection of Traditional Knowledge (TK) and Folklore Expressions / Traditional Cultural Expressions (TCEs) at the World Intellectual Property Organization (WIPO) in Geneva. As you probably know, this is a specialized agency of the United Nations Organization where an Inter-Governmental Committee was established in 2000 to deal *inter alia* with TK and TCEs. South Africa is part of the group of developing nations at WIPO where it has in the past supported this approach.

   Furthermore, we wish to point out that our neighbouring countries, and other African countries, in line with the above approach, have recently adopted a regional Protocol to protect TK and TCEs, viz the ARIPO Swakopmund Protocol (of 2010). A copy of that Protocol is attached hereto for your information and illustrates the *sui generis* approach referred to above. We may mention that ARIPO is the acronym for the African Regional Intellectual Property Organization (of English speaking countries) and includes as its member countries / contracting states the following: Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Rwanda,

Sierra Leone, Somalia, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. To date, half of these states have acceded to the Protocol, namely Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia and Zimbabwe. We understand that the Protocol has the full support of WIPO, which was instrumental in its drafting. We submit that it is appropriate that South Africa should come into line with our neighbouring countries and other African countries regarding the protection of TK and TCEs. We may mention that there are other examples of countries in Africa that have also adopted their own *sui generis* laws to protect TK, such as Tunis, Bangui, and the Agreement of OAPI (the regional IP system in Africa of French speaking countries).

2. We therefore support the broad principle of the Bill, and submit that such customized *sui generis* legislation, with appropriate amendments, is warranted. Our comments hereunder stem from the particular technical approach taken in the Bill in linking much of the protection, and referring extensively, to our IP Acts, i.e. the Copyright Act, the Designs Act, the Performers Protection Act and the Trade Marks Act. We believe that this is not the correct approach for a *sui generis* Act. Please see, for example, the approach taken in the attached ARIPO Swakopmund Protocol (2010) (the Protocol). We submit that the Protocol indicates the correct approach to provide proper *sui generis* protection (although understandably the Protocol is a regional / multi-country treaty as opposed to a national / domestic Act and it remains for each country to reword and customize the wording of the Protocol as it may see fit). Although South Africa is not a signatory to the Protocol, it may be highly instructive in indicating the necessary amendments to the Bill. Our comments hereunder are therefore based to a large extent on the approach used in the Protocol. More particularly, it should be seen as a treaty or guide, as with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), and of course its wording can be modified and adapted to suit our particular views and needs.

3. In addition to paragraph 2 above, we should mention that the nomenclature / terminology that is being used in South Africa for TK is incorrect. The tendency to date has been to refer to all traditional artistic, musical and literary matters, etc (as in the IPLAB) as TK. However, internationally (and at WIPO in its discussions and documents) the term TK is used to refer to the technological traditional matters only i.e. cultivating, selecting and processing genetic

material and treatment of patients with plants, bark, roots, etc, on the one hand. On the other hand, the term folklore (or folkloric expressions) or traditional cultural expressions (TCEs) is used internationally to refer to all the other aspects of what we have referred to loosely in South Africa as TK, such as traditional performances, ceremonies, music, dances, songs, poems, patterns, designs, etc. We should therefore, correctly speaking, in a *sui generis* Bill (and any Act based thereon) bring our nomenclature into line with international usage, as indicated above, and as we have set out in our detailed comments below.

Comments on the Bill

4. Our detailed comments and submissions with regard to the content of the Bill are as follows:

4.1 Clause 1: Definitions:

4.1.1 In order to correct the nomenclature / terminology of the Bill, we propose that the following two broad definitions, or similar wording, (which are based on the corresponding definitions in the Protocol and are recognized as such by WIPO) should be included. In what is set out below, we have somewhat broadened and improved the Protocol wording:

a. **"traditional customary expressions"** shall mean folklore, expressions of folklore or folkloric expressions, and shall include any forms, whether reduced to a material form or not i.e. whether tangible or intangible, in which traditional culture is expressed, appear or are manifested, and include the following forms of expressions or combinations thereof:

