

UNIVERSITY OF KWAZULU-NATAL

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

By

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DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university. I declare that this Dissertation contains my own work except where specifically acknowledged.

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ABSTRACT

The aim of this paper is to consider the debate amongst the various views regarding the Protection of Traditional Knowledge in South Africa. In the process, it will define Traditional Knowledge and provide some examples. It will then provide and discuss various reasons which explain why Traditional Knowledge should be protected. Then it will proceed by illustrating how Traditional Knowledge should be protected by examining and evaluating whether Intellectual Property laws, as they currently stand, protect Traditional Knowledge and then critically evaluate the proposed new law which the legislature is intending to introduce in order to protect Traditional Knowledge. In addition, as explained above, Professor Owen Dean, who is a leading Intellectual Property lawyer and academic in South Africa, has proposed his own legislation. The legislation proposed by Dean will be critically evaluated and compared with the legislation proposed by the Department of Trade and Industry. The Traditional Knowledge protection mechanisms for Traditional Knowledge which currently exist in Australia will also be considered. This paper will conclude by arguing that the introduction of legislation to protect Traditional Knowledge should be welcomed, but that the preferred legislation is that proposed by Dean.

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Abbreviations and Acronyms

1. AICRPE – All India Coordinated Research Project on Ethnobiology
2. AIPPI – International Association for the Protection of Intellectual Property
3. ARIPO – African Regional Intellectual Property Organisation
4. CBD – Convention on Biological Diversity
5. CIP – Chair of Intellectual Property Law
6. CIPC – Companies and Intellectual Property Commission
7. FAO – Food and Agriculture Organization
8. GI – Geographical indications
9. GR – Genetic resources
10. ICESCR – International Covenant on Economic, Social and Cultural Rights
11. ITPGRFA – International Treaty on Plant Genetic Resources for Food and Agriculture
12. LSSA – Law Society of South Africa
13. TCE – Traditional cultural expressions
14. TK – Traditional Knowledge
15. TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights
16. UDHR – Universal Declaration of Human Rights
17. UPOV – International Union for the Protection of New Varieties of Plants
18. USPTO – United States Patent and Trademark Office
19. WHO – World Health Organization
20. WIPO – World Intellectual Property Organisation
21. WTO – World Trade Organisation

1. INTRODUCTION

The role of Traditional Knowledge and how it should be protected is an important issue which is currently of concern throughout the world.

Mugabe describes Traditional Knowledge as being the totality of all knowledge and practices which are used in socio-economic and ecological aspects of life.¹ Such knowledge is usually the collective property of a particular community and is based on past experiences and observations.² It is these members of a particular society that contribute to it over time, and as such, adapting it (as it becomes necessary) over time.³ This knowledge is passed from generation to generation.

Mukuka is of the view that the rapid advancement of scientific knowledge over the last 50 years or so has brought about major changes within society because through new international regimes, knowledge has now become a valuable commodity that can be sold and bought.⁴ As a result, the worlds of Indigenous and Western Knowledge are constantly in contact and conflict, resulting in the clash of cultures.⁵ This is due largely to the exploitation of Traditional Knowledge by the western societies.⁶ Therefore, the need for the protection of Traditional knowledge has become more evident within the recent years.

Andanda states that protecting Traditional Knowledge through the Intellectual Property regime carries out the essential function of preventing third parties from using the knowledge inappropriately.⁷ However, such Intellectual Property regimes are not only inaccessible to most Traditional Knowledge holders, but also do not guarantee the preservation or safeguarding of the knowledge.⁸ Therefore, he emphasises the need to strike a balance between protecting Traditional Knowledge through the Intellectual Property regime whilst ensuring cultural preservation coupled with access to the knowledge.⁹

¹ J Mugabe 'Intellectual Property Protection And Traditional Knowledge: An Exploration In International Policy Discourse' 2008 <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/Mugabe.pdf> 9 September 2009 3 (Accessed 17 July 2013).

² Ibid.

³ Ibid.

⁴ G S Mukuka *Reap What You Have Not Sown: Indigenous Knowledge Systems And Intellectual Property Laws In South Africa* Pretoria University Law Press (PULP) www.pulp.up.ac.za 2010 15 (Accessed 26 February 2015).

⁵ Ibid.

⁶ Ibid.

⁷ P Andanda 'Striking A Balance Between Intellectual Property Protection Of Traditional Knowledge, Cultural Preservation And Access To Knowledge' *Journal of Intellectual Property Rights* vol 17 November 2012 547.

⁸ Ibid.

⁹ Ibid.

The World Intellectual Property Organisation (WIPO) had raised two related concerns regarding the protection of Traditional Knowledge through the Intellectual Property regime. Firstly, the availability of Intellectual Property protection for Traditional Knowledge holders and secondly, the acquisition by other persons than the Traditional Knowledge holders of Intellectual Property Rights over Traditional Knowledge based creations and innovations.¹⁰

Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets out conditions under which certain biological materials or intellectual innovations may be excluded from patenting.¹¹ The Article also contains a requirement that Article 27 is to be reviewed. The Doha Declaration¹² also expanded on the need to review Article 27 and the rest of the TRIPS Agreement, to include the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD)¹³ and the protection of Traditional Knowledge and folklore.¹⁴

The issue of Traditional Knowledge and how it should be protected is a matter of concern for the South African government as well. As a result, the Department of Trade and Industry prepared a policy framework¹⁵ on the issue and also drafted the Intellectual Property Law Amendment Bill (which was enacted in December 2013).¹⁶ Professor Owen Dean, who is regarded as the “guru” of Intellectual Property law in South Africa has also drafted the Protection of Traditional Knowledge Bill in response to the difficulties of protecting Traditional Knowledge.¹⁷

Dean has severely criticised the Intellectual Property Laws Amendment Bill¹⁸ (hereafter referred to as the Government's Bill) which seeks to introduce a special form of protection for Traditional Knowledge into each of the Trade Marks, Copyright, Designs and Performance Protection

¹⁰ WIPO, Intergovernmental Committee on Intellectual Property & Genetic Resources, Traditional Knowledge and Folklore, Report, First Session (WIPO/GRTKF/IC/1/3 16 March 2001 547-548 (Accessed 17 October 2014).

