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**TALES AS OLD AS TIME: AN EVALUATION OF INTELLECTUAL PROPERTY AND THE
PROTECTION OF TRADITIONAL KNOWLEDGE**

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Declaration

I Vianca McCall, a registered student at the University of the Witwatersrand with student number 804436, pledge that this Research Report is entirely my own work, except where I have indicated that I obtained information from other sources, such as books or internet sites (where allowed). I pledge that I have not consulted with anyone else, including other students, while completing the assessment task or copied information from any source without referencing it.

Signed: Vianca McCall

Date: 29 August 2022

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Abbreviations and Acronyms

AIPPI – International Association for the Protection of Intellectual Property
ARIPO – African Regional Intellectual Property Organisation
CBD – Convention on Biological Diversity
CIP – Chair of Intellectual Property Law
CSIR – Council for Scientific and Industrial Research
GI – Geographical indications
GR – Genetic resources
IKS - Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019
IP – Intellectual Property
IPLAA - Intellectual Property Laws Amendment Act
LSSA – Law Society of South Africa
TCE – Traditional cultural expressions
TK – Traditional Knowledge
TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights 16. UDHR – Universal Declaration of Human Rights
UPOV – International Union for the Protection of New Varieties of Plants
USPTO – United States Patent and Trademark Office
WHO – World Health Organization
WIPO – World Intellectual Property Organisation
WTO – World Trade Organisation
PIC – Prior Informed Consent
TPGRFA – International Treaty on Plant Genetic Resources for Food and Agriculture
UN – United Nations

Abstract

The aim of this paper is to assess the need to protect Traditional Knowledge and the adequacy of the existing legislative measures to protect Traditional Knowledge in South Africa. In the process, consideration will be given to the nature and value of Traditional Knowledge, the rationale for protecting Traditional Knowledge and whether the current Intellectual Property laws are capable of providing adequate protection for Traditional Knowledge. Consideration will be given to the efforts of the South African government to protect the Traditional Knowledge generated by the traditional community and alternative methods of protecting Traditional Knowledge.

TALES AS OLD AS TIME: AN EVALUATION OF INTELLECTUAL PROPERTY AND THE PROTECTION OF TRADITIONAL KNOWLEDGE

1. Introduction

Rapid developments in medicine, science, culture and technology have led to profound and significant cultural and societal change. These radical changes have led to the commodification of knowledge and diminishing of cultural and traditional reserves.¹ Traditional Knowledge, which typically serves the interests of the concerned community, has become a valuable commercial commodity. Among some indigenous people, Traditional Knowledge remains protected by a traditional way of life, values and norms, which are closely guarded. However, more frequently, western ideology pervades indigenous cultural norms, giving rise to various conflicts between the divides.² In the past, maladministration and misaligned approaches to the use and exploitation of indigenous knowledge has led to public outcry by the community and calls for greater regulation to avoid the exploitation of traditional communities.³

Traditional Knowledge holds much value for traditional communities, but only in the last few decades has the value of its recognition for commercial exploitation been recognised.⁴ At the same time, the intellectual property rights designed to protect creations and innovations have been deemed inappropriate for protecting Traditional Knowledge.⁵ This has sparked an international debate about how to formally recognize and protect Traditional Knowledge, which is at present largely unprotected by current Intellectual Property regimes.⁶ In response, policy makers who deal with trade, development, agriculture, health, culture and the environment have begun to give careful consideration to the implications of Intellectual Property laws on traditional communities.⁷ Despite this concern, traditional communities have largely been excluded from these debates, seeing the fate of their knowledge decided without adequate consultation and meaningful participation.⁸

¹ K Swiderska 'Protecting Traditional Knowledge from the Grassroots Up' (2009) *International Institute for Environment and Development Briefing Document 1* at 17.

² M Bagley 'The Fallacy of Defensive Protection for Traditional Knowledge' (2019) 58 *Washburn Law Journal* at 56.

³ L Tong 'Aligning the South African Intellectual Property System with Traditional Knowledge Protection' (2017) 12 *J Intell Prop L & Pol'y* 179.

⁴ L Mqotsi 'Science, Magic and Religion as Trajectories of the Psychology of Projection' In Odora Hoppers, C. (ed.) *Indigenous knowledge and the integration of knowledge systems* (2002) 158- 172.

⁵ G Dutfield *Intellectual property, biogenetic and traditional knowledge* (2004) 397.

⁶ J Halbert *Resisting intellectual property* (2005) 36. C McManis 'Biodiversity, Biotechnology and traditional knowledge protection: law, science and practice' In C McManis (ed.) *Biodiversity and the law: Intellectual property, biotechnology and traditional knowledge* (2007) 1-26.

⁷ Dutfield op cit note 5.

⁸ P Hountondji *Endogenous Knowledge: Research trails* (1997) 74. H Odora 'Introduction' In Odora H.C. (ed.) *Indigenous knowledge and the integration of knowledge systems* (2002) 2-23.

South Africa is the third most biodiverse country in the world.⁹ Traditional Knowledge, covering the use and preservation of the country's abundant natural resources, is prevalent.¹⁰ South Africa's development of a multi-faceted framework for cultural resource protection in relation to Traditional Knowledge could provide a promising step in the right direction for the holders of Traditional Knowledge in South Africa.¹¹

The first part of this paper will explore what Traditional Knowledge is, what it encompasses and the value that it provides the community and the world at large. The second part will address the need to protect Traditional Knowledge. The third part will discuss methods of protecting Traditional Knowledge with reference to general Intellectual Property Rights and the progress made in South Africa in this respect. The paper will also consider the effectiveness of the legislative interventions and consider alternative views regarding the effective protection for Traditional Knowledge.

2. What is Traditional Knowledge

It has been said that it would be nearly impossible to bundle together the vast diversity of indigenous knowledge, culture and tradition enjoyed by traditional communities around the world, without losing the diversity that is its lifeblood.¹² Despite concerted efforts, there is no single universally accepted definition of Traditional Knowledge, the notion is catholic and intricate, as it encompasses a wide range of topics relevant to virtually every aspect of life, including nature, medicine, history and psychology.¹³

While a concise and universally accepted definition of the term has not been adopted, there have been concerted efforts to clarify the terms associated with Traditional Knowledge.¹⁴ Various terms associated with Traditional Knowledge have proved difficult to concisely define within the parameters of the various concerns and connotations associated therewith.¹⁵

⁹ The Biodiversity Finance Initiative South Africa available at <https://www.biofin.org/south-africa>, accessed on 17 April 2022.

¹⁰ Ibid.

¹¹ R Wynberg 'Value Adding in the Southern African Natural Products Sector: How Much Do Patents Matter?' (2009) 1 *The Economics of Intellectual Property in South Africa* WIPO 25.

¹² WIPO 'Intellectual Property and Traditional Knowledge Booklet no. 2' available at <https://www.wipo.int/publications/en/details.jsp?id=123&plang=FR>, accessed on 23 July 2022.

¹³ K Hossain 'Protecting Indigenous Traditional Knowledge Through a Holistic Principle-Based Approach' available at <https://www.tandfonline.com/doi/full/10.1080/18918131.2021.1947449>, accessed on 22 April 2022. L le Grange 'Western Science and Indigenous Knowledge: Competing Perspectives or Complementary Frameworks?' (2004) 18(3) *South African Journal of Higher Education* 82. P Kuruk et al *Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property* (2020) 549.

¹⁴ C Oguamanam 'Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics' (2008) 11 *Journal of World Intellectual Property* 29 & 35.

¹⁵ Ibid.

Traditional knowledge is often summarised as knowledge and practices that people of an indigenous community, in one or more society, have developed over time and which are based on experience and adaptation to local cultures, traditions and environment, and which are constantly shaped by the innovations and practices of each generation.¹⁶

Many have formulated descriptions of what categories of knowledge fall under the banner of Traditional Knowledge. According to Dutfield, Traditional Knowledge is “a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use.”¹⁷

Traditional Knowledge encompasses a vast array of knowledge and practices, which include, knowledge regarding plants, minerals, soils and their properties, medicinal knowledge, combinations of organic and inorganic matter and even expressions of folklore.¹⁸ These intellectual creations, have developed over time and have been improved by subsequent generations of the community. This Traditional Knowledge was and is still used to sustain the community and its culture and is essential to the preservation of the environment to which the Traditional Knowledge forms an integral part.¹⁹

Despite the difficulties in producing a concise and universal definition for Traditional Knowledge, the above-mentioned definitions illustrate that while difficult to define, Traditional Knowledge can be categorised to include a vast array of cultural expressions, knowledge and traditions that belong to various communities around the world.²⁰ As opposed to the Western custom of distributing knowledge by way of publication, Traditional Knowledge exists in various forms, such as art, songs, proverbs, folklore and stories, communal laws, rituals and the like.²¹ Traditional Knowledge is typically transmitted through cultural mechanisms and communal knowledge holders, which renders it collective knowledge, as opposed to private knowledge, subject to individual ownership.²²

¹⁶ The World Bank 'Indigenous Knowledge Definitions, Concepts and Applications' available at [https://chm.cbd.int/api/v2013/documents/4A27922D-31BC-EEFF7940DB40D6DB706B/attachments/209070/Hoda%20Yacoub%20-%20IK%20Report%20\(1\).pdf](https://chm.cbd.int/api/v2013/documents/4A27922D-31BC-EEFF7940DB40D6DB706B/attachments/209070/Hoda%20Yacoub%20-%20IK%20Report%20(1).pdf), accessed on 27 July 2022.

¹⁷ G Dutfield 'Protecting Traditional Knowledge and Folklore' International Centre for Trade and Sustainable Development (2003) 203 *International Centre for Trade and Sustainable Development Circular* 20.

¹⁸ A Bala 'Traditional Knowledge and Intellectual Property Rights: An Indian Perspective' (2016) *Technology Information, Forecasting and Assessment Council* 28.

¹⁹ H Odora op cit note 12.

²⁰ T Simeone 'Indigenous Traditional Knowledge and Intellectual Property Rights' available at www.parl.gc.ca, accessed 17 July 2022.

²¹ Ibid.

²² Ibid.