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

ii. Musical expressions including audible and written expressions or notations, such as but not limited to songs and/or instrumental music;

iii. Expressions by movement including physical and written expressions or notations, such as but not limited to dances, plays, ceremonies, rituals, and other performances or manifestations of such performances;

iv. Tangible expressions, manifestations and articles embodying such expressions and manifestations, such as but not limited to productions of art, drawings, aesthetic designs including features such as shape, configuration, pattern or ornamentation, paintings including body paintings, carvings, sculptures, pottery, terracotta, mosaics, woodwork, metal ware, jewellery, adornments of all kinds, basketry, needlework, textiles and clothing, glassware, carpets, hangings, covers, costumes, handicrafts of all kinds, decorations, musical instruments, and architectural forms; and

b. "traditional knowledge" shall include but not be limited to any knowledge of a technological nature originating from a local or traditional community that results from intellectual activity and insight in a traditional context, including know-how, secret or confidential knowledge, skills, innovations, processes and products, practices, and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in a codified knowledge system passed on from one generation to the next. The term shall not be limited to a specific technical field, and may include medical, cosmetic, food, beverage, agricultural, environmental knowledge, or other knowledge, and knowledge associated with genetic resources.

4.1.2 The above two broad new definitions will replace and render the following definitions in the Bill redundant viz: "adaption(sic)/adaptation", "copy", "mark", "protected article", "protected traditional design", "protected traditional

knowledge", "protected traditional mark", "protected traditional work", "publish", "reduced to a material form", "reproduction", "traditional design", "traditional design right", "traditional knowledge", "traditional knowledge right", "traditional mark", "traditional mark right", "traditional work", and "traditional work right".

These definitions should therefore be deleted from the Bill, and the relevant clauses in the Bill that deal with these various terms and concepts should correspondingly also be deleted from the Bill – see below.

4.1.3 In order to render the Bill free-standing and in a proper *sui generis* form i.e. totally uncoupled from the IP Acts, we propose that the following definitions / references to IP Acts be deleted: "Copyright Act", "Designs Act", "Performers Protection Act" and "Trade Marks Act".

4.1.4 We further propose that the following definitions be deleted, as these concepts and / or structures are in our view not necessary in the Bill: "Council", "Fund" and "standard licence fee". The corresponding substantive clauses should likewise be deleted from the Bill – see below.

4.2 <u>Clauses 2, 6, 8,13 and 14: Protection Criteria for TK and TCEs:</u>

These clauses should be deleted and substituted with two clauses that are worded along the lines of section 4 (TK) and section 16 (TCEs) in accordance with the customary laws and practices respectively of the Protocol (see attached - these proposed clauses are not set out herein to avoid unnecessary prolixity of these comments).

4.3 <u>Clauses 3, 4, 9, 10 and 14: Rights and General Exceptions from Protection:</u>

These clauses should be deleted and substituted with three clauses that are worded along the lines of sections 7, 19 and 20 respectively of the Protocol (see attached - these clauses are not set out herein to avoid unnecessary prolixity of these comments).

Section 20 of the Protocol provides the right to use for private purposes, evaluation, analysis, research, and teaching (i.e. non infringement) subject to fair dealing / practice and acknowledgement to the relevant community. This applies throughout in respect of TCEs.

4.4 Clauses 5, 11 and 15: Duration of Rights / Term of Protection:

This should be indefinite because protection for TK and TCEs should endure as long as the culture endures – i.e. as long as the protection criteria are fulfilled. These two sets of criteria (for TK and for TCEs) are set out in section 4 and section 16 of the Protocol as indicated in paragraph 4.2 above.

4.5 Clauses 7, 12 and 16: Lapsing of Rights:

These rights should not lapse in the circumstances set out in these clauses. Lapsing should take place only if and when the protection criteria are no longer fulfilled - see 4.4 above.

4.6 Clause 17: Effect on Common Law:

We do not believe that this clause is necessary and submit that it should be deleted. Please see paragraph 4.16) below.

4.7 Clauses 18 to 32: Register(s) and Registration of TK and TCEs:

We submit that the protection granted under this Bill / Act should not require any formalities – for instance copyright comes into existence automatically upon the creation of a work – as required by the Berne Convention on Copyright. This is also consistent with the provisions of the Protocol. However, in the interest of transparency, evidence and the preservation of TK and TCEs, the relevant authorities (e.g. the DTI and / or the Department of Science and Technology (DST)) may maintain registers relating to TK

and / or TCEs as may be required by any or all parties concerned. Hence these clauses can be retained and re-worded accordingly in line with the rest of these comments and with sections 5 and 6 of the Protocol.