¹¹ Article 27.3(b) of the TRIPS Agreement 1994 www.wto.org.za (Accessed 19 November 2014).

¹² Paragraph 19 of the Doha Declaration 2001 www.wto.org.za (Accessed 19 November 2014).

¹³ Convention on Biological Diversity 1992 www.wto.org.za (Accessed 19 November 2014).

¹⁴ World Trade Organisation website www.wto.org.za (Accessed 19 November 2014).

¹⁵ The Department of Trade & Industry “The Protection Of Indigenous Knowledge Through The Intellectual Property System – A Policy Framework” ip-unit.org/wp-content/uploads/2013/09/DRAFT-IP-POLICY.pdf 2004 (Accessed on 17 October 2014).

¹⁶ Portfolio Committee on Trade & Industry (National Assembly) ‘The Intellectual Property Laws Amendment Bill’ Doc: B 8B-2010 Creda Communications www.pmg.org.za 2010 (Accessed 17 October 2014); Intellectual Property Laws Amendment Act No. 28 of 2013.

¹⁷ O H Dean ‘The Protection Of Traditional Knowledge Bill’ Doc:10D2 blogs.sun.ac.za (Accessed 17 October 2014).

¹⁸ Supra (note 16 above).

Acts.¹⁹ Dean is of the view that if some form of special protection for Traditional Knowledge is required, this should be provided in a *sui generis* statute which is customised to meet the requirements as well as characteristics of the subject matter to be protected.²⁰ He further states that the protection which the Department of Trade and Industry is seeking to achieve cannot be achieved by amending the existing Intellectual Property statutes, without doing serious damage to the basic doctrine of such statutes. This is because specialised protection for Traditional Knowledge is not compatible with the fundamental principles of Intellectual Property law as embodied in such statutes. As a result, the desired objective, which is the protection of Traditional Knowledge, cannot be achieved.²¹

Dean is of the opinion that the Government's Bill is extremely poor legislation and is indeed practically "unworkable".²² One of his criticisms is that he does not believe that any traditional work can meet the requirement of "originality" for copyright and consequently that copyright can subsist in any such work.²³

Despite these criticisms, there is a great deal of support that Traditional Knowledge should be protected. However, this should be done through a *sui generis* statute. It is argued that a *sui generis* statute must be drafted specifically to meet the special requirements of Traditional Knowledge and that the Intellectual Property statutes which are currently in place should not be "adulterated".²⁴

However, the Portfolio Committee still maintains that the Government's Bill has been appropriately passed.²⁵ It raises various arguments, which will be explored later in this paper, as to why it believes that the Government's Bill is in fact effective and sufficient for the protection of Traditional Knowledge. One of these arguments is that the Committee believes that *sui generis* protection for Traditional Knowledge is not appropriate because it still would not prevent "poaching" of Traditional Knowledge by means of the existing Intellectual Property system.²⁶

¹⁹ O H Dean 'Breaking With Tradition' <http://blogs.sun.ac.za> 30 November 2012 (Accessed 17 July 2013).

²⁰ Ibid.

²¹ Ibid.

²² O H Dean 'Golden Oldies? – Gallo Music v Sting' <http://blogs.sun.ac.za> 18 May 2012 4 (Accessed 17 July 2013).

²³ Ibid.

²⁴ O H Dean 'Inside Views: From South Africa – Keeping Traditional Knowledge Traditional' www.ip-watch.org 7 December 2012 1 (Accessed 17 July 2013).

²⁵ The Portfolio Committee on Trade and Industry 'Report Of The Portfolio Committee On Trade And Industry On The Intellectual Property Laws Amendment Bill, dated 6 March 2013' <http://blogs.sun.ac.za> 6 March 2013 (Accessed 19 November 2013).

²⁶ Ibid.

The Government's Bill has moved forward and was assented to by the President as the Intellectual Property Laws Amendment Act No. 28 of 2013 and published in the Government Gazette on 10 December 2013.²⁷ The Act is not yet in effect and will only come into effect on a date to be fixed by the President.²⁸

The new *sui generis* Protection of Traditional Knowledge Bill²⁹ (hereafter referred to as the Wilmot Bill), which was drafted by the current Stellenbosch Chair of Intellectual Property Law (CIP) Professor Owen Dean, was tabled in Parliament by Dr. Wilmot James early in 2013.³⁰ The new Bill, if it becomes law, is said to introduce a pioneering approach to the protection of indigenous works in a way that benefits South Africa's status as a leader of the international Intellectual Property community.³¹ Further, the Wilmot Bill is intended to establish a Traditional Knowledge system that will be able to stand firmly on its own, unrestricted by the interference from its 'ill – fitting cousins', namely the Intellectual Property statutes that the Act drafted by the Department of Trade and Industry amends for this purpose.³²

The Wilmot Bill, if passed, is believed to be capable of establishing a specially made Traditional Knowledge system, customized to the unique and widely divergent demographic of the South African population and capable of actually protecting Traditional Knowledge and financially benefitting the indigenous communities from whence it hails.³³ In this regard, it needs to be noted that the Government's Act was and is still met with the most serious objection possible to its proposed legislation – namely that the foremost Intellectual Property practitioners in South Africa have found it entirely impracticable and have resolved to advise their clients to ignore it (if it is to become law) and, where necessary, bypass its limping application with the law of contract.³⁴

Dean points out that there are various views on the protection of Traditional Knowledge. He refers to what he describes as the "left wing" which consists of those who are of the view that the existing Intellectual Property laws give adequate protection, to the degree necessary, to

²⁷ Spoor & Fisher 'Intellectual Property Laws Amendment Act, 28 of 2013 Published' www.polity.org.za 12 December 2013 (Accessed 18 November 2014).

