

AN ANALYSIS OF THE APPLICABLE LAWS ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS IN NAMIBIA

<https://doi.org/10.29053/pslr.v15i1.3680>

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Abstract

Traditional knowledge (TK) and cultural expressions are more vulnerable to infringements because of their nature and the lack of protection as intellectual property (IP) under many legal systems. TK can, however, contribute to the social and economic development of a country, the preservation of cultural heritage, and the increase in innovation and invention. It is for this reason that it is important to enact laws and formulate policies that recognise, promote, and protect TK and cultural expressions.

An analysis was made on the protection offered under Namibian laws to holders of TK and cultural expressions and considered the adequacy and effectiveness of such laws. The findings show that on a regional level, Namibia is a party to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, however, the Protocol has not been incorporated into national IP-related laws. In terms of domestic laws, there are no IP laws that expressly recognise and protect works of TK and cultural expression. However, there are policies such as the National Intellectual Property Policy 2019-2024 and the Namibia Arts, Culture and Heritage Policy 2021/2022-2023/2026, which recognises the value of TK and the need to protect TK and cultural expressions.

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Therefore, it is recommended that government should develop a sui generis system that can help foster the preservation and development of TK and cultural expressions. The system should take into consideration the current social and economic structures so that it can be effective. The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore can be used as a guide in developing a sui generis system for Namibia.

1 Introduction

In comparison to types of work eligible for intellectual property (IP) protection, traditional knowledge (TK) and cultural expressions, also known as traditional cultural expressions (TCEs) in Namibia, although currently not eligible for IP protection under many legal systems, are more vulnerable to infringements because of their nature. One of the major challenges is the commercial exploitation of TK by third parties without the consent of the owners, and the lack of equitable benefit-sharing.¹ Another challenge is the ability to fulfil conditions for patent applications such as to clinically prove inventive steps for a process or product of TK.

However, the healer may base the medical treatment upon generations of clinical trials, which entails research studies in which one or more human subjects are prospectively assigned to one or more interventions to evaluate the effects of those interventions on health-related biomedical or behavioural outcomes.² Healers undertook such clinical trials in the past and on a solid empirical understanding of the interaction between the mixture and human physiology.³ This can further cause the exploitation of TK by third parties. It is even more challenging when documenting and preserving such work of indigenous people especially when it relates to copyright that requires expression of work to be expressed in a fixation.⁴ Therefore, there is a need for guidelines that can help protect and foster the preservation of TK and cultural expressions.

In Namibia, the case of the hoodia plant involving the San people who are one of the indigenous people who discovered the use of the plant is one example involving infringement of rights holders of TK. The San depend on plants and hunting animals and, traditionally, they use local plants for survival and for treatment as medicine.⁵

1 WIPO 'Intellectual Property and Traditional Knowledge' https://www.wipo.int/edocs/pubdocs/en/tk/920/wipo_pub_920.pdf (accessed 13 May 2021) at 8.

2 NIH 'Definition of a Clinical Trial' <https://grants.nih.gov/policy/clinical-trials/definition.htm> (accessed 20 July 2021).

3 WIPO (n 1) 8.

4 L Nandjembo *The Effectiveness of the Swakopmund Protocol on the Protection of Traditional knowledge in Namibia* (2017) at 40.

5 S James *An Introduction to the Regional Assessment of the Status of the San in Southern Africa* (2001) at 1.

Hoodia is one of the plants that have been used by the San people to prevent hunger and thirst while they travel long journeys as they hunt in harsh climates.⁶ Research was carried out on the use of wild plants in Southern Africa including hoodia and thereafter an extract from the hoodia plant containing an appetite suppressant agent was patented at the European Patent Office in the European Union by the Council for Scientific and Industrial Research (CSIR) South Africa in respect of six inventors from South Africa.⁷ The invention was for the unique appetite suppression in the extract from the hoodia plant and a patent was sought and granted without the consent of the San people and without recognising them as the IP rights holders.⁸ This patent was sold to a company in the United Kingdom that intended to sell products made out of hoodia extracts to overweight people.⁹ After the discovery, an agreement was however reached between CSIR and the South African San Council to uplift the standard of living and well-being of the San peoples of southern Africa¹⁰ and to give royalty to the San people.¹¹ This shows that San people, as indigenous people, had no legal protection under the Namibian laws, which is an indication of inadequacy when it comes to the protection of IP especially when it relates to TK.