4.8 Clauses 33 to 35: Establishment of a National Council for Traditional Knowledge:

We do not consider that such a Council is necessary at all. We are of the view that it will be a very costly body that will achieve little in a ponderous manner and will not easily succeed in assisting traditional communities. This proposed Council will not have any marketing expertise, nor will it be able to assess the marketing efforts of an out-sourced marketing body. There are already two structured and well-functioning bodies that can comment and advise the Minister and Government on TK and TCEs, namely The National House of Traditional Leaders and CONTRALESA - The Council for Traditional Leaders of South Africa. In addition, we have full confidence in these communities being able to manage their own affairs and in commercializing their own TK products and / or TCEs through legal and marketing organizations directly – and the proceeds should accrue fully to each of them as individual communities.

4.9 Clauses 36 and 37: National Trust Fund for Traditional Knowledge:

We also do not believe that this structure is necessary at all. It adds more unnecessary and possibly wasteful bureaucracy to the system. We believe that traditional communities should manage their own funds – to the benefit of their own pockets. If the traditional communities require funding to assist them in commercializing their TK or TCEs, this could be provided by way of grants from the relevant Government Departments, namely the DTI, the DST and / or the Department of Arts and Culture (DAC) on an *ad hoc* basis. This could be included by way of a suitable new / additional clause in the Bill, if considered necessary. In addition, we believe that a simplified structure for each traditional community could be created in the Bill to deal with its monetary affairs, for example a registered private trust for each traditional community with duly appointed trustees holding the assets on behalf of the traditional community.

4.10 Clause 38: Ownership to Vest in Community Proxy:

We do not consider this arrangement to be proper or advisable. The owners and beneficiaries should vest as follows along the lines of sections 6 and 18 of the Protocol:

TK: The owners of the rights shall be the holders of traditional knowledge, or their duly appointed representatives or trustees, namely the local and traditional communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context in accordance with the protection provisions of section 4 of the Protocol - see above; and

TCEs: The owners of the rights of TCEs shall be the local and traditional communities, or their duly appointed representatives or trustees:

a) to whom the custody and protection of TCEs are entrusted in accordance with the customary laws and practices of those communities; and
b) who maintain and use the TCEs as a characteristic of their traditional cultural heritage.

As proposed in paragraph 4.9 above, a registered private trust can deal with the monetary affairs, assets and licensing in respect of TK and TCEs of each traditional community.

4.11 Clause 39: Standard Licence Fee:

We do not see the necessity for this, or for this to be determined by the Minister from time to time. The basis of profit sharing should be by mutual arrangement and should be left to negotiation and the common law of contract, as determined between the parties.

4.12 Clause 40: Protection of TK and TCEs (and Alternative Dispute Resolution)

We propose that this clause in amended by inserting as a first part / sub-clause suitable wording along the following general lines: "TK and TCEs shall be protected against all acts of misappropriation, misuse and unlawful exploitation." This is the broad text of the first subsection of section 19 and section 21 of the Protocol. This can be followed by the text or similar wording of section 14 for TK and sections 19 and 22 for TCEs, and section 23, of the Protocol that deal respectively with Administration, Management and Enforcement of TK and TCEs – subject to appropriate rewording to suit our local jurisdiction and to cover all TK and TCEs. This can be followed by the present clause of the Bill but deleting clause 40(3) – (please see paragraph 4.13 below). After this, a sub-clause for suitable mechanisms for alternative dispute resolution (ADR) should be inserted - to be administered and provided by the State e.g. by the DTI via the Companies and Intellectual Property Commission (CIPC), or directly by CIPC.

4.13 Clause 40(3): Litigation Costs

If a traditional community requests the State to litigate on its behalf, the State should be allowed to recover its costs with any balance being paid to the traditional community (and not to the aforementioned Fund).

4.14 Clause 41: Protection of Moral Rights:

Subject to the removal of the reference to the Copyright Act, we are in favour of such a provision.