²⁸ *Ibid.*

²⁹ The Department of Trade And Industry 'A Policy Framework'.

³⁰ C Jooste 'Sui Generis Protection Of Traditional Knowledge Bill Published In The Gazette' www.polity.org.za 10 April 2013 (Accessed 17 July 2013).

³¹ *Ibid.*

³² *Ibid.*

³³ Dean 'Inside Views' 1.

³⁴ *Ibid.*

Traditional Knowledge and therefore feel that no special protection is required.³⁵ Dean states that in the centre, there are those who hold the view that the existing laws are adequate, but provision can and should be made to ensure that where rights are claimed in property by a third party (for example the registration of a patent), the rights of traditional communities to continue using their Traditional Knowledge undisturbed should be entrenched. This is called “defensive protection”.³⁶ He then refers to what he calls the “right wing”, consisting of those who believe that some form of special protection for Traditional Knowledge, so called “positive protection”, may be appropriate but that such protection should be in customised *sui generis* legislation.³⁷ Lastly, he explains the so called far “right wing” which includes those who favour amending existing Intellectual Property laws so as to allow special protection for Traditional Knowledge.³⁸

The aim of this paper is to consider the debate amongst these various views. In the process, I will define Traditional Knowledge and provide some examples. I will then provide and discuss various reasons which explain why Traditional Knowledge should be protected. Then I will proceed by illustrating how Traditional Knowledge should be protected by examining and evaluating whether Intellectual Property laws, as they currently stand, protect Traditional Knowledge and then critically evaluate the proposed new law which the legislature is intending to introduce in order to protect Traditional Knowledge. In addition, as explained above, Professor Owen Dean, who is a leading Intellectual Property lawyer and academic in South Africa, has proposed his own legislation. The legislation proposed by Dean will be critically evaluated and compared with the legislation proposed by the Department of Trade and Industry. The Traditional Knowledge protection mechanisms for Traditional Knowledge which currently exist in Australia will also be considered. This paper will conclude by arguing that the introduction of legislation to protect Traditional Knowledge should be welcomed, but that the preferred legislation is that proposed by Dean in the Wilmot Bill.

2. DEFINING TRADITIONAL KNOWLEDGE

It is difficult to define Indigenous and Traditional Knowledge because they encompass many different things and have problematic histories. Words such as Indigenous Knowledge; local;

³⁵ Dean ‘Breaking With Tradition’.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

community; traditional; cultural heritage; public; culture/cultural and property are examples of words that contribute to the difficulties of defining Traditional Knowledge.³⁹

Oguamanam points out that it is because of the difficulties associated with defining Traditional Knowledge that most texts which deal with Traditional Knowledge devote a vast amount of effort to the clarification of terms.⁴⁰ He states that the clarification of the terms is vital as not only does it contribute towards analytical integrity, but more importantly it prevents misleading assumptions.⁴¹

The term "indigenous" serves as an example of a term that makes it difficult to define Traditional Knowledge due to its political connotations.⁴² Oguamanam suggests that political issues exist with the definition of this term both because of the history that relates to identifying and classifying who an indigenous person is and also due to the changing politics where new indigenous alliances have been formed and negotiated.⁴³ He also suggests that the definitional problems with such terms inevitably affect the classification and identification of the types of knowledge that are recognised and discussed in the world.⁴⁴ This has been, and still remains, a central problem for Intellectual Property Law. However, a full discussion of this problem is beyond the scope of this dissertation.

WIPO has offered a range of characteristics that are set to encompass most of what indigenous people and other experts describe as indigenous/traditional or local knowledge. The categories that have been developed by WIPO are now being used in international meetings.⁴⁵ Examples of such categories are genetic resources (GR); Traditional Knowledge (TK) and traditional cultural expressions (TCE/folklore).⁴⁶

The WIPO report on fact finding missions on Intellectual Property and Traditional Knowledge (1998 – 1999)⁴⁷ defines Traditional Knowledge as being, "tradition-based literary, artistic or

³⁹ J E Anderson 'Indigenous/Traditional Knowledge & Intellectual Property' Issues Paper 2010 Centre for the Study of the Public Domain Duke University School of Law <http://web.law.duke.edu> (Accessed on 18 November 2013).

⁴⁰ C Oguamanam 'Local Knowledge As Trapped Knowledge: Intellectual Property, Culture, Power And Politics' 11 *Journal of World Intellectual Property* 29 2008 29,35.

⁴¹ Ibid.

⁴² R A Williams, Jr 'Encounters On The Frontiers Of International Human Rights Law: Redefining The Terms of Indigenous Peoples' Survival In The World' *Duke Law Journal* 1990 660.

⁴³ Supra (note 40 above).

⁴⁴ Dean 'Inside Views' 1.

⁴⁵ Dean 'Breaking With Tradition'.

⁴⁶ Ibid.

⁴⁷ 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" International Bureau www.wipo.int 3 May 1999 (Accessed 20 November 2013).