In the WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge, Traditional Knowledge is described as, "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks; names and symbols; undisclosed information; and all other based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."²³

A Traditional Knowledge system is characterised by its embeddedness in the cultural web and history of communities, including their civilisations and forms the backbone of the social, economic, scientific and technological identity of such communities.²⁴

According to WIPO, it is not antiquity that renders the knowledge traditional, but rather the vital and dynamic role that such knowledge plays in the contemporary lives of the community.²⁵ This knowledge, which bears traditional connections with the community, is knowledge which is developed, sustained and passed on within a traditional community.²⁶ It is passed between generations and sometimes through specific customary systems of knowledge development and transmission, which forms an integral part of the cultural identity of a community.²⁷

It is the relationship with the community that renders the knowledge traditional. Accordingly, Traditional Knowledge is created and developed every day and evolves as the community navigates the challenges posed by social, environmental and miscellaneous challenges.²⁸

A firm understanding of what resources Traditional Knowledge encompasses is a pertinent factor in understanding how such knowledge should be protected. Before the protection of Traditional Knowledge is discussed, the importance of protecting Traditional Knowledge will be considered.

3. The Value of Protecting Traditional Knowledge

WIPO asserts that the contemporary characteristic of Traditional Knowledge justifies the need to protect Traditional Knowledge, in order to preserve Traditional Knowledge created in the past, on the verge of extinction and to respect and sustain the development and dissemination

²³ Permanent Committee on Cooperation for Development related to Intellectual Property 'WIPO Fact-finding Missions on Traditional Knowledge, Innovations and Practices Of Indigenous And Local Communities: Progress Report' available on www.wipo.int, accessed on 17 July 2022.

²⁴ A Van der Merwe (ed) *Law of Intellectual Property in South Africa* (2011) 367.

²⁵ Dufield op cit note 20.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

of further Traditional Knowledge which is created by the enduring use of Traditional Knowledge Systems.²⁹

Traditional Knowledge that relates to environmental and biological resources forms an intangible component of the resource itself.³⁰ Many indigenous communities originate from biologically rich and diverse geographical areas. The natural environment forms an integral and inseparable part of the cultural existence of the community and the traditional knowledge that flows therefrom is invaluable to both the community and environment.³¹ The indigenous community, as the repository of traditional knowledge on the conservation and sustainable utilisation of biological resources, plays an essential part in achieving sustainable development.³²

The protection of Traditional Knowledge raises questions of fundamental justice and the protection, preservation and control of communal cultural heritage.³³ Protecting Traditional Knowledge promotes respect of the invaluable resource and tradition-based innovation, empowers marginalised communities and could serve as a deterrent for the misappropriation of the resource.³⁴

4. The Value of Protecting Traditional Knowledge: Examples

a. Traditional Medicine

Many modern medicines, such as phytochemical based medicines and cosmetics, are derived and developed from traditional knowledge regarding plants, minerals and various natural compounds.³⁵ In many developing countries, access to modern medicine is limited and communities rely on traditional medicine, with an estimated 70% of the West African population using traditional medicine as a form of primary healthcare.³⁶ In developed countries, the use of traditional medicines, forms part of the daily lives of 70% - 80% of the population.³⁷ Traditional Indian ayurvedic products accounted for nearly 57% of holistic medicinal products sold in the US in 2021.³⁸ Traditional medicines also form an integral part

²⁹ Ibid.

³⁰ G Dutfield 'Traditional Knowledge, Intellectual Property and Pharmaceutical Innovation: What's Left to Discuss?' in Matthew David & Debora Halbert eds *The SAGE Handbook of Intellectual Property* (2015) 273.

³¹ Ibid.

³² Bala op cit note 24.

³³ Simeone op cit note 26.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ The global herbal medicine market is projected to grow from \$165.66 billion in 2022 to \$347.50 billion by 2029, at a CAGR of 11.16% in forecast period, available at <https://www.fortunebusinessinsights.com/herbal-medicine-market-106320>, accessed on 28 August 2022.

of the modern healthcare system as therapeutic alternatives for degenerative and age related ailments, such as rheumatism.³⁹

Traditional medicine is not only an important source of health care but is also an important source of income for the traditional community. It has been said that traditional medicine forms an integral part of the identity of the community.⁴⁰

A majority of the medicinal plants and compounds used today were discovered by pre-industrial traditional communities, many of which are still responsible for the collection and conservation of these resources.⁴¹ While some medicinal plants are produced by commercial endeavours, data suggests that most are still collected in the wild by traditional agricultural endeavours.⁴² This economic endeavour supports many traditional communities and serves as an incentive for the preservation of Traditional Knowledge.⁴³

b. Agriculture

Traditional knowledge is also deeply rooted in agricultural practices, where the continuous development of plant varieties and pest management practices contribute significantly to the development and diversification of the environment. Over centuries, traditional communities have cultivated ecological and cultural services to conserve the environment which forms an integral part of communal identity.⁴⁴ It is estimated that 80% of global diversity is protected by Traditional Knowledge.⁴⁵

For instance, The neem plant, has been used by Indian farmers for centuries as a pest control measure.⁴⁶ In 1994, following a patent application to the European Patent Office for the use of neem seeds as a fungicide, the price of neem seeds rose from 300 rupees per ton the previous year to around 4000 rupees per ton.⁴⁷ This posed a significant burden on Indian farmers.⁴⁸ In 2005, following protracted litigation, the patent was revoked.⁴⁹ The significant

³⁹ Ibid.

⁴⁰ R Abbott 'Documenting Traditional Medical Knowledge' (2014) 14 *WIPO Toolkit* 9.

⁴¹ World Health Organization [WHO/IUCN/WWF] 'Guidelines on the Conservation of Medicinal Plants' available at <http://apps.who.int/medicinedocs/documents/s7150e/s7150e.pdf>, accessed on 28 August 2022.

⁴² K Srivastava, J Lambert & N Vietmeyer 'World Bank Technical Paper n° 320, Medicinal Plants: An Expanding Role in Development' (1996) 320 *The World Bank Technical Paper* 12.

⁴³ Ibid.

⁴⁴ D Akullo & R Kanzikwera 'Indigenous Knowledge in Agriculture: A case study of the challenges in sharing knowledge of past generations in a globalized context in Uganda' (2007) 11 *WLIC* 17.

⁴⁵ G Raygorodetsky 'Indigenous peoples defend Earth's biodiversity—but they're in danger' (2018) 402 *National Geographic Society* 18.

⁴⁶ Bala op cit note 24.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

expense involved with challenging patent applications, the negative effect on the community while the patent holder holds the monopoly right and the negative impact on the environment, which will not necessarily be preserved by the patentee renders biopiracy a significant threat.

5. The Vindication of Traditional Knowledge

“The rationale for the protection of Traditional Knowledge centres on questions of fundamental justice and the ability to protect, preserve and control one's cultural heritage.”⁵⁰

a. Equity and Justice

Acculturation and globalisation have disrupted, encroached upon, and placed social and environmental pressure on traditional communities and their ways of life. Traditional Knowledge holders face increasing challenges in maintaining and passing on Traditional Knowledge.⁵¹ In some cases, the very survival of the knowledge is at stake.⁵² In the past, little was done outside of the traditional methods of preserving Traditional Knowledge to protect these valuable assets from falling prey to diffusion and encroachment.⁵³ The result is that many traditional practices, languages and knowledge has been irretrievably lost, such as the Apiaká language, which was the language of the Apiacá tribe located in Brazil.⁵⁴

A key objective in the quest to protect Traditional Knowledge is to ensure recognition of the value of the Traditional Knowledge and to ensure that some or other form of compensation flows to the holders of the Traditional Knowledge.⁵⁵

While pharmaceutical industries around the world have benefited immensely from the exploitation of the medicinal properties of plants and the accompanying traditional knowledge associated therewith, its often the case that the same companies and industries do not acknowledge where the knowledge and resources originate from.⁵⁶ In such cases, there is often also a lack of appreciation and respect for the development of such knowledge. In the case of traditional healers who use natural resources as a form of traditional medicine to treat

⁵⁰ Simeone op cit note 26.

⁵¹ Dutfield op cit note 5.

⁵² Bala op cit note 24.

⁵³ Dutfield op cit note 38.

⁵⁴ Ibid.

⁵⁵ X Mpanza *Intellectual Property Laws and the Protection of Traditional Knowledge in South Africa: An evaluation of the current Intellectual Property system and its protection of Traditional and Indigenous Knowledge* (LLM Dissertation, University of KwaZulu Natal, 2014) 17.

⁵⁶ C Masango 'Indigenous Traditional Knowledge Protection: Prospects in South Africa's Intellectual Property Framework?' available at <http://sajlis.journals.ac.za>, accessed on 17 July 2022.

certain ailments, these healers often base their treatments upon generations of clinical trials performed by previous generations of healers, who invariably develop invaluable empirical information and understanding of the treatment and human physiology.⁵⁷ Thus, it is not simply the information regarding the plant or compound that is misappropriated, but the years of clinical trials, data collection and knowledge development.⁵⁸

For these reasons, it is of vital importance to ensure that Traditional Knowledge is protected in the interests of equity and justice. It must be pointed out that compensation is not always required in monetary form.⁵⁹ In many instances, moral recognition has been welcomed by the holders of Traditional Knowledge.⁶⁰

b. Preservation

Among the major threats to the generation and preservation of traditional knowledge is the monopolisation of Traditional Knowledge.⁶¹ While the exploration and study of biological resources is of fundamental importance for global economic and social development, the piracy of biological knowledge held as Traditional Knowledge deprives traditional communities of the benefits of the Traditional Knowledge held by it.⁶² The overuse of these resources, without corresponding measures to preserve the resources and environment leads to the depletion of the biological resources, which were traditionally preserved by use of Traditional Knowledge by traditional communities.⁶³

The use of intellectual property rights to monopolise Traditional Knowledge, without the consent, recognition and compensation of the traditional community as the holder of the Traditional Knowledge, is often referred to as biopiracy.⁶⁴ Biopiracy presents a significant threat to the preservation of Traditional Knowledge and more so to the environment in which the relevant resources are derived from.⁶⁵ While Traditional Knowledge is often exploited to produce medicinal and other products, it is often the case that where traditional communities would use the Traditional Knowledge to simultaneously protect and preserve the environment, parties that exploit said Traditional Knowledge, often lack the composite Traditional

⁵⁷ Op cit note 12.

⁵⁸ Dutfield (supra).

⁵⁹ C Correa 'Protection and Promotion Of Traditional Medicine – Implications For Public Health In Developing Countries' available on <http://apps.who.int>, accessed on 17 July 2022.

⁶⁰ Ibid.