4.15 Clause 42: Restricting Importation of Companies (sic):

This clause, which refers to section 28 of the Copyright Act, should be deleted *in toto*.

4.16 Clause 43: Retrospective Operation and Savings:

This clause, if suitably amended to refer to TK and TCEs, is supported in principle. However, a simplified clause could be inserted in the Bill to provide as follows or along the following lines:

i) The Bill / Act shall recognize and protect all TK and TCEs existing in the Republic of South Africa at the date of coming into operation of this Act and in respect of all TK and TCEs that may come into existence in future; and

ii) The Bill / Act shall recognize *bona fide* concurrent third party rights in respect of TK and TCEs that may exist at the date of coming into operation of this Act.

4.17 Clause 44: Application of Act to Foreign Countries:

This clause, if suitably amended to refer to TK and TCEs, and if brought in line with the TRIPS Agreement, should be retained.

4.18 Other Provisions:

Although not specifically provided for in the Bill, other provisions could be usefully added to the Bill, such as: assignment and licensing provisions for TK or TCEs, *inter alia* that these should be in writing, for example regarding the *Hoodia* case (along the lines of section 8 of the Protocol); equitable benefit-sharing provisions (along the lines of section 9 of the Protocol); and separately, or as proposed above - Management, Administration and Assistance provisions should be provided by the relevant departments i.e. the DTI, the DST and / or the DAC (along the lines of sections 14 and 22 of the Protocol).

4.19 Clause 45: Regulations:

Reference to the Minister making regulations relating to the Trust Fund and the National Council should be deleted from this clause on the basis of the submissions / comments made above.

5. The above comments and submissions are not necessarily exhaustive but relate to the main aspects of the Bill which appear to require amendment.

6. These comments and submissions are based largely on, and along the lines of, the provisions of the ARIPO Swakopmund Protocol (2010) which has the support of WIPO (and obviously the ARIPO states, some of which countries are our international neighbours). This Protocol should, with respect, assist in obtaining a more suitable working document for the protection of all forms of TK and TCEs in the draft *sui generis* Bill, to the benefit of South Africa and our indigenous communities. We wish to emphasize that our comments and submissions do not propose or suggest a slavish copy of the provisions of the Protocol but wording and provisions along the lines of the Protocol, and otherwise in line with the approach of our neighbouring states in protecting and nurturing the TK and TCEs of our traditional communities.

AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANIZATION (ARIPO)

SWAKOPMUND PROTOCOL ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF FOLKLORE

ARIPO
Swakopmund, Namibia
2010

Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization (ARIPO)

Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010

ARIPO
Harare, 2010

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PREAMBLE

We, the Contracting Parties,

Having adopted the Legal Instrument for the Protection of Traditional Knowledge and Expressions of Folklore at the Eleventh Session of the ARIPO Council of Ministers in Maseru, in the Kingdom of Lesotho, on November 23, 2007,

In accordance with the objectives of ARIPO generally and in particular Article III (c), which provides for the establishment of such common services or organs as may be necessary or desirable for the co-ordination, harmonization and development of the intellectual property activities affecting its member states;

Recognizing the intrinsic value of traditional knowledge, traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, scientific, ecological, agricultural, medical, technological, commercial and educational value;

Convinced that traditional knowledge systems, traditional cultures and folklore are diverse frameworks of ongoing innovation, creativity and distinctive intellectual and creative life that benefit local and traditional communities and all humanity;

Mindful of the need to respect traditional knowledge systems, traditional cultures and folklore, as well as the dignity, cultural integrity and intellectual and spiritual values of traditional and local communities; to recognize and reward the contributions made by such communities to the conservation of the environment, to food security and sustainable agriculture, to the improvement in the health of populations, to the progress of science and technology, to the preservation and safeguarding of cultural heritage, to the development of artistic skills, and to enhancing a diversity of cultural contents and artistic expressions;

Convinced of the need to respect the continuing customary use, development, exchange and transmission of traditional knowledge and expressions of folklore by traditional and local communities, as well as the customary custodianship of traditional knowledge and expressions of folklore;

Concerned at the gradual disappearance, erosion, misuse, unlawful exploitation and misappropriation of traditional knowledge and expressions of folklore;