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."⁴⁸

The words "tradition-based" is said to refer to the knowledge systems, creations, innovations and cultural expressions which have been transmitted from generation to generation within a society.⁴⁹ These are generally seen as relating to a particular people or territory and are also constantly evolving. This evolution usually occurs in response to a changing environment.⁵⁰

Dutfield defines Traditional Knowledge as being, "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."⁵¹

Munzer and Raustiala believe that there is a broader description that applies to Traditional Knowledge. They state that Traditional Knowledge fully and carefully defined is the "understanding or skill, which is typically possessed by indigenous peoples and whose existence typically predates colonial contact (typically with the West), that relates to medical remedies, plant and animal products, technologies, and cultural expressions."⁵² They also go on to define the term "cultural expressions" as including religious rituals, sacred objects, rites of passage, songs, dances, myths, stories, and folklore generally.⁵³ These forms of knowledge and cultural expressions are said to be "rarely frozen in time as they generally evolve over decades and centuries."⁵⁴

Blanco and Razzaque advise that in order to establish the different aspects of Traditional Knowledge, it is important to distinguish between Traditional Knowledge and Indigenous Knowledge. Traditional Knowledge is said to be more of a "broad term referring to knowledge systems, encompassing a wide variety of areas, held by traditional groups or communities or to

⁴⁸ Van der Merwe (ed) *Law Of Intellectual Property In South Africa* Lexis Nexis 2011 367.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ G Dutfield 'Protecting Traditional Knowledge And Folklore' International Centre for Trade and Sustainable Development (ICTSD) June 2003 20.

⁵² S Munzer & K Raustiala 'The Uneasy Case For Intellectual Property Rights In Traditional Knowledge' *Gradzo Arts And Entertainment* 2009 48.

⁵³ Ibid.

⁵⁴ Ibid.

knowledge acquired in a non-systemic way."⁵⁵ Such knowledge is drawn from global experience and combines elements such as western scientific discoveries, economic preferences as well as philosophies with those of other widespread cultures.⁵⁶

The difference between Traditional Knowledge and Indigenous Knowledge is visible in Mugabe's definition of the two types of knowledge. Mugabe defines Indigenous Knowledge as, "knowledge that is held and used by a people who identify themselves as indigenous of a place based on a combination of cultural distinctiveness and prior territorial occupancy relative to a more recently-arrived population with its own distinct and subsequently dominant culture."⁵⁷ He then goes on to define Traditional Knowledge as, "the totality of all knowledge and practices, whether explicit or implicit."⁵⁸ He states that this knowledge is established on past experiences and observation.⁵⁹

The above mentioned definitions clearly illustrate that there is a slight difference between Indigenous Knowledge and Traditional Knowledge. Categories of Traditional Knowledge include: agricultural knowledge, scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; bio-diversity related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and movable, cultural properties.⁶⁰ When it comes to medicinal knowledge, examples of Traditional Knowledge would also include knowledge about the use of specific plants and/or parts thereof, identification of medicinal properties in plants, and harvesting practices.⁶¹ For example, the weeping wattle tree which has been said to be used for cleansing bad spells in a village or yard; Aloe which can be used for blood cleansing and for the treatment of burns as well as the use of Buffalo-thorn tree.⁶² Indigenous Knowledge therefore refers to the "Traditional Knowledge of indigenous peoples".⁶³ From this discussion it can be seen that Indigenous Knowledge is a category of Traditional Knowledge.

⁵⁵ E Blanco & J Razzaque *Globalisation And Natural Resources Law: Challenges, Key Issues And Perspectives* Edward Elgar 2011 379.

⁵⁶ J Mugabe, P Kameri-Mbote & D Mutta 'Traditional Knowledge, Generic Resources And Intellectual Property Protection: Towards A New International Regime' (2001 - 2005) <http://www.wielrc.org/content/w0105.pdf> 10 October 2008 (Accessed 17 July 2013).

⁵⁷ Mugabe 'Intellectual Property Protection' 5,6.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ WIPO Report (note 10 above).

⁶¹ Williams, Jr 'Encounters On The Frontiers' 660.

⁶² *Ibid.*

⁶³ *Ibid.*

Fien describes Indigenous Knowledge as, "the local knowledge that is unique to a culture or society. Other names for it include: local knowledge, folk knowledge, people's knowledge, traditional wisdom or traditional science."⁶⁴ This knowledge is deemed as having been passed from generation to generation, usually by word of mouth and cultural rituals, and has been the basis for agriculture, food preparation, health care, education, conservation and the wide range of other activities that sustain societies in many parts of the world.⁶⁵ Mearns, Du Toit and Mukuka support the above definition given by Fien, adding that, 'the term Indigenous Knowledge...refers to the knowledge held by the indigenous peoples'.⁶⁶

Arnold takes the definition of Indigenous Knowledge further with his description of indigenous people. He describes indigenous people as those whom in independent countries, are regarded as indigenous because of their descent from the populations which inhabited the country, or geographical region to which the country belongs at the time of conquest or colonisation or the establishment of present state boundaries.⁶⁷ He points out that irrespective of their legal status, these people still retain some or all of their social, economic, cultural and political institutions.⁶⁸

According to Von Lewinski, Indigenous Knowledge incorporates indigenous names, designations as well as folklore.⁶⁹ Makwaeba adds to this, stating that Indigenous Knowledge includes intangible African heritage that are "natural resources and cultural practices."⁷⁰ Some of such cultural practices are said to be folklore that comprises of myths, beliefs, superstition, oral history, totem, "taboos and rituals related to species".⁷¹

From all of the above, it can be seen that Traditional Knowledge is a term given to beliefs, knowledge, practices, innovations, arts, spirituality, and other forms of cultural experience and expression that belong to indigenous communities worldwide.⁷² Unlike the western custom of

⁶⁴ J Fien 'Curriculum Themes: Indigenous Knowledge And Sustainability' www.unesco.org 2006 (Accessed 17 July 2013).

⁶⁵ Ibid.

⁶⁶ M A Mearns, A S A Du Toit & G S Mukuka 'Conservation Of Indigenous Knowledge At Cultural Villages: An Exploratory Study' *Mousaion* 2006 24(1): 23 – 50 (Accessed 17 July 2013).

⁶⁷ B Arnold 'Intellectual Property Guide: Indigenous Cultural Expression, Knowledge And Copyright' <http://www.caslon.com.au/ipguide14.htm>. 2008 (Accessed 17 July 2013).

⁶⁸ Ibid.