Governments can help facilitate their use and help indigenous people contribute to economic development using traditional knowledge and cultural expressions and can improve their living standards in indigenous communities that often have many people living below the poverty line.¹² There is currently no international convention that protects TK and cultural expressions. This is because of both their nature and because they do not entirely fit into the current IP system.

This paper will look at the protection offered under Namibian laws to holders of TK and cultural expressions and will consider the adequacy and effectiveness of such laws with recommendations. Part two of the paper will address the need to protect TK and cultural expressions while part three will deal with the protection of TK and cultural expressions under Namibian laws including international laws, IP-related legislation, and national policies.

6 S Amoo & S Harring *Intellectual Property under the Namibian Constitution in Constitutional Democracy in Namibia: A critical analysis after two decades* (2010) at 303.

7 European Patent Office 'Use of extracts from Hoodia gordonii and Hoodia lugardii for the preparation of a medicament for use in the suppression of appetite' (2004) at 1.

8 Amoo & Harring (n 6) 303.

9 As above.

10 S Laird & R Wynberg *Biodiversity prospecting & access and benefit-sharing: An introductory Primer* (2003) at 13.

11 Amoo & Harring (n 6) 303.

12 WIPO *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide For Countries in Transition* (2013) at 3.

2 The need to protect TK and cultural expressions

TK is observed in the daily activities of indigenous communities including crop farming, livestock management, food processing, healing methods, and handy-craft.¹³ The rationale for protecting TK is centered on principles of fundamental justice and the ability to protect, preserve, and control cultural heritage.¹⁴ In addition, the reasons for the protection of TK are centered on equity, preservation of traditional practices, conservation of biodiversity, the sustainability of livelihoods, and resilience to human-made and natural disasters.¹⁵ There is also the associated right to receive a fair return on what communities have developed.¹⁶ TK generates value that is not adequately recognised or compensated in both plants and animals. Traditional farmers have nurtured and conserved both plants and animals.¹⁷ They have further improved the value of plant genetic resources through a continuous selection of the best plant-adapted varieties.¹⁸

TK and traditional cultural expressions are not only important because they are part of cultural heritage and contribute to the welfare and sustainable development of the communities as they also have the potential to contribute to the economic wealth of culture-related enterprises and industries.¹⁹ Additionally, TK and cultural expressions can be a source of aspiration and can help promote innovation and creativity.²⁰ Because ownership of TK and cultural expressions is vested in a group,²¹ this also means that many people have access to such work, which therefore makes TK and cultural expressions vulnerable to exploitation by third parties without consent. Therefore, it is also important to protect TK and cultural expressions in order to prevent uncontrolled exploitation by third parties, misappropriation and to prevent use contrary to cultural norms.²²

Apart from IP laws, the protection of TK by other means such as existing laws helps to preserve the self-identification of people and can ensure that the continued existence of indigenous and traditional

13 Namibia Arts, Culture and Heritage Policy, 2001 Art 32.

14 J Wekundah *Why Protect Traditional Knowledge?* (2012) at 11.

15 UN 'United Nations Permanent Forum on Indigenous Issues: Together we achieve' 2019 at 1.

16 As above.

17 UN (n 13) 1.

18 As above.

19 WIPO *Intellectual Property and Traditional Knowledge* at 8.

20 WIPO (n 12) 3.

21 WIPO (n 19) 10.

22 M Ouma 'Protection of Traditional Knowledge and Traditional Cultural Expressions in Kenya' (2014) 78 *WTO Colloquium Papers* at 77.

people, their practices, and customs are preserved.²³ Therefore, the rationale for having appropriate laws on TK is centred around the protection of TK, the preservation of TK, the heritage and the promotion of TK, indigenous peoples' cultures and identities, and the motivation for innovation.