Recognizing the right of holders and custodians of traditional knowledge and expressions of folklore to effective and efficient protection against all acts of misuse, unlawful exploitation or misappropriation of their knowledge and expressions of folklore;

Desiring to preclude the grant and exercise of improper intellectual property rights in traditional knowledge, associated genetic resources and derivatives thereof, and in expressions of folklore and works and productions derived therefrom;

Recognizing the need to ensure and promote respect for traditional cultures in order to meet the needs of communities by empowering them;

Convinced of the need to enhance the diversity of cultural contents and artistic expressions in the interest of traditional and local communities, in particular, and for the benefit of humanity in general;

Recognizing that protection must reflect the need to maintain 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 of folklore;

Affirming the requirement to meet the needs of the holders and custodians of traditional knowledge and expressions of folklore, in particular by empowering them to exercise due control over their knowledge and expressions;

Desiring to encourage and reward authentic creativity and innovation resulting from traditional knowledge systems and expressions of folklore, and to promote innovation, creativity and the transfer of technology to the mutual benefit of society, holders and users of traditional knowledge and expressions of folklore;

Emphasizing that legal protection must be tailored to the specific characteristics of traditional knowledge and expressions of folklore, including their collective or community context, the intergenerational nature of their development, preservation and transmission, their link to a community's cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned;

Hereby establish this Protocol to be known as the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the framework of the African Regional Intellectual Property Organization:

PART I: PRELIMINARY PROVISIONS

Section 1
Purpose of Protocol

1.1. The purpose of this Protocol is:

(a) to protect traditional knowledge holders against any infringement of their rights as recognized by this Protocol; and

(b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.

1.2. This Protocol shall not be interpreted as limiting or tending to define the very diverse holistic conceptions of:

(a) traditional knowledge; or

(b) cultural and artistic expressions,

in the traditional context.

1.3. This Protocol shall be interpreted and enforced taking into account the dynamic and evolving nature of traditional knowledge and the characteristic of traditional knowledge systems as frameworks of ongoing innovation.

Section 2
Definitions

2.1. In this Protocol,

"appropriate authority" means a body or an agency authorized by the State which is party to this Protocol or entrusted with the responsibility to supervise and administer the provisions of this Protocol;

" ARIPO Office" means the Office of the African Regional Intellectual Property Organization (ARIPO);

"Contracting State" means any State that has become party to this Protocol in accordance with Section 27;

"customary laws and practices" means customary laws, norms and practices of local and traditional communities recognized by the Contracting States;

"community", where the context so permits, includes a local or traditional community;

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

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

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

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

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

"national competent authority" means the authority designated or established under section 3 of this Protocol;

"Prior Informed Consent" is the giving by the prospective user of complete and accurate information, and, based on that information, the prior acceptance by the concerned communities to use their traditional knowledge or expressions of folklore under the terms envisaged by sections 7.2 and 19.2 of this Protocol;

"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.

2.2. The specific choice of terms to denote the protected subject matter falling under traditional knowledge and expressions of folklore may be determined at the national level of a Contracting State.

Section 3
National Competent Authority

The Contracting States shall designate or establish a national competent authority which shall implement the provisions of this Protocol.

PART II: PROTECTION OF TRADITIONAL KNOWLEDGE

Section 4
Protection criteria for traditional knowledge

Protection shall be extended to traditional knowledge that is:

(i) generated, preserved and transmitted in a traditional and intergenerational context;

(ii) distinctively associated with a local or traditional community; and

(iii) integral to the cultural identity of a local or traditional community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.

Section 5
Formalities relating to protection of traditional knowledge

5.1. Protection of traditional knowledge shall not be subject to any formality.

5.2. In the interests of transparency, evidence and the preservation of traditional knowledge, relevant national competent authorities of Contracting States and ARIPO Office may maintain registers or other records of the knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of the traditional knowledge holders concerned.

5.3. The registers maintained under section 5.2 may be associated with specific forms of protection, and shall not compromise the status of hitherto undisclosed traditional knowledge or the interests of holders of traditional knowledge in relation to undisclosed elements of their knowledge.

5.4. Where two or more communities in the same or different countries share the same traditional knowledge, the relevant national competent authority of the Contracting States and ARIPO Office shall register the owners of the traditional knowledge and maintain relevant records.