⁶⁹ S Von Lewinski 'Introduction In Von Lewinski, S. (ed) *Indigenous Heritage And Intellectual Property: Genetic Resources, Traditional Knowledge And Folklore*' The Hague: Kluwer Law International 2004 pp. x – xi (Accessed 17 July 2013).

⁷⁰ I M Makwaeba 'The Use Of Traditional Knowledge In The South African National Parks Imbewu Youth Programme: Planting A Seed Of Environmental Awareness' <http://www.sanparks.org> (Accessed 17 July 2013).

⁷¹ Ibid.

⁷² T Simeone 'Indigenous Traditional Knowledge And Intellectual Property Rights' Political and Social Affairs Division, Government of Canada, Ottawa: Library of Parliament Publications www.parl.gc.ca 2004 1 (Accessed 20 October 2014).

distributing knowledge through publication, Traditional Knowledge systems exist mainly in the forms of songs, proverbs, stories, folklore, community laws, common or collective property and inventions, practices as well as rituals.⁷³ Such knowledge is transmitted through specific cultural mechanisms such as the above mentioned, and most often through designated community knowledge holders, such as elders.⁷⁴ This knowledge is therefore considered collective to the community, not private to an individual(s).⁷⁵

Understanding what the term Traditional Knowledge encompasses is very important to the discussion of how such knowledge should be protected. However, before I proceed to discuss the protection of Traditional Knowledge I will first discuss whether or not Traditional Knowledge should in fact be protected.

3. THE RATIONALE FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

Simoene explains that the reasons why Traditional Knowledge should be protected "centres on questions of fundamental justice and the ability to protect, preserve and control one's cultural heritage."⁷⁶ Further, he states that the benefits of protecting Traditional Knowledge are: "promoting respect for Traditional Knowledge; deterring the misappropriation of Traditional Knowledge; empowering Traditional Knowledge holders who are typically marginalized indigenous people and protecting tradition-based innovation."⁷⁷

3.1 Equity and justice

One of the main objectives for the protection of Traditional Knowledge is to obtain recognition and some compensation for the commercial use of such knowledge outside the community which created it.⁷⁸ This is achieved either by stopping unauthorized parties from using that knowledge thus ensuring that indigenous communities are remunerated or granted some other benefit for the use of such knowledge.⁷⁹ Masango explains that drug industries benefit financially when they exploit the medicinal properties in plants used by indigenous traditional

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Simeone 'Indigenous Traditional Knowledge' 2.

⁷⁷ Munzer & Raustiala 'The Uneasy Case' 39.

⁷⁸ C M Correa 'Protection And Promotion Of Traditional Medicine – Implications For Public Health In Developing Countries' University of Buenos Aires <http://apps.who.int> 2002 21 (Accessed 17 October 2014).

⁷⁹ Ibid.

people to treat certain illnesses such as cancer but they do not acknowledge where the knowledge from such plants comes from.⁸⁰

It is worth noting that even though claims for justice are well founded in the case of misappropriation, it is not necessarily correct to assume that indigenous communities regard remuneration as the most adequate means to provide relief from prejudices suffered by them in such instances.⁸¹ In many instances, it is suggested that they may prefer a moral recognition of their contribution to the development of the knowledge.⁸² Regardless of whether or not communities desire to be compensated for their knowledge, it is only right that they should receive recognition for their input.

3.2 Preservation of Traditional Knowledge

The preservation of Traditional Knowledge is another reason why it is necessary to protect such knowledge. When Traditional Knowledge is preserved, uses which erode Traditional Knowledge are avoided, problems which negatively affect the life or culture of the communities that hold the knowledge are addressed and Traditional Knowledge is properly documented.⁸³

The conservation of natural resources is also crucial to an ecosystem capable of supporting the continued practice of Traditional Knowledge.⁸⁴ For example, crucial to the preservation of traditional medicines are direct measures to prevent the exploitation of medicinal plants as well as the development of cultivation techniques which will encourage people to cultivate the required plants.⁸⁵

Cultural erosion is regarded as possibly being a huge factor contributing to the loss of Traditional Knowledge.⁸⁶ This is due to the fact that as the youth relocate to urban areas, education is also de-emphasizing the value of traditional culture and knowledge, resulting in Traditional Knowledge losing its "heirs".⁸⁷

⁸⁰ C A Masango 'Indigenous Traditional Knowledge Protection: Prospects In South Africa's Intellectual Property Framework?' <http://sajlis.journals.ac.za> 2010 74 (Accessed 17 October 2014).

⁸¹ Correa 'Protection And Promotion Of Traditional Medicine' 23.

⁸² Ibid.

⁸³ Correa 'Protection And Promotion Of Traditional Medicine' 25.

⁸⁴ Ibid.

⁸⁵ Correa 'Protection And Promotion Of Traditional Medicine' 26.

⁸⁶ Ibid.

⁸⁷ Ibid.

The documentation of Traditional Knowledge is seen as an obvious way to preserve it. An example of a country who favours such an approach is India. India launched an "All India Coordinated Research Project on Ethnobiology" (AICRPE)⁸⁸ under the Man and Biosphere Program.⁸⁹ The overall objective of such a project was to make an in-depth study and analysis of the various facets of the life, cultures, tradition and knowledge system of the tribal communities in India.⁹⁰

Correa suggests that the preservation of Traditional Knowledge is important as it leads traditional communities to a better understanding of and pride in their own culture and beliefs relating to ownership and distribution of their Traditional Knowledge.⁹¹ He explains that communities may then be more inclined to preserve and transmit their Traditional Knowledge to future generations if their rights are respected.⁹²

The preservation of Traditional Knowledge is dependent on certain conditions such as the continuous interaction of the communities with the natural environment in which their cultures and lifestyles have developed.⁹³ This is because Traditional Knowledge is considered as unique to a particular culture or society and is developed as a result of the co-evolution as well as co-existence of both the indigenous cultures and their traditional practices of resource use as well as the management of the ecosystem.⁹⁴

The intrinsic value of Traditional knowledge reflects the culture of the indigenous communities.⁹⁵ As previously stated, in many instances small communities or tribes are more concerned with protecting their cultural integrity which is threatened when Traditional Knowledge is not protected, then they are about monetary gain.⁹⁶ Therefore when Traditional Knowledge is recognised and protected it is then also preserved for future generations.