⁶¹ R Abbott 'Treating the Health Care Crisis: Complementary and Alternative Medicine for PPACA' (2001) 14 *DePaul Journal of Health Care Law* 35.

⁶² P Puranik 'Traditional Knowledge Rights and Intellectual Property Rights: The Tale Of Two Rights' available at <http://www.rkdewan.com/articles-traditional-knowledge-ip-rights.jsp>, accessed on 23 May 2022.

⁶³ Op cit note 12.

⁶⁴ Ibid.

⁶⁵ Ibid.

Knowledge to preserve the biological resources.⁶⁶ The result being, that while it is the traditional community that preserves and sustains the resource, the same community derives no benefit from the commercialisation of the resource. Often, the commercialisation of Traditional Knowledge leads to the deprivation of resources to the community.⁶⁷

Traditional Knowledge meets many far-reaching objectives of society, including conservation, sustainability, food security and healthcare.⁶⁸ The preservation of Traditional Knowledge encourages the maintenance of these vital practices and lifestyle.⁶⁹

Yet cultural erosion, fraud and misappropriation of cultural assets poses a serious threat to the preservation of this treasure trove of Traditional Knowledge. The relocation of indigenous people to urban areas due to poverty and related factors, has resulted in the loss and depletion of valuable Traditional Knowledge as those who would be heirs and protectors of such knowledge have assumed different roles in different societies.⁷⁰

It has been suggested that the preservation of Traditional Knowledge plays a vital role in promoting better understanding of Traditional Knowledge and that it promotes pride in the associated cultures and beliefs.⁷¹ It is postulated that traditional communities may be more inclined to protect and develop Traditional Knowledge if their rights, as holders of the Traditional Knowledge, are respected and in cases where that knowledge is used by persons outside of the community, that tangible benefits are seen by the community.⁷²

As traditional communities survived by innovation and collaboration, the preservation of Traditional Knowledge depends of innovation in how it is protected and continuous collaboration with the knowledge holders to ensure that the Traditional Knowledge, is properly used and executed and particularly that the benefits that flow accrue to the community.⁷³ When Traditional Knowledge is protected and used correctly, it is also preserved for the benefit of future generations.

c. Promoting Self-Determination and Enhancement

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ L Poorna, M Mymoon & A Hariharin 'Preservation and Protection of Traditional Knowledge – Diverse Documentation Initiatives across the Globe' (2014) 107 *Current Science* 1240 – 1246. C Schulz 'Money or Pride? On the Why and How of Traditional Knowledge Protection in India and China' (2011) 101 *Konstanzer Journal fur Politik and Verwaltung* 52-62.

⁶⁹ Ibid.

⁷⁰ Correa op cit note 59.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

A fundamental principle for the advancement of traditional communities is the right to self-determination, which recognises the rights of people to define their own way of life.⁷⁴ Self-determination, in pursuit of the protection of Traditional Knowledge presents the possibility of contributing to economic development with traditional communities.⁷⁵ Some argue that the protection and recognition of Traditional Knowledge presents the opportunity of economic gain, which should not be overlooked.⁷⁶ This is due to the fact that modernisation has led to the shrinkage of supply of biological resources and an increase in the demand for solutions.⁷⁷

Traditional Knowledge, which is developed for that particular purpose, could well become a sought after resource to bridge this gap. Thus, providing effective protection for Traditional Knowledge, would allow traditional communities to derive benefits from the use of its Traditional Knowledge by industrial users, which in turn promotes innovation and community development by self-determination.⁷⁸

The availability of protection for Traditional Knowledge may also be used to encourage traditional communities to share Traditional Knowledge, which would benefit larger groups of people and result in economic benefits for the community.⁷⁹

Similar measures may empower traditional communities to commercialise and manage their own Traditional Knowledge, which may in turn strengthen the communities' market position and promote innovation and preservation of Traditional Knowledge.

d. Preventing Misappropriation

The western notion of modern Intellectual Property law holds that the individual holds the right to private property, which enables the individual to exploit their intellectual products.⁸⁰ Under this notion, intellectual works that are not capable of falling within the ambit of specific Intellectual Property rights, are said to fall with the category of *res nullius*, which belongs in the public domain.⁸¹ Whilst useful when applied to individual intellectual works, the same notion could be detrimental to Traditional Knowledge.⁸² Customary laws, which traditionally

⁷⁴ Correa op cit note 59.

⁷⁵ Y Zhang 'United Nations Conference of Trade and Development – Protecting and Promoting Traditional Knowledge, Systems, National Experiences and International Dimensions' available at https://unctad.org/system/files/official-document/ditcted10_en.pdf, accessed on 19 October 2022.

⁷⁶ Dutfield op cit note 5.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Correa op cit note 59.

⁸⁰ C A Masango 'Indigenous Traditional Knowledge Protection: Prospects in South Africa's Intellectual Property Framework?' available at <http://sajlis.journals.ac.za>, accessed 17 July 2022.

⁸¹ Correa op cit note 59.

⁸² Masango op cit note 115.

govern the use and dissemination of Traditional Knowledge, often prescribe special rules regarding the appropriation, ownership and possession of Traditional Knowledge.⁸³ The concept of the public domain, does not extend far enough to encompass the nuances that exist in the various customary laws and in many instances, it is undesirable for the Traditional Knowledge to be placed in the public domain at all.⁸⁴

Many communities hold Traditional Knowledge as a central component of their daily lives, environment and religious systems.⁸⁵ Given its nature of being a communal asset for the benefit of the community, Traditional Knowledge is often viewed as a subject over which individual proprietary rights cannot be held.⁸⁶ More so, the application of the western notion of Intellectual Property rights over Traditional Knowledge has led to much outrage by various communities as such use violates community value systems.⁸⁷

The Turmeric plant has been used in Ayurvedic medicinal practice for many years.⁸⁸ In 1995, a Patent was granted for the use of Turmeric as a wound healing medicinal preparation by the US Patent Office.⁸⁹ The ensuing public outcry regarding the appropriation of this Traditional Knowledge led the Indian government through the Council for Scientific and Industrial Research (CSIR) to pursue the revocation of the patent on the grounds that the Patent lacked the required level of novelty to qualify for patent protection, as turmeric was a known compound used in healing for decades in India, and more significantly, part of the traditional Indian knowledge base.⁹⁰ Among the evidence brought to substantiate the contention were 32 references to the healing properties of turmeric found in ayurvedic scripts in three different languages and a paper published nearly 40 years prior (1953) by the Indian Medical Association.⁹¹ The revocation of the turmeric patent was one of the earliest examples of a successful challenge to a patent over traditional knowledge and demonstrated the complexities of challenging whether an idea that forms part of traditional knowledge in one country, can be sufficiently well established to rule out novelty in another country.⁹²

⁸³ J Githaiga 'Intellectual Property Law and The Protection Of Indigenous Folklore And Knowledge' (2008) 5 *Murdoch University Electronic Journal of Law* para 4.

⁸⁴ *Ibid.*

⁸⁵ Correa *op cit* note 59.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Abbott *op cit* note 82.

⁸⁹ US patent no.5 401 504.

⁹⁰ K Timmermans 'TRIPS, CBD, and Traditional Medicines: Concepts: Concepts and Questions, Report of an Asean Workshop on the TRIPS Agreement and Traditional Medicine' available at <http://apps.who.int/medicinedocs/en/d/Jh2996e/6.4.html>, accessed on 12 February 2022; A Bhowmick, S Deb Roy and M De 'A Brief Review on the Turmeric Patent Case with its Implications on the Documentation of Traditional Knowledge' available at <https://www.ndcebios.in/v1n1/2021010110.pdf>, accessed on 22 September 2023.

⁹¹ *Ibid.*

⁹² K. Jayaraman 'US patent office withdraws patent on Indian herb' *Nature* vol. 389 (6) (1997), electronic version available at <https://www.nature.com/articles/37838>, accessed 22 September 2023.

The Pharmaceutical and Agricultural industries play major roles in the worldwide economy and as a result, enjoy significant power.⁹³ Without adequate protection, the holders of Traditional Knowledge are at a great disadvantage and are ultimately the greatest loser in the exploitation of Traditional Knowledge.⁹⁴ The misappropriation of Traditional Knowledge, particularly from those without any connection to the community, poses a significant threat to the preservation of Traditional Knowledge.

Intellectual Property rights are granted to an individual to reward creativity, whereas traditional communities hold the view that the community as a whole should receive recognition, to maintain and develop the group identity and survival, as opposed to encouraging individual economic gain.⁹⁵

A major concern shared by many traditional communities and scholars is that existing Intellectual Property regimes of many developed countries favour multinational corporations over traditional communal values.⁹⁶ The 'poaching' of Traditional Knowledge, under the prescripts of existing Intellectual Property regimes, leads to significant economic benefits for those appropriating the resource.⁹⁷ It has been said that developed countries are reluctant to adopt laws and policies that protect Traditional Knowledge as the adoption of those laws may result in significant economic losses.⁹⁸

For instance, Article 102 of the U.S. Patent Law defines prior art to exclude technologies and methods in use in other countries as prior art. Thus, if the knowledge is new in the US market, it satisfies the criteria for novelty, despite it being part of an ancient tradition of other cultures and countries.⁹⁹

Another sphere of traditional communal values that should be addressed is the notion that Traditional Knowledge should be used for the benefit of the community. It is important to consider who the community is with this context. Community and communal benefit, in the traditional context is aimed at benefitting the traditional community, who use their own efforts and corresponding Traditional Knowledge to conserve and sustain their natural environment.¹⁰⁰ Thus, while the word community suggests that Traditional Knowledge could

⁹³ Masango op cit note 73.

⁹⁴ Ibid.

⁹⁵ S A Hansen & J W van Fleet *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Holders in Protecting their Intellectual Property and Maintaining Biological Diversity* (2003) 4.

⁹⁶ Simeone op cit note 26.

⁹⁷ Ibid.

⁹⁸ Correa op cit 59.

⁹⁹ S Grain 'Traditional Knowledge of Biodiversity in Asia-Pacific: Problems of Piracy & Protection' available at https://iatp.org/files/Traditional_Knowledge_of_Biodiversity_in_Asia-.htm, accessed on 15 June 2022.