Section 6
Beneficiaries of protection of traditional knowledge

The owners of the rights shall be the holders of traditional knowledge, namely the local and traditional communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context in accordance with the provisions of section 4.

Section 7
Rights conferred to holders of traditional knowledge

7.1. This Protocol shall confer on the owners of rights referred to in section 6 the exclusive right to authorize the exploitation of their traditional knowledge.

7.2. In addition, owners shall have the right to prevent anyone from exploiting their traditional knowledge without their prior informed consent.

7.3. For the purposes of this Protocol, the term "exploitation" with reference to traditional knowledge shall refer to any of the following acts:

(a) Where the traditional knowledge is a product:

  (i) manufacturing, importing, exporting, offering for sale, selling or using beyond the traditional context the product;

  (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;

(b) Where the traditional knowledge is a process:

  (i) making use of the process beyond the traditional context;

  (ii) carrying out the acts referred to under paragraph (a) of this subsection with respect to a product that is a direct result of the use of the process.

7.4. In addition to all other rights, remedies and action available to them, the owners shall have the right to institute legal proceedings against any person who carries out any of the acts mentioned in section 7.3 without the owner's permission.

Section 8
Assignment and licensing

8.1. Owners of traditional knowledge shall have the right to assign and conclude licensing agreements; however, traditional knowledge belonging to a local or traditional community may not be assigned.

8.2. All access, authorizations, assignments or licences granted in respect of protected traditional knowledge shall be granted in writing, otherwise they shall be of no force or effect.

8.3. A document drawn up for the purpose of section 8.2 shall be approved by the national competent authority, failing which the document shall be void.

8.4. The ARIPO Office shall keep a register of all licences and assignments granted under this section.

Section 9
Equitable benefit-sharing

9.1. The protection to be extended to traditional knowledge holders shall include the fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties.

9.2. The national competent authority shall, in the absence of such mutual agreement, mediate between the concerned parties with a view to arriving at an agreement on the fair and equitable sharing of benefits.

9.3. The right to equitable remuneration might extend to non-monetary benefits, such as contributions to community development, depending on the material needs and cultural preferences expressed by the traditional or local communities themselves.

Section 10
Recognition of knowledge holders

Any person using traditional knowledge beyond its traditional context shall acknowledge its holders, indicate its source and, where possible, its origin, and use such knowledge in a manner that respects the cultural values of its holders.

Section 11
Exceptions and limitations applicable to protection of traditional knowledge

The protection of traditional knowledge under this Protocol shall not be prejudicial to the continued availability of traditional knowledge for the practice, exchange, use and transmission of the knowledge by its holders within the traditional context.

Section 12
Compulsory licence

12.1. Where protected traditional knowledge is not being sufficiently exploited by the rights holder, or where the holder of rights in traditional knowledge refuses to grant licences subject to reasonable commercial terms and conditions, a Contracting State may, in the interests of public security or public health, grant a compulsory licence in order to fulfil national needs.

12.2. In the absence of an agreement between the parties, an appropriate amount of compensation for the compulsory licence shall be fixed by a court of competent jurisdiction.

Section 13
Duration of protection of traditional knowledge

Traditional knowledge shall be protected for so long as the knowledge fulfils the protection criteria referred to under section 4, except that where traditional knowledge belongs exclusively to an individual, protection shall last for 25 years following the exploitation of knowledge beyond its traditional context by the individual.

Section 14
Administration and enforcement of protection of traditional knowledge

14.1. To ensure the effectiveness of the protection of traditional knowledge, the national competent authority and ARIPO Office acting on behalf of the Contracting States shall be entrusted with the tasks of awareness-raising, education, guidance, monitoring, registration, dispute resolution, enforcement and other activities related to the protection of traditional knowledge.

14. 2. National competent authorities shall be entrusted, in particular, with the task of advising and assisting holders of protected traditional knowledge in defending their rights and instituting civil and criminal proceedings, where appropriate and when requested by them.

14.3. Where two or more communities in different countries share the same traditional knowledge, the ARIPO Office shall be responsible for raising awareness, education, guidance, monitoring, dispute resolution and other activities relating to the protection of traditional knowledge of those communities.