⁸⁸ All India Coordinated Research Project on Ethnobiology 1982 www.worldcat.org (Accessed 20 November 2014).

⁸⁹ UNESCO Man and the Biosphere Programme (MAB) 1971 www.unesco.org (Accessed 20 November 2014).

⁹⁰ *Ibid.*

⁹¹ Correa 'Protection And Promotion Of Traditional Medicine' 29.

⁹² Correa 'Protection And Promotion Of Traditional Medicine' 30.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Law Teacher, UK 'Intrinsic Value Of Traditional Knowledge' www.lawteacher.net November 2013 (Accessed 23 June 2014).

⁹⁶ Correa 'Protection And Promotion Of Traditional Medicine' 23.

3.3 Preventing the misappropriation of Traditional Knowledge

An issue which is of major concern to those who recognise the importance of Traditional Knowledge is the misappropriation of Traditional Knowledge by those who have no connection to indigenous communities. What is particularly concerning is the fact that they use the current system of Intellectual Property law to misappropriate Traditional Knowledge.⁹⁷ Simeone points out that, "Traditional Knowledge holders are often disadvantaged economically and socially and the country concerned is usually in an inferior economic position."⁹⁸ Pharmaceutical and Agricultural industries are major contributors to the economy and if there is no protection of Traditional Knowledge, the locals and the country are then the major losers.⁹⁹ This is quite an unfair position for the Traditional Knowledge holder as they do not get the respect and recognition they deserve for the knowledge.¹⁰⁰

Researchers such as Simoene point out that developed countries are often not in favour of the protection of Traditional Knowledge.¹⁰¹ This attitude might be due to the fact that multinational pharmaceutical companies from such countries are the best "poachers" of Traditional Knowledge from their developing counterparts.¹⁰² A key concern shared by indigenous peoples worldwide is that the present Intellectual Property rights regime favours multinationals and other non-indigenous interests.¹⁰³

Masango adds to this, explaining that Traditional Knowledge needs to be protected in order to prevent the knowledge from being exploited by appropriation for financial gains "by third parties".¹⁰⁴ An example of where Traditional Knowledge has been misappropriated is where patents have been granted to large Pharmaceutical companies for medicines which are based on traditional methods for treating diseases.¹⁰⁵ The reaction to such patents being granted shows the difference in approach between western culture and indigenous communities.¹⁰⁶

⁹⁷ Simeone 'Indigenous Traditional Knowledge' 5.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Law Teacher, UK 'Intrinsic Value Of Traditional Knowledge'.

¹⁰¹ Simeone 'Indigenous Traditional Knowledge' 5.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Masango 'Indigenous Traditional Knowledge' 75.

¹⁰⁵ Correa 'Protection And Promotion Of Traditional Medicine' 31.

¹⁰⁶ Correa 'Protection And Promotion Of Traditional Medicine' 32.

Masango states that Indigenous Traditional Knowledge is vulnerable both because it is exploitable and has been exploited.¹⁰⁷ He is also of the view that this is because the modern Intellectual Property law regimes are based on notions of property ownership which are detrimental to indigenous peoples.¹⁰⁸ He explains that the liberal Eurocentric discourse on which these laws are based, hold that individuals have a right to private property.¹⁰⁹ He emphasizes that the purpose of recognising private propriety rights is to enable individuals to exploit products of their intellect.¹¹⁰

In terms of western culture, any information that is not covered by a specific form of Intellectual Property rights, such as a patent, is considered a *res nullius* and belongs to the public domain.¹¹¹ The concept of the public domain does not take into consideration the fact that knowledge may be subject to special rules of appropriation under customary laws, which sometimes acknowledge different forms of ownership or possession.¹¹²

Certain communities view Traditional Knowledge as an integral part of their natural environment, religious systems as well as worldview.¹¹³ Even where there is a notion of property within the worldviews of indigenous communities, certain peoples do not view Traditional Knowledge as a subject over which property rights can be held.¹¹⁴ In such instances, it can be seen that the western concept of Intellectual Property rights may actually violate the communities' value systems, which in turn explains the communities' outrage when it comes to certain patents being granted over Traditional Knowledge.¹¹⁵

Indigenous people believe that Traditional Knowledge should be available to the public and are therefore not in support of Intellectual Property rights as they put a burden on indigenous people to prove that their knowledge is in the public domain, rather than on patent offices to properly establish the lack of prior art.¹¹⁶ In this regard, Correa points out that the patent system is intended to reward new contributions to the state of the art and is not intended to permit the

¹⁰⁷ Supra (note 104 above).

¹⁰⁸ J Githaiga 'Intellectual Property Law And The Protection Of Indigenous Folklore And Knowledge' *Murdoch University Electronic Journal of Law* June www.murdoch.edu.au 2008 vol 5 no. 2 para 4 (Accessed 17 October 2014).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Correa 'Protection And Promotion Of Traditional Medicine' 32.

¹¹² Ibid.

¹¹³ Correa 'Protection And Promotion Of Traditional Medicine' 33.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Correa 'Protection And Promotion of Traditional Medicine' 34.

appropriation of pre-existing knowledge by certain individuals.¹¹⁷ He suggests that a possible solution to the problem would be to gather and publish data on disclosed Traditional Knowledge to prevent the granting of Intellectual Property rights over knowledge which is already in the public domain.¹¹⁸ For example, what was done in India and Venezuela.