3 Protecting TK and cultural expressions under Namibian law

3.1 Protection under international law

In terms of the Namibian Constitution, the general rules of public international law and international agreements binding upon the country shall be recognised under Namibian laws.²⁴ This means that international agreements being acceded to or ratified by the country will be recognised as law in Namibia. In terms of IP, Namibia is a member of the World Intellectual Property Organization (WIPO), which is a specialised agency of the United Nations (UN) which has an objective to promote worldwide IP protection through the cooperation of states and collaboration with international organisations.²⁵ In addition, Namibia is a party to many of WIPO's conventions and treaties, including the Berne Convention for the Protection of Literary and Artistic Works 1886, and the Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty 1970, amongst others. Negotiations are ongoing in terms of establishing an agreement on ways of protecting TK and cultural expressions within the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC), which was established in 2000.²⁶

The IGC is a platform where WIPO member states discuss IP-related issues that arise within the context of access to genetic resources, benefit-sharing, the protection of TK, and traditional cultural expressions.²⁷ In this forum, members have formal negotiations which aim to reach an agreement on international instruments that can promote the effective protection of genetic resources, TK, and traditional cultural expressions.²⁸

The UN Declaration of the Rights of Indigenous Peoples (UNDRIP) emphasises the protection of indigenous peoples' rights to their TK

23 WIPO (n 12) 3.

24 Constitution of the Republic of Namibia, 1990 (Constitution) Art 144.

25 Convention Establishing the World Intellectual Property Organization, 1967 Art 3(1).

26 WIPO *The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2016) at 1.

27 As above.

28 WIPO (n 26) at 2.

and places an obligation on states to take effective measures that will recognise and protect them in the exercise of their rights.²⁹ Indigenous communities are some of the groups that are allowed to express their views and participate in the WIPO members' IGC decision-making processes in accordance with the UNDRIP. Namibia was one of the 144 states that voted for the adoption of the UNDRIP. The UNDRIP stipulates the following:³⁰

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

In respect of Biodiversity, the Convention on Biological Diversity (CBD), which Namibia is a party to, also recognises the close ties of indigenous peoples and local communities to biological resources, and the contributions that TK can make to the Convention and to sustainable biological diversity.³¹ A working group was established under the CBD with the aim to address the implementation and protection of TK.

Namibia became a member of the World Trade Organization (WTO) when it acceded to the Marrakesh Agreement establishing the WTO, which is contained as an annexure to the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),³² amongst other agreements. TRIPS aims to 'reduce distortions and impediments to international trade and taking into account the need to promote effective and adequate protection of intellectual property rights',³³ amongst other things.³⁴ Although TRIPS has provisions that are generally applicable to IP, there are, however, no specific provisions in respect of TK and cultural expressions.

29 United Nations Declaration of the Rights of Indigenous Peoples (02 October 2007) UN Doc (A/RES/61/295) (2007) Art 31(2).

30 United Nations Declaration of the Rights of Indigenous Peoples (n 29) Art 31(1).

31 Convention on Biological Diversity (05 June 1992) 1760 UN Treaty Series 69 Art 8(j).

32 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UN Treaty Series 299 (TRIPS).

33 TRIPS (n 32) 320.

34 As above.

3.2 The protection of TK and cultural expressions under regional laws

Namibia is a member of the African Regional Intellectual Property Organization (ARIPO) which was established by virtue of the Lusaka Agreement in 1976 to develop and harmonise IP laws, amongst other things.³⁵ Namibia signed the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (Swakopmund Protocol), which was adopted on 09 August 2010 and entered into force on 11 May 2011. The Swakopmund Protocol has two purposes, namely, to protect holders of TK against any infringement of IP rights and to protect cultural expressions against any misuse and unlawful exploitation that is beyond unlawful expressions.³⁶

The Swakopmund Protocol protects both TK and cultural expressions. It has important provisions specifically tailor-made on the criteria to be used when protecting TK, cultural expressions and the beneficiaries thereof, and the rights conferred to holders, limitation, assignment and licensing, duration, enforcement, and remedies, amongst other things. What is notable in terms of the criteria is that no formal requirements and protection shall be extended to TK which is:³⁷

- (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.