Section 15
Access to traditional knowledge associated with genetic resources

Authorization under this Protocol to access protected traditional knowledge associated with genetic resources shall not imply authorization to access the genetic resources derived from the traditional knowledge.

PART III: PROTECTION OF EXPRESSIONS OF FOLKLORE

Section 16
Protection criteria for expressions of folklore

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.

Section 17
Formalities relating to protection of expressions of folklore

17.1. The protection of expressions of folklore shall not be subject to any formality.

17.2. For the purposes of evidence, measures for the protection of expressions of folklore may require that certain categories of the expressions 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.

17.3. The notification shall have a merely declaratory function and shall not in itself constitute rights, nor shall it involve or require the documentation, recording or public disclosure of the expressions of folklore concerned.

17.4 Where two or more communities in the same or different countries share the same expressions of folklore, the relevant national competent authorities of Contracting States and ARIPO Office shall register the owners of the rights in those expressions of folklore.

Section 18
Beneficiaries of protection of expressions of folklore

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 are 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.

Section 19
Protection of expressions of folklore against unlawful acts

19.1. Expressions of folklore shall be protected against all acts of misappropriation, misuse and unlawful exploitation.

19.2. In respect of expressions of folklore of particular cultural or spiritual value or significance to a community, the Contracting States shall 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:

(a) in respect of such expressions of folklore other than words, signs, names and symbols:

i). 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;

ii). any use of the expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the expressions of folklore;

iii). any distortion, mutilation or other modification of, or other derogatory action, in relation to the expressions of folklore; and

iv). the acquisition or exercise of intellectual property rights over the expressions of folklore or adaptations thereof;

(b) in respect of words, signs, names and symbols which are such expressions of folklore, 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.

19.3. In respect of the use and exploitation of other expressions of folklore, the Contracting States shall 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, 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.

19.4. Contracting States shall provide adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of intellectual property rights over expressions of folklore that are held secret.

Section 20
Exceptions and limitations applicable to protection of expressions of folklore

20.1. Measures for the protection of expressions of folklore shall:

(a) be such as not to restrict or hinder the normal use, development, exchange, dissemination and transmission of expressions of folklore within the traditional or customary context by members of the community concerned, as determined by customary laws and practices;

(b) extend only to uses of expressions of folklore taking place outside their traditional or customary context, whether or not for commercial gain;

(c) be subject to exceptions in order to address the needs of 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 of expressions of folklore for inclusion in an archive or inventory exclusively for the purposes of safeguarding cultural heritage, and incidental uses,

Provided that in each case, such uses are compatible with fair practice, the relevant community is acknowledged as the source of the expressions of folklore where practicable and possible, and such uses would not be offensive to the relevant community.

20.2. The measures put in place for the protection of expressions of folklore may make special provision for their use by the nationals of the country concerned.

Section 21
Duration of protection of expressions of folklore

Expressions of folklore shall be protected against all acts of misappropriation, misuse or unlawful exploitation for as long as the expressions of folklore fulfil the protection criteria set out in section 16.

Section 22
Management of rights in expressions of folklore

22.1. For the purpose of ensuring the effectiveness of the protection and management of expressions of folklore, the national competent authority and the ARIPO Office acting on behalf of the Contracting States shall be entrusted with the tasks of awareness-raising, education, guidance, monitoring, dispute resolution and other activities relating to the protection of expressions of folklore.

22.2. Authorizations to exploit expressions of folklore shall be obtained from the national competent authority which acts on behalf of and in the interests of the community concerned.

22.3. Where the national competent authority acts under sections 22.1 and 22.2 of this Protocol:

(a) authorizations shall be granted only after appropriate consultations with the communities concerned, in accordance with their traditional processes for decision-making and public affairs management;

(b) authorizations shall comply with the scope of protection provided for the expressions of folklore concerned and shall, in particular, provide for the equitable sharing of the benefits arising from their use;

(c) uncertainties or disputes as to which communities are concerned shall be resolved, as far as possible, in accordance with customary laws and protocols, where applicable, of those communities;

(d) any monetary or non-monetary benefits arising from the use of the expressions of folklore shall be transferred directly by the national competent authority to the community concerned;

(e) enabling legislation or administrative measures shall provide guidance on matters such as procedures for applications for authorization, 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 authorizations that may be granted by the national competent authority.

