



**VIRTUAL REGIONAL SEMINAR ON COPYRIGHT  
AND TRADITIONAL CULTURAL EXPRESSIONS  
ORGANIZED BY WIPO**

**IN COOPERATION WITH MEXICAN NATIONAL  
INSTITUTE OF COPYRIGHT (INDAUTOR**

**PROTECTION OF TRADITIONAL KNOWLEDGE  
& TRADITIONAL CULTURAL EXPRESSIONS  
PRACTICAL INITIATIVES AND PROJECTS:  
KENYA'S JOURNEY**

**CATHERINE BUNYASSI KAHURIA: DEPUTY CHIEF STATE  
COUNSEL, INTERNATIONAL LAW DIVISION**

**OFFICE OF ATTORNEY GENERAL & DEPARTMENT OF  
JUSTICE**

**REPUBLIC OF KENYA**



# KENYA'S JOURNEY



- A National Development Agenda
- TK, TCE's and GR Policy
- The Constitution 2010 –devolved system of Government, National and County Government
- Relevant Policy Documents-Cultural Policy ,Vision,Mission,Mandates
- IPLCs- **42 tribes** in Kenya with different languages and cultures that all merge to become the unique mix of Kenyan culture
- State's recognition of support, promotion and protection of intellectual property- Parent Ministry- Ministry of Culture and Heritage, State Department of Culture
- Regional and International instruments

# KEY ISSUES

- Development of TK ,TCE's and GR Policy
- Constitutional Provisions: Art 11,40.5 and 69
- Developing of legal framework of TK and TCE's. Multi Agency Team
- The Law-Protection of Traditional Knowledge and Traditional Cultural Expressions Act 2016
- **Operationalize/amend the Act and do regulations- Multi Agency Team**
- **NOTE:IPLC be involved during the formulation of the policy by countrywide consultations with various indigenous communities: All stages**



# TCE'S DEFINITION IN THE KENYAN LAW



“**cultural expressions**” means any forms, whether tangible or intangible, in which traditional culture and knowledge are **expressed, appear or are manifested**, and comprise of the following forms of expressions or combinations thereof—

- **verbal expressions** including stories, epics, legends, poetry, riddles; other narratives; words, signs, names, and symbols;  
( Communities in Kenya)
- **musical expressions** including songs and instrumental music;

# CONT'D



- **expressions by movement**, including dances, plays, rituals or other performances, whether or not reduced to a material form;
- **tangible expressions**, including productions of art, drawings, etchings, lithographs, engravings, prints, photographs, designs, paintings, including body-painting, carvings, sculptures, **pottery**, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, pictorial woven tissues, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments, maps, plans, diagrams architectural buildings, architectural models; and architectural forms;



# TCES MODE OR FORM

- the products of **creative and cumulative intellectual activity**, including **collective creativity** or **individual creativity** where the identity of the individual is unknown;
- characteristic of a **community's cultural identity** and **cultural heritage** and have been maintained, used or developed by such community in accordance with the customary laws and practices of that community;
- generated, preserved and transmitted from **one generation to another**, within a community, for economic, ritual, narrative, decorative or recreational purposes;
- **individually or collectively generated**; belongs to a community; and
- **integral to the cultural identity of community** that is recognized as holding the knowledge through a form of custodianship or guardianship



# ROLE OF CUSTOMARY LAW

- Determining the **equitable sharing of benefits** from the commercial exploitation of TK
- Determining the **distribution of damages/compensation** in the infringement of IPRs
- Importance of recognizing the international **instrument > national treatment, reciprocity, mutual recognition**



# PROTECTION OF TK AND TCE'S ACT 2016

- **Sui generis** : used to describe a form of **legal** protection that exists outside typical **legal** protections that is, something that is unique or different.
- Swakopmund Protocol for TK and TCEs





# BENEFICIARIES OF PROTECTION



- The local and traditional communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a **traditional and intergenerational context**
- The owners of the rights in expressions of folklore shall be the **local and traditional communities**: 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 who maintain and use the expressions of folklore as a **characteristic of their traditional cultural heritage**.

# HOLDER OF TK/TCE'S OWNER OF TK/TCE'S



- **holder** means **recognized individuals** or organizations within communities in whom the **custody or protection** of traditional knowledge and cultural expressions are entrusted in accordance with the customary law and practices of that community;
- **owner** means **local and traditional communities**, and recognized individuals or organizations within such communities in whom the custody or protection of traditional knowledge and cultural expressions are **entrusted in accordance with the customary law and practices of that community;** "

# HOLDERS AND OWNERS OF TK/TCE'S



- **Present generations are not considered the owners, but rather the custodians and administrators**, of the collective knowledge they possess. Therefore, they are not allowed to transfer it to a third party, but only to permit its use **through licenses**.
- As holders of TK, communities have the right to deny access or to grant and determine the level of access to their collective traditional knowledge.