¹⁰⁰ Correa op cit note 59.

fall into the public domain for the benefit of all people, this is not the case in respect of Traditional Knowledge.¹⁰¹ The publication of Traditional Knowledge beyond the confines of the community that holds the Traditional Knowledge, denies that community an important component of the right to self-determination.¹⁰² This is because, while a wrongly granted patent can be revoked, once publication is made of Traditional Knowledge, there is no way of remedying or reversing the publication, unless the holder of the Traditional Knowledge promptly applies to patent the Traditional Knowledge, which in many cases is impossible due to financial and social constraints.¹⁰³ The threat of misappropriation places a significant burden on rights holders, particularly in poor and developing countries.

The scarcity of knowledge and access to effective protective mechanisms contributes heavily to the mass misappropriation of Traditional Knowledge.¹⁰⁴ For instance, Liquorice Root, which is one of the most prevalent ingredients in Traditional Chinese Medicine,¹⁰⁵ was traditionally easily available and widely produced in China.¹⁰⁶ Today, as a result of excessive harvesting and habitat destruction, production of the plant has halved.¹⁰⁷

The above highlights the need to reform the existing Intellectual Property laws to avoid the further misappropriation of Traditional Knowledge and the resultant loss of biological resources.

The free and unfettered exploitation of Traditional Knowledge without any benefit to the relevant community in which the knowledge was developed, poses a threat to the further generation and preservation of Traditional Knowledge.

The very nature of Traditional Knowledge, being an asset that is held collectively and used individually, raises questions as to the adequacy of the existing protective mechanisms for the preservation and protection of Traditional Knowledge.¹⁰⁸ These characteristics abridge the fundamental conflict between Traditional Knowledge, which is a communal asset and Traditional Knowledge used as an asset based on private ownership.¹⁰⁹ The next section will

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Githaiga op cit note 118.

¹⁰⁵ D Bensky *Chinese Herbal Medicine Materia Medica* 3 ed (2004) 734.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ S Grey & R Kuokkanen 'Indigenous Governance of Cultural Heritage: Searching for Alternatives to Co-Management' (2020) 26(10) *International Journal of Heritage Studies* at 254. P Andanda 'Striking A Balance Between Intellectual Property Protection of Traditional Knowledge, Cultural Preservation and Access to Knowledge' (2012) 17 *Journal of Intellectual Property Rights* at 547.

¹⁰⁹ Ibid.

address mechanisms for the protection of Traditional Knowledge within the sphere of Intellectual Property Rights.

6. The Protection of Traditional Knowledge in the context of Intellectual Property

The protection of Traditional Knowledge in the context of existing Intellectual Property regimes could perform two functions.

The provision of positive protection, whereby the rights holder is able to attain Intellectual Property rights or alternative rights under a *sui generis* regime.¹¹⁰ This would allow the holder access to enforcement mechanisms to protect its rights in the Traditional Knowledge.¹¹¹ Positive protection promotes the empowerment of the community to play an active role in the preservation of its Traditional Knowledge and promotes Prior Informed Consent, equitable benefit sharing arrangements and empowers the community to combat misappropriation.¹¹²

The provision of defensive protection for Traditional Knowledge provides the holder with safeguards against the appropriation of Traditional Knowledge by means of Intellectual Property regimes.¹¹³ These safeguards include disclosure requirements as to the origin of the resources, information and/or Traditional Knowledge in the Patent application process and the preparation of databases containing information regarding Traditional Knowledge and an accessible form.¹¹⁴ A database of this nature would be of assistance to various parties, including Patent examiners when determining the novelty of the invention in question.

As both approaches serve distinct functions in the protection of Traditional Knowledge, it is submitted that both approaches should be used in conjunction to provide better protection for Traditional Knowledge.

¹¹⁰ Munzer SR & Raustiala K 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009) 27 *Cardozo Arts & Entertainment Law Journal* 37-97.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

7. The Role of Intellectual Property Rights (IPRS)

Intellectual property rights serve to protect investments in research and development and to promote innovation by providing the innovator with incentives in the form of monopoly rights and rights to compensation (*inter alia*).¹¹⁵

Intellectual property rights could be interpreted and developed to serve as a tool to protect Traditional Knowledge by the development of national legislation in conjunction with international conventions and international cooperation.¹¹⁶ While various international conventions have been developed to facilitate the protection of Traditional Knowledge at an international level, there is much that can be done to strengthen the position.

An overview of the existing IPRS and how each relates to Traditional Knowledge is set out below.

a. Patents

A Patent allows the holder (being an individual, group of individuals or juristic entity) a limited statutory monopoly over commercially or socially valuable inventions.¹¹⁷ The rationale behind the grant of patent protection is that it encourages innovation and development in exchange for valuable rewards for the inventor.¹¹⁸ Once the limited period has lapsed, the valuable knowledge falls into the hands of the public and becomes available for public exploitation.

Patents have long been regarded as one of the more effective methods of securing Traditional Knowledge as the scope of protection provided is significant.¹¹⁹

However, while there are numerous examples of how patent protection can secure Traditional Knowledge, no examples can be provided of where this right is granted to the community that holds the Patent as opposed to an individual.¹²⁰ For example, while a group of individuals can in fact be recorded as a holder of a patent, this would prove cumbersome and difficult in the context of a community. If, for example, the elders or traditional leaders of the community were recorded as the holders of a particular patent, they would hold these rights in their personal capacities and not in the interests of the community, who in turn would hold no legal right to force said traditional leaders to use the patent for the benefit of the community. While the

¹¹⁵ Van der Merwe A 'South and Southern Africa- recent developments in the legal protection of traditional knowledge and traditional cultural expressions' (2014) 9(5) *Journal of Intellectual Property Law & Practice* 416.

¹¹⁶ Duffield (*supra*).

¹¹⁷ S Ragavan 'Protection of Traditional Knowledge' available at www.law.ou.edu, accessed on 28 May 2022.

¹¹⁸ *Ibid.*

¹¹⁹ A Hoare & R Tarasofsky 'Asking and Telling: Can "Disclosure of Origin" Requirements in Patent Applications Make a Difference?' (2009) 10(2) *Journal of World Intellectual Property* at 149.

¹²⁰ L Tong 'Aligning the South African intellectual property system with traditional knowledge protection' (2017) 12(3) *Journal of Intellectual Property Law & Practice* 182.

community could form a trust to hold the patent, the administration of the trust would then again, be left in the hands of the trustees, albeit that the community would hold more rights to ensure that their traditional knowledge is in fact held for the benefit of the community.¹²¹ This represents another instance where traditional knowledge is cast in an ill fitting mould to secure some form of protection.

The Trade-Related Intellectual Property Rights agreement (TRIPS agreement) emphasizes the importance of the right of patentees.¹²² The rights of the holders of Traditional Knowledge are understated. The original holders of Traditional Knowledge who have nurtured and developed a vast pool of knowledge that has been benefiting the society since time immemorable, struggle for recognition and compensation for their innovations.¹²³ Patentees who exploit the very same innovations, however, are permitted to monopolise those innovations to the detriment of the community in question.¹²⁴

The South African Council for Scientific and Industrial Research (CSIR) obtained various patents covering the use of Hoodia as an anti-obesity preparation.¹²⁵ The Hoodia plant has been used by the San community as an appetite suppressant for centuries.¹²⁶ Following protracted legal processes, the parties reached settlement on the basis of a benefit sharing agreement, whereby six per cent of all profit received by the CSIR will be paid to the San community.¹²⁷

The patent system could offer defensive protection to traditional knowledge holders by treating all Traditional Knowledge as part of the commons, and thereby incapable of being monopolised.¹²⁸ However, as Traditional Knowledge would not enjoy adequate protection as part of the commons, it is suggested that effective defensive protection could arise from the creation of Traditional Knowledge registers or databases to prevent the registration of Traditional Knowledge as Patents by third parties.¹²⁹

¹²¹ Ibid.

¹²² V Shiva 'Biopiracy: need to change Western IPR systems' available at <http://future-nonstop.org/c/11c74ffd436db364c0dad625612a6eec>, accessed on 28 August 2022.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ G Chennells 'After Nagoya' in T Hodges and J Langford (ed) *Canada and the Nagoya Protocol: Canada and Global Access and Benefit Sharing Genetic Resources, Justice and Reconciliation* 2018 20 – 39. R Wynberg 'Hot Air Over Hoodia' available at <https://grain.org/en/article/4047-hot-air-over-hoodia>, accessed on 28 August 2022.

¹²⁷ Ibid.

¹²⁸ Frankel, Susy R., *Trademarks and Traditional knowledge and Cultural Intellectual Property Rights. Trademark Law And Theory: A Handbook Of Contemporary Research*, 2008 217.

¹²⁹ Masango supra; see also Anup Shah Food, "Patents—Stealing Indigenous Knowledge?" <http://www.globalissues.org/article/191/food-patents-stealing-indigenous-knowledge>; see also US Patent no. no.5, 401,504.

While Traditional Knowledge could be said to constitute prior art, there does not exist an international directory of Traditional Knowledge that could be consulted by patent examiners when assessing the prior art.¹³⁰

The Patents Act presents several shortcomings in as far as the efficiency of Patent protection for those seeking protection for inventions based on Traditional Knowledge is concerned. The Act provides that "where an invention is based on an indigenous biological resource, genetic resource, or traditional knowledge ... the applicant is required to furnish proof of his or her title or authority to use the information or resources."¹³¹ The Act also limits protection to "the knowledge that an indigenous community has regarding the use of an indigenous biological resource or a genetic resource" and "the way in which or the purpose for which an indigenous community has used an indigenous biological resource or a genetic resource."¹³²

b. Copyright

Copyright protects specific forms of Traditional Knowledge.¹³³ A work, as defined by the Copyright Act, is eligible for protection if it is original and has been reduced to material form.¹³⁴ The work does not need to be completely new, provided that the author or creator used its own skill and labour to create the work in question.¹³⁵ It is therefore possible to create a new work from an existing work under copyright law.¹³⁶

Provided that the work meets the originality criteria and has been reduced to material form, copyright law could be used as a mechanism to protect Traditional Knowledge. The copyright owner, could license the use of the Traditional Knowledge, which would attract the payment of royalties for the community.¹³⁷

Oral traditions, however, would not attract protection until reduced to material form.¹³⁸ While copyright would provide protection to the rights holder, it cannot prevent third parties from making use of Traditional Knowledge to create further works.¹³⁹ Section 28B of the Intellectual Property Laws Amendment Act (IPLAA) sets out that in order for Traditional Works to be eligible for copyright protection under South African law, it must be reduced to a material form

¹³⁰ Tejaswini Apte, 'A Simple Guide to Intellectual Property Rights, Biodiversity and Traditional Knowledge' (2006) 54.