There have also been cases where there is merely a disclosure, rather than the misappropriation of Traditional Knowledge through the publication of such without the consent of the Traditional Knowledge holders, which then inadvertently puts this knowledge into the public domain.¹¹⁹ In recent years, there has been a growing trend of surveying medicinal plants, conducting screenings of their chemical components, and developing inventories of their traditional use in healthcare.¹²⁰

Correa states that those who oppose Intellectual Property rights being granted over Traditional Knowledge accept the fact that publication will prevent appropriation.¹²¹ However, questions regarding the legitimacy of the publications without the consent of the Traditional Knowledge holders would arise in such instances.¹²² Masango agrees, adding that such knowledge needs to be protected because Western science makes a lot of money from medicinal plants “without the consent of the possessors of the resources and knowledge.”¹²³ Correa argues that publication without the said consent denies an important component of the right to self-determination. He adds that unlike the possible invalidation of a wrongly granted patent, once publication is made, there is no way of reversing or remedying the situation, unless a patent is promptly applied for by the original holders of the knowledge and fraud in the publication can be proved.¹²⁴ He argues that this is too heavy a burden for most Traditional Knowledge holders, especially those in developing countries.¹²⁵ This is because the Traditional Knowledge holders within such communities do not know their Intellectual Property rights. Therefore, the lack of knowledge and access to the Intellectual Property regime is a contributing factor to the need for reform of the current regime in order to avoid misappropriation of Traditional Knowledge.¹²⁶

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Correa ‘Protection And Promotion Of Traditional Medicine’ 38.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Masango ‘Indigenous Traditional Knowledge’ 75.

¹²⁴ Correa ‘Protection And Promotion Of Traditional Medicine’ 39.

¹²⁵ Ibid.

¹²⁶ Law Teacher, UK ‘Intrinsic Value Of Traditional Knowledge’.

Traditional Knowledge holders should not necessarily be seen as expecting remuneration for the knowledge that they supply.¹²⁷ While western culture holds that the act of innovation or creation is driven largely by financial gain, indigenous communities generally believe that knowledge is socially created, and thus needs to be used for the benefit of the community without expecting any remuneration.¹²⁸ In this regard, Hansen and van Fleet highlight the fact that Intellectual Property rights are granted to an individual to reward their creativity whereas indigenous communities hold a certain view that an entire community should receive recognition as "a means of maintaining and developing group identity as well as group survival, rather than promoting or encouraging individual economic gain."¹²⁹ However, they realise that often Traditional Knowledge does not meet the legal requirements for protection as Intellectual Property.¹³⁰ Also, the "prohibitive costs of registering and defending a patent or other Intellectual Property right may curtail effective protection."¹³¹

3.4 Promoting self-determination and development

The right to self-determination recognizes the right of people to define their own way of life, in all its aspects.¹³² Such a right is seen by indigenous scholars, leaders and communities as very important for the advancement of the interests of indigenous people.¹³³

Some scholars are of the view that when Traditional Knowledge is protected, indigenous communities have control over their relations with the rest of their community.¹³⁴ Such control is considered to possibly be an element of self-determination.¹³⁵ The protection of Traditional Knowledge is consistent with the spirit of the right to self-determination as well as other specific rights in international law.¹³⁶

¹²⁷ Correa 'Protection And Promotion Of Traditional Medicine' 22.

¹²⁸ Ibid.

¹²⁹ 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* AAAS 2003 4.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Correa 'Protection And Promotion Of Traditional Medicine' 40.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Correa 'Protection And Promotion Of Traditional Medicine' 41.

Another goal that has been suggested as a rationale for the protection of Traditional Knowledge is based on its potential contribution to economic development that would in particular benefit indigenous communities.¹³⁷

Brush argues that one clear advantage of recognising Traditional Knowledge as Intellectual Property is the economic gain that it brings to indigenous communities.¹³⁸ Further, Brush states that, "inestimable value of biological knowledge leads to the principle that such knowledge is a common heritage to be shared for the benefit of all humanity, rather than a monopoly for private gain."¹³⁹ He points out that, "the value of biological resources has grown because of a shrinking supply and an increased demand."¹⁴⁰ This increased value has thus created an opportunity for indigenous communities to gain financially from the use of their Traditional Knowledge. Brush asks "why indigenous people should continue to operate under the common heritage principle by providing their knowledge and resources as free goods?"¹⁴¹ He suggests that the granting of Intellectual Property rights will allow for compensation to indigenous communities by industrial users.¹⁴² He provides three possible approaches for such compensation. These are: (1) a top-down approach where international agencies as well as national agencies extend rights to indigenous groups; (2) a middle-ground approach where indigenous groups utilise existing Intellectual Property laws; and (3) a bottom-up approach where indigenous groups claim rights.¹⁴³

It has been said that that role of Intellectual Property rights as instruments to promote and support commercialization, and thereby ensure that there is economic development, is very different in the case of codified and non-codified Traditional Knowledge.¹⁴⁴ Therefore the commercial exploitation of, for example, traditional medicines has opened up important business opportunities for various countries both domestically as well as internationally.¹⁴⁵

Within the medical industry, there are now increased demands for safety, efficacy and quality control and therefore the necessary investments required in research development, plant

¹³⁷ Correa 'Protection And Promotion Of Traditional Medicine' 42.

¹³⁸ S Brush 'Indigenous Knowledge Of Biological Resources And Intellectual Property Rights: The Role Of Anthropology' *American Anthropologist New Series* www.unl.edu/rharms/courses/current/readings/Brush.pdf vol 95 no. 3 September 1993 653,657 (Accessed 17 October 2014).

¹³⁹ *Ibid.*

¹⁴⁰ Brush 'Indigenous Knowledge' 658.