Instead, emphasis is placed on documentation by way of registers for the preservation of TK. In respect of beneficiaries, the local and traditional communities, and individuals who are recognised in such communities are the recognised right holders of TK.³⁸ Therefore, TK can be owned jointly by local or traditional communities. In addition, to prevent unfair compensation, there is a provision that promotes the equitable and fair benefit sharing of TK, which shall include non-monetary benefits such as the recognition of the holders and the source of origin of TK.³⁹

35 UN General Assembly, DRC: Ceasefire Agreement (Lusaka Agreement) (23 July 1999), S/1999/815 Art 3(a).

36 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2019 (Swakopmund Protocol) sec 1.1(a)-(b).

37 Swakopmund Protocol (n 36) sec 4.

38 Swakopmund Protocol (n 36) sec 6.

39 Swakopmund Protocol (n 36) sec 9.

In respect of the duration of protection, the period of protection is 25 years in respect of TK owned by individuals.⁴⁰ The period is longer than the protection granted under existing IP systems which include, for example, 20 years for patents. In addition, where the TK is owned by a local community or tradition, the protection will be expanded for as long as the criteria for protection can be fulfilled.⁴¹

In respect of cultural expressions, there is provision for protection to be granted in respect of whatever form or mode of the expressions with no formalities required for protection. It is provided that such expressions are:⁴²

- (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.

Local and traditional communities are the only ones allowed to own the rights in cultural expressions and will be granted protection against all acts of misuse or unlawful exploitation for as long as the cultural expressions fulfil the protection criteria.⁴³

Another important provision included in respect of cultural expressions is the section on the management of rights relating to cultural expressions which entail awareness-raising, education, guidance, monitoring, and dispute resolution in relation to the protection of cultural expressions.⁴⁴ Under this provision, authorisation in terms of the exploitation of cultural expressions shall be granted by the authority which acts on behalf of and in the interest of the communities.⁴⁵ In considering such authorisation, the following provisions shall be applicable:⁴⁶

- (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;

40 Swakopmund Protocol (n 36) sec 13.

41 As above.

42 Swakopmund Protocol (n 36) sec 16.

43 Swakopmund Protocol (n 36) secs 18 & 21.

44 Swakopmund Protocol (n 36) sec 22.1.

45 Swakopmund Protocol (n 36) sec 22.3.

46 As above.

- (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.

For as long as the cultural expressions fulfil the protection criteria as previously discussed, cultural expressions will be eligible for protection against acts of misappropriation, misuse, and unlawful exploitation.⁴⁷ The exclusion of reservations⁴⁸ from the Protocol is seen as a way of putting obligations on member states to implement the Protocol into their national laws and to accord the standard of protection provided in respect of TK and cultural expressions. Despite the Protocol being adopted more than 10 years ago in Namibia, it has not yet been incorporated into its national laws.

3.3 Protection under national laws

In respect of the protection of TK and cultural expressions under Namibian law, protection is offered in terms of the Constitution which is the supreme law in Namibia, international law, legislation, and national policies as will be discussed below.

3.3.1 *The Namibian Constitution*

Culture and tradition are part of the Namibian communities, and the right is recognised and protected by the Constitution in the article below:⁴⁹

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

In addition, customary law which regulates the customs, practices, and beliefs of indigenous groups and communities is also a branch of law that is enforceable under the Namibian Constitution. Customary

47 Swakopmund Protocol (n 36) sec 21.

48 J Dugard *International Law: A South African Perspective* (2005) at 411.

49 Constitution (n 24) Art 19.

law is valid on condition that it is not in conflict with the provisions of the Constitution.⁵⁰

By virtue of the recognition of culture and tradition in the Constitution, the application of international laws, and being party to various international agreements, Namibia is obliged to enact legislation that recognises and protects TK and cultural expressions.

