

NATIONAL COUNCIL FOR LAW REPORTING
100 RICHMOND STREET
NAIROBI, KENYA

SPECIAL ISSUE

Kenya Gazette Supplement No. 154 (Acts No. 33)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2016

NAIROBI, 7th September, 2016

CONTENT

Act—

PAGE

The Protection of Traditional Knowledge and Cultural Expressions Act, 2016.....	64
---	----

NATIONAL COUNCIL FOR LAW REPORTING
RECEIVED
 04 OCT 2016
 P. O. Box 10443-00100
 NAIROBI, KENYA
 TEL: 2711231 FAX: 2712694



**THE PROTECTION OF TRADITIONAL KNOWLEDGE
AND CULTURAL EXPRESSIONS ACT, 2016**

No. 33 of 2016

Date of Assent: 31st August, 2016

Date of Commencement: 21st September, 2016

ARRANGEMENT OF SECTIONS

Section

PART I—PRELIMINARY

- 1—Short title.
- 2—Interpretation.
- 3—Guiding principles.
- 4—Responsibility of county governments.
- 5—Responsibilities of the national government.

**PART II—PROTECTION OF TRADITIONAL
KNOWLEDGE**

- 6—Protection criteria for traditional knowledge.
- 7—Formalities relating to protection of traditional knowledge.
- 8—Maintenance of registers.
- 9—Right to protection.
- 10—Rights conferred to holders of traditional knowledge.
- 11—Recognition of traditional knowledge and cultural expression owners.
- 12—Compulsory licence.
- 13—Duration of protection of traditional knowledge.

**PART III—PROTECTION OF CULTURAL
EXPRESSIONS**

- 14—Protection criteria of cultural expressions.
- 15—Formalities relating to cultural expressions.
- 16—Right of protection.
- 17—Duration of protection of cultural expressions.

PART IV—GENERAL PROVISIONS

- 18—Protection of traditional knowledge and cultural expressions against unlawful acts.

19—Exceptions and limitations.

20—Derivative works.

PART V—MORAL RIGHTS

21—Meaning of moral rights.

22—Assignment and licensing.

23—Additional rights.

24—Equitable benefit sharing rights.

PART VI—MANAGEMENT OF RIGHTS

25—Authorization for use of Traditional knowledge and cultural expressions.

26—Access to traditional knowledge associated with genetic resources.

27—Application for consent.

28—Public consultation.

29—Identification of holders.

30—Uncertainty or dispute of ownership.

31—No claim to ownership.

32—Authorized user agreements.

33—User agreements.

34—Terms and conditions of user agreement.

35—Authorized user agreement and prior informed consent.

36—Obtained consent from traditional knowledge holders.

PART VII—SANCTIONS AND REMEDIES

37—Offences and penalties.

38—Civil action.

39—Civil remedies.

40—Other mechanisms to resolve disputes.

41—Other rights and remedies.

PART IX—TRANSITIONAL MEASURES AND MISCELLANEOUS

42—Transition.

43—Regulations.

44—Recognition of other laws.

**THE PROTECTION OF TRADITIONAL
KNOWLEDGE AND CULTURAL EXPRESSIONS
ACT, 2016**

AN ACT of Parliament to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(1) (c) of the Constitution; and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Protection of Traditional Knowledge and Cultural Expressions Act, 2016.

Short title.

2. In this Act, unless the context otherwise requires—

Interpretation.

“authorized user agreement” means a written agreement entered into under section 32 of this Act;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to intellectual property rights;

“community” means a homogeneous and consciously distinct group of the people who share any of the following attributes—

- (a) common ancestry;
- (b) similar culture or unique mode of livelihood or language;
- (c) geographical space;
- (d) ecological space; or
- (e) community of interest;

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

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

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

“cultural heritage” means —

- (a) tangible cultural heritage including —
 - (i) movable cultural heritage;
 - (ii) immovable cultural heritage; and
 - (iii) underwater cultural heritage;
- (b) intangible cultural heritage;
- (c) natural heritage including natural sites with cultural aspects such as cultural landscapes, physical, biological or geological formations; or
- (d) heritage in the event of armed conflict;