¹³¹ Van der Merwe (supra).

¹³² Ibid.

¹³³ Copyright Act No.98 of 1978.

¹³⁴ Section 2(1) of the Copyright Act 98 of 1978.

¹³⁵ Section 2(1) and (2) of the Copyright Act 98 of 1978.

¹³⁶ O Dean 'Copyright' available at www.spoor.com/articles/copyright271.html, accessed 13 July 2022.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

or be capable of substantiation from the collective memory of the relevant indigenous community.¹⁴⁰ The Act further states that Copyright protection will only be conferred on a Traditional Work if the work is a derivative indigenous work and was developed on or after the date that IPLAA commences.¹⁴¹ IPLAA further qualifies the section by setting out that no right in a derivative indigenous work provided for in IPLAA, will be eligible for registration unless prior informed consent is obtained from the associated indigenous community or relevant authority, a disclosure of the indigenous knowledge has been made to the commission (CIPC under the Act) and a benefit sharing agreement has been concluded between the parties.¹⁴²

While IPLAA has afforded recognition to the value of Traditional Knowledge in the context of South African law, the practical value of these provisions is questionable. In order for a work of Traditional Knowledge to be protected under IPLAA (and subsequently under section 9(1) of the IKS Act, which provides for protection of registered Traditional Knowledge) it must first be re-enacted in a derivative form or created as a new work after the commencement of the Act. While the IPLAA provides for the work to be “capable of substantiation” in order to qualify, the IPLAA gives no guidance what that means or how it should be practically interpreted. Practically, this means that the community would need to spend time, effort and potentially obtain funding to in a sense recreate their Traditional Knowledge in order to gain protection under the IPLAA.

Further, the qualifications set out in section 28(B)(4) present complications in that it may be logistically challenging to obtain the required consent, the disclosure may well result in suspicion and confusion within communities that share similar traditions and the conclusion of benefit sharing agreements would necessarily require that the communities have the requisite funding to ensure that they receive adequate advice to avoid being exploited through the mechanisms set out in IPLAA.

While IPLAA has sought to provide some form of protection for Traditional Knowledge in South Africa, its attempt is ill-fitting to the practical needs of traditional communities. Notwithstanding the above discussion of IPLAA, IPLAA has not yet come into force.

As copyright comes into existence automatically, it is the duty of the holder to prove their claim to copyright in the course of litigation, this places an extra burden on the holder of the Traditional Knowledge, who would need to adduce significantly more evidence regarding the

¹⁴⁰ Intellectual Property Laws Amendment Act 28 of 2013, section 28 (B).

¹⁴¹ Ibid at section 28(B)(3).

¹⁴² Ibid at section 28(B)(4).

source of the work, how it was passed down and related information, which could become a costly exercise.¹⁴³

As copyright generally attaches to the identifiable authors or composers, the requirement that copyright only arises when said work is reduced to material form presents a challenge in identifying the author or composer. As Traditional Knowledge arises from the combined effort and contribution across generations within the community, the duration of copyright also presents a challenge for the protection of Traditional Knowledge.¹⁴⁴ As copyright does not currently recognise any form of perpetual protection (both IPLAA and the IKS Act have not yet come into operation), the protection of Traditional Knowledge by use of copyright presents the risk of misappropriation and misuse by third parties.¹⁴⁵ While it is acknowledged that moral rights enjoy perpetual protection in certain countries, moral right vests in the creator or author of the work. Thus, in the context of traditional works, the definition of who the author actually is or who the right vests in becomes a central point. If for instance the moral right were said to vest in the community as a whole, it would be practically impossible to enforce the right or determine the appropriate dispute resolution method as every member of the community would need to reach consensus on the point.

Section 28(F) of the IPLAA sets out that the term of Copyright protection conferred on derivative indigenous works under section 28(B) shall be protected for 50 years from the end of the year in which the work was first communicated to the public with the permission of the author or from the date of the death of the author.¹⁴⁶ The section goes on to state that if the traditional work is an indigenous work under the Act that copyright will exist perpetually and where the traditional work vests in the state under the Act, then copyright shall exist perpetually.¹⁴⁷

While the Act has not yet commenced, the deficiencies in protection for Traditional Knowledge are clear in the IPLAA. The protection needed for Traditional Knowledge should be tailored to meet the practical needs of traditional rights holders to ensure that the legal mechanism can be effectively used by those that need it.

¹⁴³ P Andanda & H Khademi 'Protecting Traditional Medical Knowledge through the Intellectual Property Regime Based on the Experiences of Iran and South Africa' in C Ncube & E Du Plessis eds *Indigenous Knowledge & Intellectual Property* (2016) 67-8.

¹⁴⁴ W Alberts 'Copyright in Literary Works' available at <https://www.bowmanslaw.com/insights/intellectual-property/copyright-in-literary-works-wim-alberts/>, accessed on 11 November 2021.

¹⁴⁵ Ibid.

¹⁴⁶ Op cit note 141 at section 28 (F).

¹⁴⁷ Ibid.

c. Trade Marks

A trade mark acts as a badge of origin of the supplier of a product or service and is used to differentiate the undertakings of one supplier to that of another.¹⁴⁸ The Trade Marks Act provides for the registration of trade marks, certification marks and collective trade marks.¹⁴⁹ In order to be registrable, a trade mark must be inherently capable of distinguishing the undertaking in question from that of another in the course of trade or it must have acquired the necessary distinctiveness over a period of time.¹⁵⁰

Trade mark protection could be used by traditional communities to designate that certain marks, such as symbols, phrases and emblems originate from that particular community, which may be useful for the protection of the trade interests of the community.¹⁵¹ Trade mark protection could also provide effective assistance in the prevention of the appropriation of the value of successful trade marks from traditional communities.¹⁵² It is important to note that trade mark protection is limited to marks intended for use in trade, therefore, the community would need to bear the intention of engaging in trade in order to have recourse to trade mark protection.¹⁵³

The requirement that a trade mark must be used in the course of trade renders it inappropriate to provide general protection for Traditional Knowledge.¹⁵⁴ The further restriction that monopoly in the form of trade mark protection cannot be granted over geographical areas presents challenges as many traditional communities are closely tied to their geographical origin.¹⁵⁵ Further, the Trade Marks Act does not adequately protect Traditional Cultural interests. The Trade Marks Act make no provision for the attaining of consent from traditional communities for the registration of their Traditional Knowledge, such as emblems, names and phrases.¹⁵⁶ While the community is able to oppose the registration of such a trade mark, it would only be able to do so with prior knowledge of the trade mark application and the financial backing to pursue the endeavour.

¹⁴⁸ Trade Marks Act No.194 of 1993.

¹⁴⁹ Ibid.

¹⁵⁰ Section 9 of the Trade Marks Act No.194 of 1993.

¹⁵¹ Ragavan op cit note 182. The Department of Trade & Industry 'Policy Framework' at 11.

¹⁵² Ibid.

¹⁵³ Ragavan op cit note 182. Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 'Technical and Procedural Aspects Relating to the Registration Of Certification and Collective Marks' available at www.wipo.int, accessed on 2 March 2022.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Z Ismail & T Fakir op cit note 189.

Collective trade marks can be used to protect cultural goods and certification trade mark would be of assistance in preserving the integrity of traditional processes and standards.¹⁵⁷ Cultural icons, symbols, phrases and the like could also be protected by way of registered trade mark.¹⁵⁸ The issue of individual ownership arises in as far as trade mark registrations are concerned. A number of traditional communities in South Africa have formed community trusts and holding companies to allow the community or members of the community to hold registered rights of their traditional knowledge and property.¹⁵⁹

For example, the protection of the word ROOIBOS as a trade mark has been in dispute since around 1994.¹⁶⁰ A US company acquired the trade mark rights over the word in the US, which placed the export of the traditionally South African product and the earning potential of traditional South African farmers in jeopardy.¹⁶¹ Objections were lodged against the registration and following protracted litigation, the US holder of the trade mark and a South African producer of ROOIBOS reached settlement in the matter, which brought the monopoly over the word to an end.¹⁶² However, when a French company attempted to attain an EU trade mark over the word in respect of beverages, the South African government stepped in to protect the word, which forms an integral part of the traditional South African community.¹⁶³ This intervention led to the recognition of ROOIBOS as a geographical indication, effectively ending all possibility for future appropriation by third parties.¹⁶⁴

Section 43(b) of the IPLAA states that a traditional terms or expression shall be capable of constituting a collective trade mark, certification mark or a geographical indication, and in order to be registered as such, the term or expression in question must meet “capable of distinguishing” criteria set out in trade mark law and practice as applied to ordinary trade marks. Section 43(E) of IPLAA goes on to provide indigenous terms, expressions and geographical indications the same period of protection that trade marks enjoy (ten years and renewable), and provides for perpetual protection in certain instances.¹⁶⁵

¹⁵⁷ Bala op cit note 24.

¹⁵⁸ Ibid.

¹⁵⁹ J van Garderen & E Emdon 'Corruption Watch improving transparency and accountability in the flow of benefits to mining communities' available at <https://www.corruptionwatch.org.za/wp-content/uploads/2021/08/3727-CW-FLOW-OF-BENEFITS-MINE-COMM-REPORT-SPRD-LINKS.pdf>, accessed on 16 October 2022.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ D Smith 'Rooibos Tea Trade Mark Awarded To South Africa In Deal With EU' www.theguardian.com 28 July 2014 (Accessed 13 July 2022).

¹⁶⁴ Ibid.

¹⁶⁵ Op cit note 141 at section 43 (E).

While the provisions of IPLAA provide much needed assistance in as far as trade marks are concerned, it has not yet come into force and its value and practical implementation are yet to be assessed.

d. Geographical Indications (GI)

GIs identify goods as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.¹⁶⁶

While similar to trade marks, GIs are not limited to specific identifiable authors, nor do they require an element of novelty or inventiveness to enjoy protection.¹⁶⁷ In addition, GI protection is perpetual and the burden of registration is relatively low.¹⁶⁸

GIs could provide effective protection for Traditional Knowledge by recognising that certain products and undertakings originate from specific regions.¹⁶⁹ While not providing specific protection for the particular community, GI protection could prevent third parties from appropriating Traditional Knowledge that originates in specific regions.¹⁷⁰ GIs could also be used as a method of recognition of Traditional Knowledge within the IP regime. GIs are particularly attractive for the protection of Traditional Knowledge as GIs are owned and exercised collectively, which accords with the collective nature of Traditional Knowledge.¹⁷¹

Where traditional knowledge is maintained and developed over a number of years to achieve specific characteristics to certain products, GIs give recognition to these efforts and prevent third parties from exploiting the Traditional Knowledge.¹⁷² If natural and cultural characteristics of the given product in the relevant place of cultivation are maintained, the GI is protected. As the rights under GIs are community rights, these cannot be transfer freely from one owner to another.¹⁷³

It has been said that as GIs only protect the names of goods rather than the underlying Traditional Knowledge, GIs can only play a complementary role in the protection of Traditional

¹⁶⁶ Article 22(2) of the TRIPS Agreement.