3.3.2 *Legislation*

Industrial Property Act

The Industrial Property Act, 2012⁵¹ provides for the registration, protection, and administration of industrial properties in Namibia including patents, utility models, and trademarks.

The Industrial Property Act does not expressly have provisions on TK or cultural expressions in respect of trademarks, industrial designs, utility models, and trade secrets. This does not prevent TK or cultural expressions from being registered as trademarks or utility models. There are examples where trademarks with names that have traditional origins have been registered to distinguish goods and services. These include *Omaere* which has an origin from traditional milk made by the *Ovaherero* people and *meme mahangu* which has an origin from the Oshiwambo culture referring to millet.⁵² In addition, one of the other ways of protecting TK under the Industrial Property Act is to register it as a collective and certification trademark.⁵³ Certification trademarks relate to marks that are capable of distinguishing goods and services certifying, *inter alia*, the quality, value, geographical origin, and characteristics of the goods and services.⁵⁴ Collective trademarks are marks that can distinguish the goods and services of members belonging to an association from those not part of the association.⁵⁵ Because of the nature of TK in that it often belongs to an indigenous community,⁵⁶ registering TK as collective or certification trademarks can have a mutual benefit to the community.

However, in respect of patents, the provision of the Industrial Property Act requires that an application for a patent where the subject matter is derived from, developed, or associated with indigenous or TK must disclose the country of origin providing such

50 Constitution (n 24) Arts 19 & 66(1).

51 Industrial Property Act 1 of 2012.

52 Nandjembo (n 4) 35.

53 Industrial Property Act (n 51) Part 10.

54 Industrial Property Act (n 51) sec 131.

55 As above.

56 WIPO (n 12) 15.

indigenous or TK, from whom in the country it was obtained, and any other information regarding the nature or source.⁵⁷

Copyright and Neighbouring Rights Protection Act

In terms of copyright, the Copyright and Neighbouring Rights Protection Act (Copyright Act),⁵⁸ does not also contain specific mention of creation from indigenous TK or cultural expressions. However, the provisions in the Copyright Act do not specifically exclude TK and cultural expressions⁵⁹ and can be interpreted to include protection for cultural expressions especially in terms of performer's rights, and artistic work which can include sculptures and certain weaving skills, literary work, and musical work. However, there is hope for TK as, in respect of the Namibia Draft Copyright Bill, protection is to be extended to works of 'expression of traditional cultural heritage'.⁶⁰

Traditional cultural heritage is defined in terms of the Draft Bill as follows:⁶¹

... shall be understood as productions made up exclusively of characteristic elements of traditional artistic and literary heritage, which is developed and continued by a national community of Namibia or by individuals who are considered to meet this community's traditional artistic expectations, especially popular tales, popular poetry, popular songs and instrumental music, popular dance and shows and artistic expressions of rituals and productions of popular art.

In terms of the Draft Bill, the provisions on traditional cultural heritage also extend to authors that are creators of works with characteristic elements of traditional cultural heritage. The provisions also extend to individual authors that are known and have been dead for more than 70 years.⁶² In respect of ownership of expression of the cultural traditional heritage of known authors and in accordance with the Draft Copyright Bill, such ownership shall belong to the author, and any person who claims to be the author of such work must prove that they are indeed the author.⁶³ Royalties that are to be paid in respect of known authors shall be shared between the right holders and the Collective Management Organization (CMO) in accordance with the distribution rules of the organisation.

57 Industrial Property Act (n 51) sec 24(2).

58 Copyright and Neighbouring Rights Protection Act 6 of 1994 (Copyright Act).

59 Nandjembo (n 4) 33.

60 Draft Copyright Bill, 2019 <https://www.bipa.na/?wpdmact=process&did=NjgyLmhvdGxpbms=> (accessed 16 July 2021).

61 Copyright Act (n 58) sec 4.

62 As above.

63 Draft Copyright Bill (n 60) 32.

Further provisions in the Bill protect any expression of cultural traditional heritage that is part of the national heritage in Namibia. Where expressions of cultural traditional heritage which are part of the national heritage are used with the intention of gain outside their traditional or customary context, authorisation shall be granted from the relevant CMO. The uses that require authorisation in terms of the Draft Copyright Bill are contained as follows:⁶⁴

- 8(a) any publication, reproduction and distribution of copies of expressions of traditional cultural heritage which are part of national heritage; and
- 8(b) any public recitation or performance, any transmission by wire or wireless means, and any other form of communication to the public of expressions of traditional cultural heritage which are part of national heritage.