“customary context” refers to the utilization of traditional knowledge or cultural expressions in accordance with the practices of everyday life of the community, such as, for instance, usual ways of selling copies of tangible expressions of folklore by local craftsmen;

“customary use” means the use of traditional knowledge or cultural expressions in accordance with the customary laws and practices of the holders ;

“customary laws and practices” means customary laws, norms and practices of local and traditional communities that are legally recognized in Kenya;

“derivative work” means any intellectual creation or innovation based upon or derived from traditional knowledge or cultural expressions;

“derogatory treatment”, includes, in relation to traditional knowledge or cultural expressions, any act or omission that results in a material distortion, mutilation or alteration of the traditional knowledge or cultural expressions that is prejudicial to the honour or reputation of the holders, or the integrity of the traditional knowledge or cultural expressions;

“exploitation” means the employment of the greatest possible advantage of traditional knowledge and cultural expressions for selfish purposes, taking advantage of unwary traditional knowledge and cultural expressions holders and advertising or a publicity program, including—

- (a) where the traditional knowledge is a product—
 - (i) manufacturing, importing, exporting, offering for sale, selling or using beyond the traditional context the product; and
 - (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;
- (b) where the traditional knowledge is a process—
 - (i) making use of the process beyond the traditional context; and
 - (ii) carrying out the acts referred to under paragraph (a) of this subsection with respect to a product that is a direct result of the use of the process;

“genetic resources” means microorganisms, plant and animal material including indigenous seeds, genetic plant varieties and traditional animal breeds that contain functional hereditary units and whose management shall also be subject of other relevant legislations;

“genetic material ” means genetic material of plant, animal, microbial or other origin containing functional units of heredity;

“holder” means recognized individuals or organizations within communities in whom the custody or protection of traditional knowledge and cultural expressions are entrusted in accordance with the customary law and practices of that community;

“intangible cultural heritage” means the practices, representations, expressions, knowledge and cultural spaces associated therewith that communities, groups and, in some cases, individuals recognized as part of their social cultural heritage;

“Repository” means the Traditional Knowledge Digital Repository established and maintained by the national government under section 8(3);

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

“person” means a natural or legal person;

“prior informed consent” means the giving of, by the prospective user, complete and accurate information, and based on that information, the prior acceptance, by the owners, to the use of their traditional knowledge or cultural expressions;

“traditional context” means the mode of using traditional knowledge or cultural expressions in their proper artistic framework based on continuous usage by the community;

“traditional knowledge” means any knowledge—

- (a) originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or
- (b) contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.

3. In the performance of the functions and exercise of powers under this Act, every person dealing with matters relating to traditional knowledge or cultural expressions

Guiding principles.

shall be guided by the national values and principles of governance set out in Article 10 of the Constitution.

4. (1) A county government shall, through the county executive committee member responsible, for matters relating to culture, be responsible for—

Responsibility of
county
governments

- (a) in relation to the repository and for the purpose of collecting and compiling information relating to traditional knowledge and cultural expressions—
 - (i) the primary registration of traditional knowledge and cultural expressions within a county for the purposes of recognition under this Act;
 - (ii) the receipt, documentation, storage and updating of information relating to traditional knowledge and cultural expressions from communities within a county;
- (b) the preservation and conservation of traditional knowledge and cultural expressions;
- (c) the protection and promotion of the traditional knowledge and cultural expressions of communities within a county; and
- (d) the facilitation of collaboration, access to or the sharing of information and data relating to traditional knowledge and cultural expressions between county governments.
- (e) the allocation of financial resources for the promotion of cultural activities; and
- (f) subject to this Act or any other law, the establishment of mechanisms for using culture as a tool for conflict resolution and promotion of cohesion.

5. The national government shall, under this Act be responsible for—

Responsibilities of
the national
government.

- (a) the establishment and maintenance of the Repository at the Kenya Copyright Board;
- (b) the promotion and conservation of traditional knowledge and cultural expressions of communities in Kenya;

- (c) the protection of traditional knowledge and cultural expressions from misuse and misappropriation; and
- (d) the facilitation of access of information and the sharing of information and data relating to traditional knowledge and cultural expressions.