22.4 Where two or more communities in different countries share the same expressions of folklore, the ARIPO Office shall be responsible for raising awareness, education, guidance, monitoring, dispute resolution and other activities relating to the protection of expressions of folklore of those communities.

PART IV: GENERAL PROVISIONS

Section 23
Sanctions, remedies and enforcement

23.1. The Contracting States shall ensure that accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies are available where there is a breach of the provisions relating to the protection of traditional knowledge and expressions of folklore.

23.2. The national competent authority shall be entrusted with the task of advising and assisting holders of protected traditional knowledge and communities who are beneficiaries of protected expressions of folklore in defending and enforcing their rights and instituting civil and criminal proceedings, where appropriate and when requested by the holders and communities concerned.

Section 24
Regional Protection

24.1. Eligible foreign holders of traditional knowledge and expressions of folklore shall enjoy benefits of protection to the same level as holders of traditional knowledge and expressions of folklore who are nationals of the country of protection, taking into account as far as possible the customary laws and protocols applicable to the traditional knowledge or expressions of folklore concerned.

24.2. Measures should be established by the national competent authority and ARIPO Office to facilitate as 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.

24.3. ARIPO may be entrusted 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 shall make use of customary law, local information sources, alternative dispute resolution mechanisms, and any other practical mechanism of this kind, which might prove necessary.

Section 25
Transitional measures

25.1. Exploitation and dissemination of traditional knowledge prior to the entry into force of the protection under this Protocol shall comply with the provisions of section 9 relating to equitable benefit-sharing and section 10 relating to the recognition of the source, within twelve months following the entry into force of the protection, subject to equitable treatment of the rights acquired by third parties in good faith.

25.2. The continued use of expressions of folklore that had commenced prior to the introduction of this Protocol to protect the expressions of folklore shall comply with provisions of section 19 within twelve months of this Protocol entering into force, subject to equitable treatment of the rights and interests acquired by third parties through prior use in good faith.

Section 26
Regulations

26.1. The Administrative Council of ARIPO shall make Regulations for the implementation of this Protocol and may amend them where necessary.

26.2. The Regulations shall, in particular,

a) stipulate any administrative requirements, or any necessary details for the implementation of the provisions of this Protocol;

b) prescribe the procedure for applications of authorization to exploit traditional knowledge and expressions of folklore;

c) prescribe fees to be charged by the ARIPO Office and the details of the distribution of part of the fees among Contracting States; and

d) provide forms to be used for matters requiring forms under this Protocol.

Section 27
Entry into force

27.1. Any State which is a member of ARIPO or any State to which membership of ARIPO is open may become party to this Protocol by:

i) signature followed by the deposit of an instrument of ratification; or

ii) deposit of an instrument of accession.

27.2. Instruments of ratification or accession shall be deposited with the Government of the Republic of Zimbabwe.

27.3. This Protocol shall come into force three months after six States have deposited their instruments of ratification or accession.

27.4. Ratification of or accession to this Protocol shall entail acceptance of the Agreement on the Creation of the African Regional Intellectual Property Organization.

Section 28
Reservations

Reservations may not be made to this Protocol.

Section 29
Signature of the Protocol

29.1. This Protocol shall be signed in a single copy and shall be deposited with the Government of the Republic of Zimbabwe.

29.2. The Government of the Republic of Zimbabwe shall transmit certified copies of this Protocol to the Contracting States to which membership of ARIPO is open in accordance with Article IV of the Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO).

Section 30
Amendment of the Protocol

30.1. This Protocol may be amended at the instance of any Contracting State or the Director General of ARIPO during the sessions of the Administrative Council of ARIPO.

30.2. Adoption of the amendments of any provision of this Protocol shall require a majority of two-thirds of the votes of all the Contracting States.

Section 31
Denunciation of the Protocol

31.1. Any Contracting State may denounce this Protocol by notification addressed to the Government of the Republic of Zimbabwe.

31.2. Denunciation of this Protocol shall take effect six months after receipt of the said notification by the Government of the Republic of Zimbabwe.