It can be a challenge to protect TK and cultural expressions by means of copyright because such work may not be eligible as it is often not original. In addition, even where the work is original, there can be another challenge where the requirement of originality is met by an author who is not part of the local community in terms of which the tradition originated from.⁶⁵ This is because most TK and cultural expression is easily accessible and has become part of the public domain.⁶⁶ However, the Draft Copyright Bill once made law, will be applicable to TK and cultural expressions in respect of copyright as it includes provisions that can help determine the nature of TK and cultural expressions in respect of copyright. In addition, because of the nature of copyright protection in that, it is granted in respect of a specific author, it can create a challenge if one tries to apply this to TK and cultural expressions which are often owned by communities.⁶⁷

3.3.3 National policies

National Intellectual Property Policy 2019-2024

The mission of the policy is to create a balanced and effective IP system in Namibia, which amongst other things, values and protects creativity and innovation by 'fostering an enabling environment for

⁶⁴ Draft Copyright Bill (n 60) 33.

⁶⁵ WIPO 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Folklore: Background Paper No 1' (2003) at 13.

⁶⁶ WIPO (n 65) 14.

⁶⁷ WIPO 'Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore A Guide For Countries in Transition' at 16.

generation, commercialization and utilization of creative, cultural, and inventive assets'.⁶⁸

The Policy defines TK as:⁶⁹

... 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.

In respect of cultural expressions, the policy defines the term as:⁷⁰

... 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:

- (a) Verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (b) Musical expressions, such as but not limited to songs and instrumental music;
- (c) Expressions by movement, such as, but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form; and
- (d) 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.

There is a specific objective aimed to 'provide adequate protection and promote the use of TK and traditional cultural expressions (TCEs); and ensure equitable sharing of benefits arising from the use of TK, TCEs, and TK associated with the use of genetic resources by 2024'.⁷¹ In terms of this objective, the following strategic interventions are needed:⁷²

- (a) Develop and enact a law aimed at facilitating the implementation of the Swakopmund Protocol on the protection of traditional knowledge and traditional cultural expressions.
- (b) Expedite the process of enacting the ABS Bill.
- (c) Participate actively in international fora where efforts and negotiations are made to develop international instruments

68 Namibia National Intellectual Property Policy, 2019-2024 at 22.

69 Namibia National Intellectual Property Policy (n 69) 7.

70 Namibia National Intellectual Property Policy (n 69) 6.

71 National Intellectual Property Policy (n 69) 30.

72 National Intellectual Property Policy (n 69) Strategy 17.3.1.

addressing needs and concerns related to TK, TCEs and genetic resources.

- (d) Use IP laws where appropriate to protect traditional knowledge and expressions of folklore and address concerns related to traditional knowledge and TCE's.
- (e) Support and strengthen the use of the national database on traditional knowledge.
- (f) Strengthen the ongoing initiative to educate traditional knowledge holders on their rights and legal instruments to address their needs and concerns
- (g) Develop guideline and model agreements on the transfer and use of expressions of folklore, traditional knowledge and associated genetic resources and promote their use.

This policy acknowledges and recognises TK and cultural expression in Namibia. The policy specifically defines what constitutes TK and cultural expressions, something which is currently not expressly defined in IP-related legislation in Namibia.⁷³ From the definitions of TK and cultural expressions, it is clear that protection can be accorded by means of copyright, trademarks, and patents for creative work and innovations of traditional and cultural origin. The Policy should be used as a reference point in the process of drafting relevant laws applicable to TK and cultural expressions.