# HOLDER AND OWNER OF TK/TCE'S



- **HOLDER** may not be the owner (present generations- allowed to LICENSE)
- **OWNER** is both a holder and an owner- Local and Traditional Communities

# IMPORTANT TOOLS



- Documentation methods- **Databases, TKDR**
- Contracts, customary laws, authorised user agreements
- Newly developed sui generis **regulations** and
- Legislation to address the effective protection of TK & TCEs

# PRACTICAL INITIATIVES

- Strengthen communities **capacity to document,**
- Protect, develop, teach and apply all aspects of the communities' heritage and traditional cultural expressions.
- To **develop a wide range of education and training opportunities** and modules including co-curricula activities in diverse copyright traditional cultural expressions from communities and in the education system.



# CONT'D



- Build the **capacity of individuals, communities and national institutions** in negotiations and conflict resolution. .
- **Encourage the dissemination of copyright and traditional cultural expressions** while actively developing mechanisms to acknowledge, protect and benefit the sources of that information. .
- Facilitate **access by local communities to appropriate information and technology.**

- Enhance capacity through **peer - to - peer exchanges.**

# ASSIGNMENTS AND LICENSES



- Contracts
- Assignments: The owners of traditional knowledge or cultural expressions rights shall have the **right to assign and conclude licensing agreements.**
- Traditional knowledge or cultural expressions belonging to a local or traditional **community shall not be assigned without the authorization of the custodian of the local or traditional community.**
- Licenses
- Compensation



# MONETIZING COPYRIGHT ECONOMIC/MORAL RIGHT



- TCE works can be protected by copyright or related rights
- Duration for Copyright: 50 years after the death of the author
- TCE's in perpetuity
- Adaptation of folksong
- Prior authorization of holder is required
- Within the Sui Generis regime
- Misuse, misappropriation must be prevented

# EXCEPTIONS AND LIMITATIONS

- Private and
- Non Commercial use
- Personal use
- Research
- Educational Purposes
- Criticism, review or reporting current events



# WITHOUT PRIOR INFORMED CONSENT/ PERMISSION



- the **reproduction** of the traditional knowledge or cultural expressions;
- the publication of the traditional knowledge or cultural expressions;
- the **performance** or display of the traditional knowledge or cultural expressions in public;
- the **broadcast** of the traditional knowledge or cultural expressions to the public by radio, television, satellite, cable or any other means of communication;

# CONT'D



- the **translation, adaption, arrangement, transformation or modification** of the traditional knowledge or cultural expressions;
- the **fixation** of the traditional knowledge or cultural expressions through any process, including making a photograph, film or sound recording;
- the **availing online or electronic transmission to the public** (whether over a path or a combination of paths, or both) traditional knowledge or cultural expressions;
- the **creation of derivative works/inspired works**; and
- the **making, use, offer for sale, sell, import or export** traditional knowledge or cultural expressions or products derived there from.

# PROTECTED TK/TCE'S AND COMPULSORY LICENSE

SECTION 12 of the TK AND TCEs ACT

- Where protected traditional knowledge is not being **sufficiently exploited** by the owner or rights holder, or where the owner or holder of rights in traditional **knowledge refuses to grant licenses for exploitation**, the Cabinet Secretary may, **without** prior informed consent of the owners, grant a compulsory licence for exploitation subject to Article 40(3) (b) of the Constitution.



# RECOGNITION OF TK HOLDERS/OWNERS



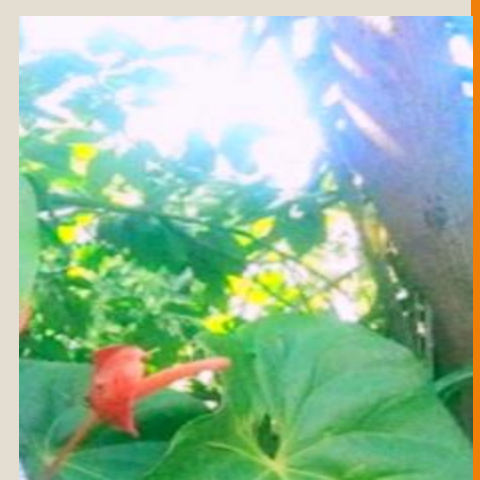
- A person who uses traditional knowledge or traditional cultural expressions beyond its traditional context they shall **acknowledge the knowledge,**
- indicate the **source** of the knowledge or expression and where possible,
- **the origin** of the knowledge or expression, and use such knowledge or expression **in a manner that respects the cultural values of the holders.**

# AUTHORIZED USER AGREEMENTS RIGHTS HOLDER AND AUTHORIZED USER



- a **benefit sharing arrangement** that provides for fair equitable monetary or nonmonetary compensation to the right holders;
- provide for **identification and disclosure** of the traditional knowledge or cultural expressions on which the derivative work based by mentioning the holders or the geographical place from which it originated; and
- **state that the traditional knowledge or cultural expressions in the derived work will not be subject to derogatory treatment.**

# CONT'D



- The Authorized User Agreement involves some kind of bilateral approach or negotiation **between a user and an indigenous peoples' representative.(Consultations)**
- TK-related policies and instruments include registers as a tool to support protection measures, whether defensively or to positively help in assigning rights to indigenous peoples.  
EXAMPLE the Traditional Knowledge Digital Library (TKDL) initiative in India, among others.