¹⁶⁷ Ismail & Fakir op cit note 189.

¹⁶⁸ Ibid.

¹⁶⁹ Van der Merwe op cit note 180.

¹⁷⁰ Ibid.

¹⁷¹ F Addor & A Grazioli 'Geographical Indications Beyond Wines and Spirits: A Roadmap for A Better Protection Of Geographical Indications In The WTO TRIPS Agreement' available at www.ige.ch, accessed 18 June 2022.

¹⁷² Bala op cit note 24.

¹⁷³ Dutfield op cit note 20.

Knowledge.¹⁷⁴ Further criticism points out that as the scope of GIs is limited to specific classes and/or locations of the relevant traditional community, there appears to exist a prohibition on the sharing or transfer of Traditional Knowledge with other traditional communities.¹⁷⁵

In South Africa, provision was made for the registration of geographical indications in 2019.¹⁷⁶ This recognition serves as a step in the right direction for the protection of Traditional Knowledge as GIs.

e. Designs

The Designs Act regulates the protection of designs in South Africa.¹⁷⁷ Design law protects aesthetic and functional designs based on its shape, form appearance, pattern, ornamentation and configuration. The protection afforded is limited and limited only to the features of the registered design.¹⁷⁸ The Designs Act provides limited protection to Traditional Knowledge, in the form of specific protection for specific designs, provided that same is used in the course of trade.¹⁷⁹

Regrettably, the Designs Act does little to effectively protect Traditional Knowledge as no protection is afforded to reproductions of traditional designs.¹⁸⁰ There is also not protection against the reproduction of traditional designs in an offensive manner.¹⁸¹

f. Trade Secrets

A trade secret is any type of information, which is guarded within an entity for the furtherance of the objectives of the entity.¹⁸² The purpose of recognising protection for trade secrets is to prevent the disclosure of previously undisclosed information within the control of a person or entity from being disclosed to, acquired by, or used by others without consent, in a way which is contrary to honest commercial practices.¹⁸³

¹⁷⁴ B O'Connor 'Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law' available at <http://onlinelibrary.wiley.com> vol 6 issue 5 2003 690, accessed on 18 June 2022, M Singh 'India: Role of Geographical Indications in the Field of Traditional Knowledge' available at <https://www.mondaq.com/india/intellectual-property/56866/role-of-geographical-indications-in-the-field-of-traditional-knowledge>, accessed on 18 June 2022.

¹⁷⁵ D Gervais 'Traditional Knowledge: Are We Closer to the Answers? The Potential Role of Geographical Indications' available at http://works.bepress.com/daniel_gervais/18 15.2 2009: 551 – 567, accessed on 18 June 2022.

¹⁷⁶ Van der Merwe op cit note 180.

¹⁷⁷ Designs Act No. 195 of 1993.

¹⁷⁸ Ibid.

¹⁷⁹ Munzer op cit note 175.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Van Heerden & Neethling *J Unlawful Competition* 2nd ed (2008) 213.

¹⁸³ Ibid.

Provided that there is a clear intention to keep the information in question secret, trade secrets could provide an effective way of protecting Traditional Knowledge.¹⁸⁴ The rationale in defending trade secrets is that it protects the commercial value of the trade secret for the holder.¹⁸⁵

A further benefit of trade secret protection is that the absence of registration formalities and minimal cost implications renders this an attractive option for traditional communities.¹⁸⁶ The protection afforded is perpetual and this type of protection can be held collectively.¹⁸⁷ Given the flexible nature of trade secrets, Traditional Knowledge that is not susceptible to other types of IP protection enjoy protection as trade secrets.¹⁸⁸ Trade secrets present the community with the means of keeping their Tradition Knowledge a secret, which as a result, promotes self-determination.¹⁸⁹

A major shortcoming of trade secrets is that once the information has been disclosed, it no longer qualifies as a secret and therefore cannot be protected as such.¹⁹⁰ Thus, the risk exists that disclosure of the trade secret could lead to the Traditional Knowledge falling into the public domain.¹⁹¹ While the community with have recourse against the discloser of the information, it would have lost the valuable Traditional Knowledge to the public domain.¹⁹² The costs of enforcing these rights may also prove probative for the community.¹⁹³

In addition, while trade secrets could prove valuable for many communities around the world, not all countries recognise trade secrets. India, for instance, has a large traditional community and a wealth of Traditional Knowledge, however, as India does not recognise trade secrets, traditional communities cannot rely on its protection.¹⁹⁴

g. Concluding Comments

The foregoing discussion illustrates that existing Intellectual Property regimes are ill-fitted to providing substantive and effective protection for Traditional Knowledge. Despite the

¹⁸⁴ Ragavan op cit note 182.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Van Heerden & Neethling op cit note 258.

¹⁹¹ Simoene op cit note 26.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Abbott op cit note 82.

limitations presented by each type of IP right, there also exists various threats of misappropriation in each instance.

The Protection of Traditional Knowledge in South Africa and the call for Sui Generis Protection

The Department of Trade and Industry mentioned two concerns in respect of the protection and commercialisation of Traditional Knowledge in South Africa.¹⁹⁵ Firstly, that the current regime in place allows individuals to protect and commercialise their assets to the exclusion of traditional communities.¹⁹⁶ Secondly, that in areas where the collective exercise of intellectual property rights are available to traditional communities, the communities have not exercised these rights.¹⁹⁷

It has been suggested a *sui generis* form of protection for Traditional Knowledge would be more effective in adequately catering for the needs of Traditional Knowledge. Under a *sui generis* regime, Traditional Knowledge would not need to fit into the confines of the existing regime, but instead, provision would be made for Traditional Knowledge and its nuances. To date various countries have adopted *sui generis* systems to protect Traditional Knowledge, including Portugal, Peru and Thailand.

The next section will consider the mechanisms in place to protect Traditional Knowledge in South Africa and *sui generis* regimes which may strengthen the position and the possibility of adopting a *sui generis* regime in South Africa.

8. The South African position

The Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act defines Indigenous knowledge as “*knowledge which has been developed within an Indigenous community and has been assimilated into the cultural and social identity of that community, and includes knowledge of a functional nature; knowledge of natural resources; and Indigenous cultural expressions.*”¹⁹⁸

The communal nature of Traditional Knowledge entails that it does not fit into the western concepts of subject matter eligible for IP protection.¹⁹⁹ Moreover, biological resources, to which the Indigenous knowledge often relates, have often been viewed as “the common heritage of

¹⁹⁵ The Department of Trade & Industry ‘Policy Framework’ 7.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.

¹⁹⁹ T Janke op cit note 278.

mankind,” free for appropriation and use without regard to ownership or sustainability.²⁰⁰ Yet the value of these resources and this knowledge is incalculable, and, without adequate protection, both can be expected to continue to gradually disappear, to the detriment of our global society as a whole.²⁰¹

The protection of Traditional Knowledge is very important to South Africa and its economic and cultural future, as South Africa is home to approximately ten percent of the world’s plant, reptile, avian, mammalian and coastal marine species, and its people have a rich base of knowledge regarding traditional uses of these resources.²⁰²

This Act has been said to introduce uncertainty in Intellectual Property law in South Africa as it does not address various key issues concerning Traditional Knowledge.²⁰³ For instance, the issue of novelty is not addressed, and therefore Traditional Knowledge would still be excluded from protection where novelty is a requirement.²⁰⁴ Further criticism set out that where people come up with ideas based on their traditions and where this has resulted in new inventions which represent traditional and cultural expressions of the communities and giving it a new interpretation, which helps to express the dynamism of their culture, no specific protection exists for this type of innovation, but instead the innovator would need to fit into an ill-fitting mould.²⁰⁵ These gaps in the legislation places South African innovators and holders of Traditional Knowledge at a disadvantage in the global arena.²⁰⁶ It has also been said that this Act was not drafted with sufficient consultation with Traditional Communities, and therefore does not address the unique needs of Traditional Knowledge Innovators.²⁰⁷ Despite the wide-ranging criticism, this Act provided a fundamental step forward in the quest to protect Traditional Knowledge, which was lacking before the enactment of this Bill.

a. Intellectual Property Laws Amendment Act of 2013

The Intellectual Property Laws Amendment Act (IPLAA) sought to bridge the gap between the traditional IP regime and the need to protect Traditional Knowledge.²⁰⁸ IPLAA, which was strongly influenced by the Traditional Knowledge Systems Policy, took a general approach by

²⁰⁰ Van der Merwe op cit note 180. C Ho 'Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies' (2006) 39 *University of Michigan Journal of Law Reform* at 473.

²⁰¹ K Maze, M Barnett, E Botts, A Stephens, M Freedman & L Guenther 'Making the case for biodiversity in South Africa: Reframing biodiversity communications' available at <http://dx.doi.org/10.4102/abc.v46i1.2039>, accessed on 23 March 2022.

²⁰² Van der Merwe op cit note 180.