Namibia Arts, Culture and Heritage Policy 2021/2022-2023/2026

This policy acknowledges the challenges associated with traditional and indigenous knowledge, including the duty to respect and protect traditional and indigenous knowledge from exploitation by non-indigenous parties, and to promote its application in the human, social and economic development of Namibia.⁷⁴ The Policy sets several considerations when protecting traditional and indigenous knowledge and states that such protection must reflect the need to maintain an equal balance between the rights and interests of those who develop, preserve and maintain TK innovations and practices, and those who use and benefit from such knowledge and cultural expressions.⁷⁵ Additionally, the legal protection to be adopted must be made to the specific characteristics of TK and cultural expressions, 'including their community context, the nature of their development, preservation and transmission, their link to community's cultural and social identity, integrity, beliefs, spirituality and values'.⁷⁶

There are also specific interventions to be made in terms of cultural expressions in respect of crafts such as pottery, baskets,

73 Industrial Property Act (n 51); Copyright Act (n 58).

74 Namibia Arts, Culture and Heritage Policy 2021/2022-2023/2026 at 32.

75 As above.

76 As above.

wood carvings, leather works, jewellery and patchwork, traditional dances, traditional music and instruments, traditional literature, traditional drama and dance, visual arts, and design and folk art.⁷⁷

Although there are good strategies and intervention procedures under the two policies, the biggest challenge is the absence of legislation that specifically recognises TK and cultural expressions and which right holders can rely on for protection and remedy in instances of right infringements.⁷⁸ This makes it difficult for creators and innovators of TK to seek remedies and relief as they become forced to seek alternatives such as instituting proceedings based on common law or under other existing legislation such as the Copyright Act, or seeking guidance from the courts on whether TK and cultural expressions are recognised and can be protected under IP laws. The successes of protecting TK and cultural expressions might be limited because such works are often not original and might be difficult to describe in respect of the compounds or products to be patented because of the ancient roots in TK.⁷⁹ Thus, the available protection for TK and cultural expressions in respect of patents may not be sufficient for such work.⁸⁰ The best way to protect TK and cultural expressions is through the development of a *sui generis* system that is specific to such work or through the adoption of other means such as the protection of trade secrets and undisclosed information.⁸¹ Therefore, there is a need for national legislation that specifically recognises and protects TK and cultural expressions, and the Swakopmund Protocol can be used as a benchmark by the legislators.

4 Conclusion

The importance of protecting TK and cultural expressions cannot be overemphasised as this does not only benefit TK holders and communities, but also ensures that TK continues to contribute to the social and economic development of the country, the preservation of cultural heritage, and the increase in innovation and invention. This paper has identified the challenges in the existing international, regional, and national systems in terms of the protection of TK and outlined the need to enact laws that properly fit the profile and nature of TK. On an international level, there are international conventions that can be used to protect the rights of TK holders, such as the CBD, and negotiations are ongoing for the drafting of an international convention on TK and cultural expressions with the

77 Namibia Arts, Culture and Heritage Policy (n 74) 35.

78 Nandjembo (n 4) 33.

79 Nandjembo (n 4) 39.

80 Nandjembo (n 4) 34.

81 WIPO (n 65) 17.

WIPO. On a regional level, ARIPO has advanced the adoption of the Swakopmund Protocol, which acts as a model law for ARIPO members.

Domestically, the Industrial Property Act makes reference to TK, however, the provisions are not adequate as TK does not fit in with the requirements for protection, and the provisions merely acknowledge the use of TK in patents. The Copyright Bill provides for the protection of works that entail expressions of cultural traditional heritage and if passed into law, will be the first IP law in Namibia to have express provisions that holders of TK and cultural expressions can use to protect their work in terms of IP. The challenge in having a system that adequately protects TK and cultural expressions already exists at a global level as there is currently no international agreement under IP that expressly protects TK. Therefore, it is recommended that Namibia develop a *sui generis* system that fits within its social and economic structures to protect TK and cultural expressions and to use the Swakopmund Protocol as a guide.