PART II—PROTECTION OF TRADITIONAL KNOWLEDGE

6. Protection shall be extended to traditional knowledge that is—

Protection criteria for traditional knowledge.

- (a) generated, preserved and transmitted from one generation to another, within a community, for economic, ritual, narrative, decorative or recreational purposes;
- (b) individually or collectively generated;
- (c) distinctively associated with or belongs to a community; and
- (d) integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.

7. (1) Protection of traditional knowledge shall not be subject to any formality.

Formalities relating to protection of traditional knowledge.

(2) Notwithstanding subsection (1), county governments shall collect information, document and register traditional knowledge within the respective counties for the purposes of recognition.

(3) The Registration under subsection (2) shall be undertaken willingly by the owners of traditional knowledge upon obtaining prior informed consent but shall not require the public disclosure of the traditional knowledge concerned.

(4) Where a community in Kenya shares traditional knowledge with a community outside Kenya, the national and county government shall register the owners of the traditional knowledge in Kenya and maintain relevant records.

(5) Where more than one community in the same or different counties share the same traditional knowledge, respective county governments shall register the owners of the traditional knowledge and maintain relevant records.

(6) Where concurrent claims arise from different communities, the Kenya Copyright Board or county government shall, while determining the claim, consider customary law and protocol of the communities in question, local information sources and any other means that may be applicable.

(7) Registration shall have a mere declaratory function and shall not in itself confer rights.

8. (1) Every county government shall, establish and maintain a register which shall contain information relating to traditional knowledge and cultural expressions collected and documented by the county government during the registration process.

Maintenance of registers.

(2) The registers maintained under subsection (2) may relate to specific forms of protection, and shall not compromise the status of undisclosed traditional knowledge or the interests of holders of traditional knowledge that relate to the undisclosed elements of their knowledge.

(3) The national government shall, in consultation with the relevant county government establish and maintain a comprehensive Traditional Knowledge Digital Repository which shall contain information relating to traditional knowledge and cultural expressions that have been documented and registered by county governments.

(4) Notwithstanding subsection (1), in the interests of transparency, evidence and the preservation of traditional knowledge, the national government and the lead agencies shall, where appropriate and subject to the relevant policies, laws and procedures and considering the needs and aspirations of the traditional knowledge holders, maintain registers or other records of the knowledge in the Repository.

(5) The county governments and other institutions that deal with matters relating to traditional knowledge and cultural expressions shall co-operate with the national government in the establishment and maintenance of the Repository.

(6) Every county shall, upon collecting and documenting information on traditional knowledge and cultural expressions and registering the traditional knowledge or cultural expressions relating to any community, transmit the complete and validated information relating to the traditional knowledge of cultural expressions for entry in the Repository in the form or manner prescribed by the Cabinet Secretary.

9. The owners and holders of traditional knowledge shall have the right to protection of that knowledge.

Right to protection.

10. (1) Every community shall have the exclusive right to—

Rights conferred to holders of traditional knowledge.

- (a) authorize the exploitation of their traditional knowledge; and
- (b) prevent any person from exploiting their traditional knowledge without their prior informed consent.

(2) In addition to all other rights, remedies and action available, the owners shall have the right to institute legal proceedings against any person who exploits traditional knowledge without the owner's permission.

(3) Every community shall make and adopt its community rules prescribing the procedures for the authorization of the exploitation of their traditional knowledge.

(4) The rules shall be submitted to the county government during the registration of traditional knowledge.

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

Recognition of traditional knowledge and cultural expression owners.

12. (1) Where protected traditional knowledge is not being sufficiently exploited by the owner or rights holder, or where the owner or holder of rights in traditional knowledge refuses to grant licenses for exploitation, the Cabinet Secretary may, with prior informed consent of the owners, grant a compulsory licence for exploitation subject to Article 40(3) (b) of the Constitution.

Compulsory licence.

(2) In the absence of an agreement between the parties on an appropriate amount of compensation for the compulsory licence, a court of competent jurisdiction shall on the application of the parties determine the compensation.