²⁰³ C Jooste 'Trampling tradition - a call for support' available at: [Trampling tradition - a call for support \(bizcommunity.com\)](http://bizcommunity.com), accessed on 23 March 2022.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Hossain op cit note 13.

extending existing IP laws to accommodate Traditional Knowledge by amending existing IP laws but without creating a *sui generis* regime.²⁰⁹

IPLAA sought to achieve its aims by making various amendments to the existing IP laws in South Africa. IPLA also made provision for the establishment of a National Council for indigenous knowledge, a national database for recording indigenous knowledge, a national trust for indigenous knowledge to allow holders of manifestations of traditional knowledge to commercialise the relevant work or for benefit sharing purposes.²¹⁰

Various shortcomings of IPLAA have been pointed out.²¹¹ IPLAA provides protection for manifestations of Traditional Knowledge and not the knowledge itself.²¹² Notably, while the Traditional Knowledge is owned by the community, the manifestation thereof would have to be owned by an individual.²¹³ Section 28D of IPLAA does in fact provide that an indigenous community is deemed to be a juristic person for the purposes of the Act, and read with the definition of an Author under Act, it could be said that the Act make provision for the communal ownership of Traditional Knowledge.²¹⁴ However, the section goes on to qualify the ownership in that where copyright is created under section 3 or 28(B) the author is deemed to be the owner.²¹⁵ This means that the person or persons that create a derivative work from the traditional knowledge shall own that derivative work, with no guidance as to how the actual underlying Traditional Knowledge shall be held and protected under the Act. Section 28(B) also provides for Traditional Work created after the Act comes into force, however, it does not regulate how the work should be created to qualify, for instance, does the entire community need to participate, and if not, who in the community bears the authority of holding the rights in trust.²¹⁶ The Act acknowledges that different communities hold different values and structures, but it does not provide practical guidance on how to regulate these differences. Simply put, Traditional Knowledge does not quite fit the mould of IPLAA as IPLAA as failed to address the practical needs of various and differing traditional communities.

Further criticism levied against IPLAA at the time of its passing, included that Traditional Knowledge is created for and by the community and not for commercial use.²¹⁷ The

²⁰⁹ Ibid.

²¹⁰ Intellectual Property Laws Amendment Act 28 of 2013.

²¹¹ Van der Merwe op cit note 180.

²¹² A Vermeulen 'Traditional Knowledge to Be Protected Through Intellectual Property Legislation' available at www.polity.org.za, accessed 20 June 2022.

²¹³ Ibid.

²¹⁴ Op cit note 141 at section 28(D).

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ M Klein 'Draft Protection, Promotion, Development and Management of Indigenous Knowledge Bill, 2014' available at <https://blogs.sun.ac.za/iplaw/files/2015/05/Written-comments-on-the-Indigenous-Knowledge-Systems-Bill-2014-Dr-MM-Kleyn-May-13-2015.pdf>, accessed on 22 November 2021.

widespread commercial use divests the community of these assets in several ways that are not remedied by IPLAA. Further, Traditional Knowledge is enduring and may last in perpetuity, IP rights however, are limited rights for the very reason that the limitation allows for the creator to benefit for a period before the knowledge is given to the community, the rationale for limiting IP rights simply does not fit the nature of Traditional Knowledge.²¹⁸

Further, the purpose of protecting Traditional Knowledge is to safeguard the continued development and existing Traditional Knowledge. IP rights, however, take the Traditional Knowledge outside of the communal sphere in which it developed.²¹⁹ The danger presented in the form that IPLAA has taken is the disintegration of communal values in favour of individual exclusive rights and infighting regarding which individual should hold the right to own the manifestation of Traditional Knowledge which is protected under the amendments introduced by IPLAA.²²⁰

b. Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (IKS)

The IKS is the legislature's second attempt at protecting Traditional Knowledge, but is not a piece of Intellectual Property legislation.²²¹

The IKS envisages the preservation of Traditional Knowledge via a recordable system to protect and promote Traditional Knowledge within South Africa.²²² It aims to do so by introducing somewhat of a *sui generis* approach to the legislative and commercial protection of Traditional Knowledge in South Africa.²²³ It envisages the registration of Traditional Knowledge, the establishment of a National Indigenous Knowledge Systems Office and an Advisory Panel to assist the National Indigenous Knowledge Systems Office.²²⁴

The IKS seeks to protect Traditional Knowledge and its holders against unauthorised use, exploitation and misappropriation and to promote public awareness and understanding of Traditional Knowledge.²²⁵ In doing so, it strives to strengthen the potential and value of traditional communities and promote the commercial use of traditional knowledge to benefit society at large without divesting traditional communities of their valuable assets and identity.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.

²²² Law Society of South Africa Annual Report 2016/2017, page 48.

²²³ A Van der Merwe 'Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems Bill' available at <https://www.golegal.co.za/iks-bill-indigenousknowledge-systems/>, accessed on 22 September 2023.

²²⁴ Op cit note 222.

²²⁵ The Anton Mostert Chair of Intellectual Property 'A Better Second Attempt – Protection of Indigenous Knowledge' available at: <http://blogs.sun.ac.za/iplaw/2015/04/08/a-better-second-attemptprotection-of-indigenous-knowledge/>, accessed on 22 September 2023.

While the IKS is certainly not without its flaws, it proceeds from a more appropriate starting point, particularly, that Traditional Knowledge is fundamentally different to traditional western notions of Intellectual Property and that Traditional Knowledge should enjoy protection more appropriate to its nature.²²⁶ It recognises the paradox that exists between the two systems, that IP rights exist to incentivise individuals to create and innovate in exchange for a limited period of exclusive rights to benefits of the creation, which will fall part of the public domain once the protection lapses and the communal nature of Traditional Knowledge, which should enjoy protection outside of the ill fitted and contrasting bounds of Intellectual Property law.²²⁷

Some criticism levelled against the IKS at the time of its drafting was that the drafters did not clearly define the scope of what can be protected as Traditional Knowledge.²²⁸ Other criticism against the IKS relate to the lack of clarity regarding the registration system, the subject matter eligible for registration, ownership and how competing claims could be resolved.²²⁹ It is also worth noting that the IKS does not explicitly repeal IPLAA, which invariably clashes with the IKS in certain respects.²³⁰

The Act, seeks to incorporate Traditional Knowledge into existing law, instead of creating a separate act to address the various needs that exist.²³¹ It has been said that the protection required cannot be achieved by simply amending the existing Intellectual Property statutes that are already in place without dealing serious harm to the underlying ideology of those statutes.²³² The result is an uncomfortable fit.²³³

According to Judge Louis Harms “The proposals are fundamentally flawed and will not lead to any material benefit to any community in South Africa: they will not make the country technologically or otherwise rich and they will protect little (if any) indigenous knowledge.”²³⁴ He expresses the view that the Act not only fails to achieve its goal, but that its application will undermine long established and internationally recognised principles of Intellectual Property.²³⁵

²²⁶ S Karjiker ‘A Better Second Attempt – Protection of Indigenous Knowledge’ available at <https://blogs.sun.ac.za/iplaw/2015/04/08/a-better-second-attempt-protection-of-indigenous-knowledge/>, accessed on 22 November 2021.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² O Dean ‘Traditional Knowledge Subverts Intellectual Property Principles’ in S Karjiker & M Kleyn ‘Commentary on the Draft Intellectual Property Policy of the Republic of South Africa Phase I 2017’ at page 16 available at <https://blogs.sun.ac.za/iplaw/files/2017/11/CIP-Comments-RE-Draft-IP-Policy-Phase-1-2017.pdf>, accessed on 17 July 2022.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

Another point of contention, is that the IKS Bill has not taken the stance of repealing IPLAA. Section 32 of the IKS Bill sets out that the provisions of the Bill will be overruled by any rights which are conferred by another statute regarding Intellectual Property.²³⁶ As IPLAA seeks to include traditional cultural expressions and Traditional Knowledge in the Intellectual Property laws of South Africa, any conflict between IPLAA and the IKS Bill will see the ill fitted IPLAA prevail. Thus, while the IKS presents somewhat of a positive step towards protecting Traditional Knowledge outside of the Intellectual Property law-based approaches, its effectiveness could be questionable in light of the conflict with the IPLAA. Furthermore, while the IKS cannot be regarded as Intellectual Property legislation, it explicitly cedes to the Intellectual Property laws of South Africa, which invariably means that it cannot stand on its own without reference to the Intellectual Property laws of South Africa.

The South African attempt at protection Traditional Knowledge, when fully implemented and operational, could operate to achieve economic, cultural and sustainable outcomes and, more importantly, to provide protection for Traditional Knowledge. However, shortcomings in both attempts have left much to be desired.

The consequence has been that the country as a whole, including Traditional Knowledge holding communities, have not benefited equitably from the commercial and other gains derived from commercialization of these assets and currently little recourse is available to address the nuances of Traditional Knowledge in South Africa.²³⁷

c. Concluding Comments

The Department of Trade and Industry (DTI) mentioned two concerns in respect of the protection and commercialisation of Traditional Knowledge in South Africa.²³⁸ Firstly, that the current regime in place allows individuals to protect and commercialise their assets to the exclusion of traditional communities.²³⁹ Secondly, that in areas where the collective exercise of intellectual property rights are available to traditional communities, the communities have not exercised these rights.²⁴⁰ As these values are contradictory and serve as a major challenge to the protection and conservation of Traditional Knowledge, there is a significant need to strike a balance between individual and communal rights.

²³⁶ Op Cit note 141.

²³⁷ S Sahai 'Protection of Indigenous Knowledge and Possible Methods of Sharing Benefits with Local Communities' available at <https://agris.fao.org/agris-search/search.do?recordID=GB2013200324>, accessed on 17 July 2022.

²³⁸ Op cit note 226.

²³⁹ Ibid.

²⁴⁰ Ibid.

Given that both the IPLAA and IKS are not yet operable, their practical implementation cannot be assessed. However, given the shortcomings of the IPLAA, it is unlikely that the DTI's concerns can be adequately addressed by the implementation of the IPLAA. While IKS presents a positive step towards addressing these concerns, its failure to override the IPLAA renders it ineffective in matters where there is a conflict between the two. Therefore, at the moment, the IPLAA presents a stumbling block in the way of achieving the goals of protecting and promoting Traditional Knowledge.

It has been suggested a fully and independent *sui generis* form of protection for Traditional Knowledge would be more effective to adequately cater for the needs of Traditional Knowledge. Under a *sui generis* regime, Traditional Knowledge would not need to fit into the confines of the existing regime, but instead, provision would be made for Traditional Knowledge and its nuances.

9. Sui Generis Protection

The phrase *sui generis* describes something that is unique.²⁴¹ An Intellectual Property regime could be *sui generis* where it has been modified to accommodate certain special or nuanced subject matter and policy needs.²⁴²

Janke aptly summarises the value of a *sui generis* regime as:

*"Recognising the uniqueness of indigenous culture but also respecting it and understanding that Indigenous Knowledge and Western Knowledge are two parallel systems of innovation. Furthermore, it must be recognised that Indigenous customary laws and the existing ... legal system are two parallel systems of law, both which need to be given proper weight and recognition."*²⁴³

In as far as the protection of Traditional Knowledge is concerned, several considerations have been suggested for effective protection, including the policy objectives, the subject matter, the beneficiaries, the scope of the right, administration and enforcement and how the rights can be acquired or lost.²⁴⁴

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ T Janke et al *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998) 112.