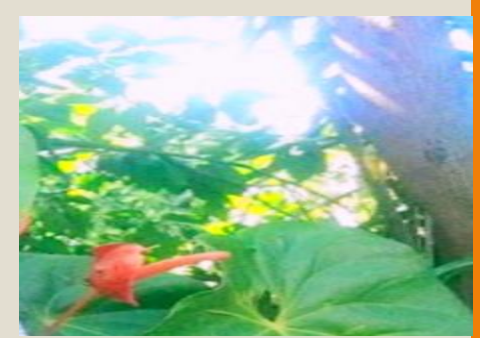


# MANAGEMENT OF RIGHTS



- The owners of traditional cultural expressions may- :
- **grant authorization** for the exploitation and use of expressions their traditional knowledge and cultural expressions; or
- after **necessary consultations**, authorize the Government or any other person **to exploit** their traditional knowledge and cultural expressions

# CONT'D



- the relevant **community is identified as the source of any work** or other production adapted from the cultural expressions;
- any distortion, mutilation or other modification of, or other **derogatory action in relation to cultural expressions can be prevented;**
- any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the **cultural expressions of a community or suggest any endorsement by or linkage with that community;**
- where the use or exploitation is intended to be gainful, equitable remuneration or benefit-sharing, the use or **exploitation is on terms determined and agreed** with the relevant community and in the absence of such agreement as determined by the **Cabinet Secretary in consultation with the relevant community.**

# COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

- Done on behalf of the Rights Owners
- Rights of Performers-in their performances of copyright works and folklore
- Rights of Producers
- Rights of Broadcasting Organizations-
- Exclusive rights for economic benefit



# SCOPE OF PROTECTION RIGHTS OF TK HOLDERS



Every community shall have the exclusive right to:

- **authorize the exploitation** of their traditional knowledge' knowledge;
- **prevent any person from exploiting** their traditional knowledge without their prior informed consent.
- the owners shall have the **right to institute legal proceedings against any person who exploits** traditional knowledge without the owner's permission.
- Every community shall make and adopt its **community rules** prescribing the procedures for the authorization of the exploitation of their traditional knowledge.

# REGISTRATION MODEL NO FORMALITY



- Register cultural expressions within the **respective countries** for the purposes of recognition.
- The **registration shall be undertaken willingly** by the owners of cultural expressions upon obtaining prior informed consent but shall not require the public disclosure of the cultural expressions concerned.

# CONT'D



- Where more than one community in the same or different counties share the same cultural expressions, **respective country governments shall register the owners** of the cultural expressions and maintain relevant records.
- Where concurrent claims arise from different communities, national government or county government shall while determining the claim **consider customary law and protocol of the communities in question, local information sources and any other means that may be applicable.**
- Registration shall have a **mere declaratory function** and shall not in itself confer rights.
- Cultural expressions shall be protected against **all acts of misappropriation, misuse, unlawful access or exploitation for as long as the cultural expressions fulfill the protection criteria**

# SANCTIONS AND REMEDIES



- **possession;**
- **manufactures,**
- **produces or**
- **makes in the course of trade;**
- **sells, barter or exchanges,**
- **offers or exposes for sale, disposes, distributes, hires out;**
- **Criminal Offences-Fines \$20,000,10 years imprisonment etc**
- **Civil Remedies- compensation,declaration,public apology etc**

# OTHER MECHANISMS TO RESOLVE DISPUTE

- Mediation;
- Alternative dispute resolution procedures;
- Customary laws, practices and protocols not inconsistent with the Constitution.





# REGULATIONS



- **administrative requirements** necessary for the implementation of the provisions of this Act;
- the **procedure** for applications of authorization for the exploitation of traditional knowledge and cultural expressions;
- **fees** to be paid
- mechanisms for fair distribution of benefits derived from usage of traditional knowledge and cultural expressions;
- **preventive mechanisms** aimed at protecting traditional knowledge and cultural expressions;
- **forms** to be used for matters requiring forms under this Act; and

# CONCLUSION



- Assist IPLC's in coming up with **community logos, brands, designs to encourage creativity.**
- **Establishing inter linkages and collaborations between stakeholders.**(County governments), National Government, Regional and International Partners
- **Capacity Building and Technical Assistance:** design and maintenance of databases- **TKDR KENYA PROJECT**
- **Sensitization and awareness creation to the communities, Government, donors and other relevant stakeholders(PIC,MAT,EBS ABS)**

# GOURD- POTTERY: MOST KENYAN COMMUNITIES

GOURD HOLDER PLACED ON THE HEAD  
MADE BY WOMEN AND GIRLS, DIFFERENT SHAPES AND SIZES  
UNIQUE POTS FOR WATER, BEER, FOOD  
ORGANIC, QUALITY, STORAGE, COOL WATER, THERAPEUTIC



ASANTE SANA!  
THANK YOU!



Email: [bckahuria@gmail.com](mailto:bckahuria@gmail.com)

Cell phone: +254 722 545015

+254 721 531116

ALL RIGHTS RESERVED

( Photos attributed to the  
Communities in Kenya)