(3) The Cabinet Secretary may, in the case of a dispute where there is no agreement between the parties, refer the matter for determination through alternative dispute resolution mechanisms.

(4) The Cabinet Secretary shall make regulations prescribing the criteria and conditions for the grant of a compulsory licence.

13. Traditional knowledge shall be protected for so long as the knowledge fulfils the protection criteria referred to under section 6.

Duration of protection of traditional knowledge

PART III—PROTECTION OF CULTURAL EXPRESSIONS

14. (1) The protection of cultural expressions under this Act shall relate to cultural expressions, of whatever mode or form, which are—

Protection criteria of cultural expressions.

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

and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.

15. (1) The protection of cultural expressions shall not be subject to any formality.

Formalities relating to cultural expressions.

(2) Notwithstanding subsection (1), county governments shall collect information document and register cultural expressions within the respective counties for the purposes of recognition.

(3) The registration under subsection (2) shall be undertaken willingly by the owners of cultural expressions upon obtaining prior informed consent but shall not require the public disclosure of the cultural expressions concerned.

(4) Where a community in Kenya shares cultural expressions with a community outside Kenya, the national and county government shall register the owners of the cultural expression in Kenya and maintain relevant records.

(5) Where more than one community in the same or different counties share the same cultural expressions, respective country governments shall register the owners of the cultural expressions and maintain relevant records.

(6) Where concurrent claims arise from different communities, national government or county government shall while determining the claim consider customary law and protocol of the communities in question, local information sources and any other means that may be applicable.

(7) Registration shall have a mere declaratory function and shall not in itself confer rights.

16. The owners and holders of cultural expressions shall have the right to protection of those expressions.

Right of protection.

17. Cultural expressions shall be protected against all acts of misappropriation, misuse, unlawful access or exploitation for as long as the cultural expressions fulfil the protection criteria set out in section 14.

Duration of protection of cultural expressions.

PART IV—GENERAL PROVISIONS

18. (1) A person shall not, in any way, misappropriate, misuse, abuse, unfairly, inequitably or unlawfully access and exploit traditional knowledge and cultural expressions.

Protection of traditional knowledge and cultural expressions against unlawful acts

(2) Traditional knowledge or cultural expressions shall not, without the prior and informed consent of the owners, be used for—

- (a) the reproduction of the traditional knowledge or cultural expressions;
- (b) the publication of the traditional knowledge or cultural expressions;
- (c) the performance or display of the traditional knowledge or cultural expressions in public;
- (d) the broadcast of the traditional knowledge or cultural expressions to the public by radio, television, satellite, cable or any other means of communication;
- (e) the translation, adaption, arrangement, transformation or modification of the traditional knowledge or cultural expressions;
- (f) the fixation of the traditional knowledge or cultural expressions through any process, including making a photograph, film or sound recording;
- (g) the availing online or electronic transmission to the public (whether over a path or a combination of paths, or both) traditional knowledge or cultural expressions;
- (h) the creation of derivative works; and
- (i) the making, use, offer for sale, sell, import or export traditional knowledge or cultural expressions or products derived there from.

(3) Despite subsection (2), the owners shall be entitled to use the cultural expressions in the ways mentioned in subsection (2) in the exercise of their cultural rights.

(4) The national government in consultation with county governments shall establish mechanisms that enable the communities to prevent the misappropriation, misuse or unlawful access and exploitation of traditional knowledge and cultural expressions, without prior consent, including of such cultural expressions other than words, signs, names and symbols including—

- (a) the reproduction, publication, adaptation, broadcasting, public performance, communication

to the public, distribution, rental, making available to the public and fixation (including by still photography) of the cultural expressions or derivatives thereof;

- (b) any use of the cultural expressions or adaptation thereof that does not acknowledge the community as the source of the cultural expressions;
- (c) any distortion, mutilation or other modification of, or other derogatory action, in relation to the cultural expressions; and
- (d) the acquisition or exercise of intellectual property rights over the cultural expressions or adaptations thereof.

(5) A person shall not use words, signs, names and symbols that are cultural expressions or derivatives thereof, or acquire or exercise intellectual property rights over the cultural expressions or derivatives thereof, in a manner that disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute.