²⁴⁴ Ibid.

A *Sui Generis* regime has been suggested as a solution for the protection of Traditional Knowledge.²⁴⁵ This is because a *Sui Generis* regime could result in new, better fitting intangible property rights that cater for perpetual protection, protection for historical and communal cultural works and an extension of what works qualify as Intellectual Property.²⁴⁶

This view, however, is not without difficulty. The lack of consensus between Traditional Communities and the difficulty in defining Traditional Knowledge limits the ability to define the scope of protection that should be provided.²⁴⁷ The adoption of such a system could not address the inequalities created by the existing Intellectual Property laws, which would, of necessity exist in parallel to the *Sui Generis* regime.²⁴⁸ Thus, a careful balance must be struck, and it may prove impossible to please all stakeholders in producing an effective method of protecting Traditional Knowledge by means of a *Sui Generis* system.

10. An Alternative

Many have advocated for *Sui Generis* protection to be introduced in order to effectively protect Traditional Knowledge in South Africa.²⁴⁹ While the IKS is the legislature's attempt at introducing *sui generis* protection for Traditional Knowledge, its shortcomings have rendered it largely ineffective in its current form.²⁵⁰

The Law Society of South Africa, through consultation with the South African Institute of Intellectual Property, indicated its support for the protection of Traditional Knowledge in the form of a *Sui Generis* regime.²⁵¹ The International Association for the Protection of Intellectual Property (AIPPI) has expressed similar views.²⁵² While the IKS could be refined to provide the *sui generis* protection that could effectively achieve its purposes, no consensus has been reached as to the parameters to the potential refinements.²⁵³

The Shadow Minister of Trade and Industry, Dr Wilmot James, presented a Private Members' Bill to the Office of the National Speaker. This Bill represents the first formal step in the quest to introduce a *Sui Generis* system to protect Traditional Knowledge in South Africa. The Bill

²⁴⁵ J Straus 'The Impact of the New World Order on Economic Development: The Role of Intellectual Property Rights System' 6 J. Marshall Rev. Intell. Prop. L. 1 (2006).

²⁴⁶ Supra at 226.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ O Dean 'The Protection of Traditional Knowledge Bill' available at blogs.sun.ac.za, accessed on 17 July 2022, O H Dean 'Synopsis of the Protection of Traditional Knowledge Bill Doc: 2OD2012 IPStell' available at <https://blogs.sun.ac.za/iplaw/files/2012/02/2OD2012.pdf>, accessed on 17 July 2022.

²⁵⁰ Op cit note 226.

²⁵¹ Op cit note 250..

²⁵² Ibid.

²⁵³ Ibid.

sought to bridge the gap between the ideals set out by Government for the protection of Traditional Knowledge and the subsequent pieces of legislation that were introduced to meet those ideals.

11. The Wilmot Bill

With the view of creating an adequate, financially viable and legally enforceable protection mechanism for Traditional Knowledge, the Wilmot Bill was proposed as an alternative to the IKS.²⁵⁴ The Wilmot Bill was drafted with the aim of providing government with guidance on how a *sui generis* regime could achieve the goals of protecting Traditional Knowledge and to mitigate the damage that the implementation of IKS may cause.²⁵⁵

The purpose of the Bill is to protect Traditional Knowledge, by means of a *Sui Generis* regime, as a distinct category of Intellectual Property, while catering for the nuances that Traditional Knowledge represents.²⁵⁶ It also sought to ensure that South Africa's Intellectual Property regime is made to comply with international obligations and to give effect to the more general principles of Traditional Knowledge as advocated by WIPO. It also sought to introduce a type of protection for Traditional Knowledge that could serve as an international benchmark.

It has been said that the key differences between the IKS and the Wilmot Bill are that instead of making amendments to various Intellectual Property Acts to squeeze Traditional Knowledge into the existing mould, the Wilmot Bill creates a new property right called Traditional Knowledge, which itself consists of three different rights, namely the traditional work, the traditional design and the traditional mark.²⁵⁷

The Bill contains various provisions that are customised to the needs of Traditional Knowledge and has been hailed by many as a step in the right direction for the protection of Traditional Knowledge in South Africa.²⁵⁸

The Bill establishes a system of protection that is customised to benefit the South African Traditional Community and should adequately protect Traditional Knowledge. Further, it

²⁵⁴ Ibid.

²⁵⁵ C Jooste 'Sui Generis Protection of Traditional Knowledge Bill Published in The Gazette' available at <https://journals.co.za/doi/abs/10.10520/EJC139040>, accessed on 17 July 2022.

²⁵⁶ O Dean (supra).

²⁵⁷ A Vermeulen 'Traditional Knowledge to Be Protected Through Intellectual Property Legislation' available at www.polity.org.za, accessed on 17 July 2022.

²⁵⁸ M Coetzee 'LSSA Comments: Draft Protection of Traditional Knowledge Bill (2013)' available at <https://www.lssa.org.za/wp-content/uploads/2020/01/LSSA-Comments-on-Protection-of-Traditional-Knowledge-Bill-2013.pdf>, accessed on 17 July 2022.

proposes that the relevant traditional communities receive financial benefits from the use of their Traditional Knowledge.²⁵⁹

The Bill was criticised on the grounds that the Bill could not prevent the poaching of Traditional Knowledge by means of the current IPR, that it introduces additional and burdensome provisions that could be dealt with within the existing regimes at a lower cost and that the implementation of the Bill would take longer than is justifiable in view of the current need to protect Traditional Knowledge in South Africa.²⁶⁰

The Wilmot Bill has not progressed further and has not been made law in South Africa.

WIPO has expressed the view that Traditional Knowledge is best protected by *Sui Generis* legislation.²⁶¹ It is in the process of developing a Traditional Knowledge Model Law to assist individual states to adequately protect Traditional Knowledge.²⁶² The Wilmot Bill, which proposes *Sui Generis* provisions presents a step in the right direction for the protection of Traditional Knowledge in South Africa.

12. A Balanced Approach

The current imbalance between the existing Intellectual Property Laws in operation in South Africa and the needs of Traditional Knowledge holders to procure adequate protection for their unique Intellectual Property has led to much injustice and misappropriation.

While the need to develop a system to protect Traditional Knowledge cannot be understated, many have cautioned the overprotection of Traditional Knowledge, which may limit the ability to develop such assets and result in the shrinking of the public domain.²⁶³ Boyle points out that expanding the Intellectual Property regime past reasonable bounds will upset the fundamental balance between Intellectual Property and the Public Domain.²⁶⁴ He states that disrupting the balance would have the effect of disrupting distributive justice.²⁶⁵

Arguably, the expansion of the existing Intellectual Property regimes benefit developing countries and indigenous communities on a greater scale than the more developed countries. To avoid difficulties in the universal implementation of these rights and promote innovation, an equitable balancing of Intellectual Property rights and *Sui Generis* rights that protect

²⁵⁹ Vermeulen op cit note 316.

²⁶⁰ C Jooste op cit note 194.

²⁶¹ M Coetzee op cit note 317.

²⁶² Ibid.

²⁶³ A Boyle 'Manifesto on WIPO and the Future of Intellectual Property' 2004 Duke L. & Tech. Rev. 0009 (2004).

²⁶⁴ Ibid.

²⁶⁵ Ibid.

Traditional Knowledge must be achieved.²⁶⁶ Such a system should respect the contributions of Traditional Knowledge, as well as the interests of individuals, both of whom are invaluable assets in the global economy.

Thus, there is a fundamental need to bridge the divide between the protection of Traditional Knowledge, being a communal asset and individual innovation as an individual right. While finding the solution may result in greater costs and while it may be impossible to recover damage for past losses, the Traditional Community may well finally receive recognition for its contribution to modern developments.²⁶⁷

It has been postulated that a balance of this nature can only be achieved by the adaptation of Intellectual Property laws to operate alongside fully independent and effective *sui generis* protective legislation and measures (such as traditional knowledge databases), which operate in addition to community level measures to promote the value of Traditional Knowledge and encourage communities to protect and continue to develop their Traditional Knowledge.²⁶⁸

13. Conclusion

The value of Traditional Knowledge and the importance of allowing traditional communities to exploit their Traditional Knowledge has been addressed in this work.

While the necessity of protecting Traditional Knowledge has been acknowledge by many, both internationally and nationally, numerous challenges exist in the quest to achieve substantive and effective protection for Traditional Knowledge. These include that existing Intellectual Property rights are ill-fitted for the purpose, that the cost implications on traditional communities, particularly in developing countries present probative challenges without state intervention and that traditional communities require assistance to enforce their rights from the state.

In the quest to create better fitting laws to protect Traditional Knowledge, many mechanisms have been employed in South Africa and around the world to address the nuances of Traditional Knowledge.

The South African Government has attempted to achieve these goals by adapting existing laws to include Traditional Knowledge. It is submitted that this attempt is short-sighted and

²⁶⁶ Dutfield supra.

²⁶⁷ Bala Supra.

²⁶⁸ Op cit note 68.

incapable of achieving this goal. The method in which the government has sought to enforce its policy bears the risk of negatively impacting the principles of the existing Intellectual Property regime, which is valuable to the public within its own confines, or of being entirely ineffective and providing no protection for Traditional Knowledge at all.

In the alternative, many have proposed that a *sui generis* regime would better fit the purposes of protecting Traditional Knowledge. This approach entails the introduction of specific legislation tailored for the protection of Traditional Knowledge.

The Wilmot Bill, which has been widely accepted by many key stakeholders, provides a workable example of how a *Sui Generis* regime could be introduced and function in the South African context.

While the implementation of a *Sui Generis* regime will inevitably present challenges, particularly at the outset, it appears to be the most appropriate course of action in as far as the protection of Traditional Knowledge is concerned. A *Sui Generis* approach aligns with the interests of traditional communities and existing measures to protect and preserve Traditional Knowledge. There is a need to strike a balance between the existing Intellectual Property regimes, which are necessary to protect individual innovation and a *Sui Generis* approach to protecting Traditional Knowledge, which does not fit within the ambit of the existing regimes. Neither can exist without the other and should work hand in hand to effectively bridge the gap between individual innovations that are protected by Intellectual Property laws and Traditional Knowledge that lacks substantive protection in several respects.

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