(6) The Cabinet Secretary in consultation with county governments shall establish mechanisms to ensure that—

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

(7) The Cabinet Secretary in consultation with county governments shall establish mechanisms to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of intellectual property rights over cultural expressions that are held secret.

19. (1) Notwithstanding section 18, the protection of traditional knowledge or cultural expressions shall—

Exceptions and
limitations.

- (a) not restrict or hinder the normal usage, development, exchange, dissemination and transmission of traditional knowledge or cultural expressions by members of a particular community within the traditional and in accordance with the customary law and practices of that community;
- (b) extend only to uses of traditional knowledge or cultural expressions taking place outside their traditional or customary context, whether for commercial gain or not; and
- (c) be subject to such other exceptions as may be necessary to address the needs of non-commercial use, including teaching and research for educational purposes, personal or private use, criticism or review, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions of traditional knowledge or cultural expressions for inclusion in an archive or inventory exclusively for the purposes of safeguarding knowledge or cultural heritage, and incidental uses.

(2) A user of traditional knowledge or cultural expressions shall obtain prior informed consent and sufficiently acknowledge the owners by expressly mentioning them or the geographical place from which the traditional knowledge or cultural expressions originated, in the course of use.

(3) The use of traditional knowledge or cultural expressions shall be compatible with fair practice, the relevant community's customary laws, protocols and practices and the relevant community shall be acknowledged as the source of the traditional knowledge or

cultural expressions, and such use shall not be offensive to the relevant community.

20. (1) Any copyright, trademark, patent, industrial design, geographical indication or other intellectual property right that exists in relation to a derivative work shall vest in the creator of the work as provided by the relevant intellectual property law.

Derivative works

(2) Where a derivative work that is based on traditional knowledge or cultural expressions is to be used for a commercial or industrial purpose, an authorized user agreement shall be prepared between the rights holder and the authorised user.

(3) An authorized user agreement prepared under subsection (2) shall—

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

PART V—MORAL RIGHTS

21. (1) The owners of traditional knowledge or cultural expressions shall be holders of the moral rights in the traditional knowledge or cultural expressions.

Meaning of moral rights

(2) The moral rights of the owners of traditional knowledge and cultural expressions shall include—

- (a) the right of attribution of ownership or paternity in relation to their traditional knowledge and cultural expressions;
- (b) the right not to have ownership of traditional knowledge or cultural expressions falsely attributed to them; and
- (c) the right not to have their traditional knowledge and cultural expressions subject to derogatory treatment including any act or omission that

results in a material distortion, mutilation or alteration of the traditional knowledge or cultural expressions that is prejudicial to the honor or reputation of the traditional owners, or the integrity of the traditional knowledge or cultural expressions; and

- (d) the right to protection from false and misleading claims to authenticity and origin.

(3) The moral rights of traditional owners in their traditional knowledge and cultural expressions shall exist independently of their cultural rights.

(4) The moral rights shall continue in force in perpetuity and shall be inalienable or transferable and incapable of being waived.

22. (1) The owners of traditional knowledge or cultural expressions rights shall have the right to assign and conclude licensing agreements.

Assignment and licensing.

(2) Despite subsection (1), traditional knowledge or cultural expressions belonging to a local or traditional community shall not be assigned without the authorization of the custodian of the local or traditional community.

(3) The holders of traditional knowledge or cultural expressions rights shall grant access, authorizations, assignments or licenses in respect of protected traditional knowledge or cultural expressions in writing and copy submitted to the Cabinet Secretary and the respective county executive committee member in charge of matters relating to traditional knowledge and culture.

(4) Access, authorizations, assignments or licenses in respect of protected traditional knowledge or cultural expressions that have not been granted in writing shall have no effect.

(5) The parties to a licensing agreement may seek the advice of the Cabinet Secretary when drawing up a document for the purpose of this section.

(6) The Cabinet Secretary shall keep a register of all licenses and assignments granted under this section.

23. (1) The cultural rights in traditional knowledge or cultural expressions shall be in addition to any rights that may subsist under any law relating to copyright, trademarks,

Additional rights