¹⁴¹ *Ibid.*

¹⁴² Brush 'Indigenous Knowledge' 661.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

capacity and compliance with good manufacturing practices are greater.¹⁴⁶ These investments may be large in some cases, especially when it comes to the scientific validation of medicines, and may therefore pose a barrier to poor indigenous communities that are willing to commercialize their knowledge.¹⁴⁷

Correa states that it can also be argued that the mere availability of Intellectual Property rights protection could act as an incentive for indigenous communities to transmit their Traditional Knowledge to third parties, resulting in the possibility of commercial exploitation.¹⁴⁸ He suggests that such an argument needs to take into consideration the fact that Intellectual Property rights are an unfamiliar concept to indigenous communities and therefore it may be difficult to create trust on the basis of such an instrument, which is based on values which are not shared.¹⁴⁹

Instances may also arise where indigenous communities desire to not only gain Intellectual Property rights, but to also take on the commercialization of their Traditional Knowledge themselves, provided that they have the necessary capital and managerial capacity to do so.¹⁵⁰ Correa suggests that in such instances, the Intellectual Property rights may strengthen the communities' market position.¹⁵¹

Correa is of the view that countries who wish to encourage the availability of protection for the purpose of economic development more generally, should have the benefits arising from such activities fairly distributed.¹⁵² He states that through the common measures of fairness, some benefits arising from such protection should in some way be channelled back into the indigenous communities in which the Traditional Knowledge originated.¹⁵³

3.5 An example - the importance of traditional medicine in human healthcare

A good example demonstrating why Traditional Knowledge should be protected can be found in the case of the Pharmaceutical industry and traditional medicine. Traditional medicine plays an important role in healthcare in both developed and developing countries.¹⁵⁴ This is evident from

¹⁴⁶ Correa 'Protection And Promotion Of Traditional Medicine' 43.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Correa 'Protection And Promotion Of Traditional Medicine' 44.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Correa 'Protection And Promotion Of Traditional Medicine' 45.

¹⁵³ Ibid.

¹⁵⁴ Y Zhang 'United Nations Conference Of Trade And Development – Protecting And Promoting Traditional Knowledge, Systems, National Experiences And International Dimensions' United Nations Publication 2004 3.

the fact that due to the availability and affordability of traditional medicines and therapy systems, the medicines of developing countries provide healthcare to the vast majority of these countries' residents.¹⁵⁵ Masango agrees with this, and adds that Traditional Knowledge needs to be protected against financial exploitation by third parties because traditional medicine "plays an important role in developed countries, where the demand for "herbal medicines" is growing."¹⁵⁶

It is apparent that the twentieth century witnessed a revolution in human healthcare. There was a dramatic decline in the mortality rate and the increase in life expectancy. The eradication of smallpox is also one of the highlights of this success. This was largely due to scientific innovation leading to the development of new medicines.¹⁵⁷

Regardless of these successes, in 2002 it was estimated that over one-third of the world's population does not have regular access to affordable and essential drugs.¹⁵⁸ In the context of persisting poverty, marginalization and high prices generally charged for patented medicines, the relevance of traditional medicines in developing countries has increased.¹⁵⁹ This illustrates that modern medicine is therefore unlikely to be a realistic treatment option for a huge portion of the world's population.¹⁶⁰ However, traditional medicine on the other hand is widely available even in remote areas.¹⁶¹

For example, 70 per cent of India's population uses traditional Indian medicine.¹⁶² Also, in Africa the resolution on "Promoting the Role of Traditional Medicine in Health Systems: A Strategy for the African Region", adopted by the fiftieth meeting of the World Health Organization's (WHO's) Regional Committee for Africa in August 2000 states that about 80 per cent of Africa's population depends on traditional medicine for its healthcare needs.¹⁶³ Further, in the last decade alone, there has been a global surge in the use of complementary and alternative medicine in both developed and developing countries.¹⁶⁴

According to various government and non-government reports from various countries, the percentages of their populations which use complementary and alternative medicine is

¹⁵⁵ Ibid.

¹⁵⁶ Masango 'Indigenous Traditional Knowledge' 75.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Correa 'Protection And Promotion Of Traditional Medicine' 7.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² FRONTLINE/ World India: A Second Opinion: Ayurveda 101 / PBS www.pbs.org (Accessed on 28 November 2013).

¹⁶³ World Health Organization Regional Office for Africa 'Promoting The Role Of Traditional Medicine In Health Systems: A Strategy For The African Region' Report of the Regional Director AFR/RC50/9 2002.

¹⁶⁴ Supra (note 158 above).

increasing.¹⁶⁵ Various reasons have been given for this increase, including the affordability of treatment as well as changing needs and beliefs.¹⁶⁶ Today traditional medicine and complementary and alternative medicine plays an increasingly important role in reshaping the health sector of many countries.¹⁶⁷ This is evident from the fact that in the year 2000 the Secretariat of the CBD reported that the world market for herbal medicines, including herbal products and raw materials, was 60 billion United States dollars.¹⁶⁸ Therefore traditional medicines are considered a valuable source of products and treatments within western science.¹⁶⁹ Traditional medicine also provides ways for the development and commercialization of new pharmaceutical products.¹⁷⁰

3.6 International recognition of the importance of Traditional Knowledge

In this section, I have discussed the reasons why Traditional knowledge should be protected. In conclusion it must be pointed out that the importance of protecting and preserving Traditional Knowledge has been recognised internationally.¹⁷¹ International instruments which include the Universal Declaration of Human Rights (UDHR), the CBD, the draft United Nations Declaration on the Rights of Indigenous Peoples, the International Labour Organization Convention No. 168 as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) have recognised this necessity.¹⁷²

The Rio Declaration which is also known as Agenda 21 as well as the CBD emphasise the need for governments to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities" and encourage the right of traditional communities to share in the economic and social benefits "arising from the utilisation of such knowledge, innovations and practices."¹⁷³

Other United Nations agencies are also involved in addressing the protection of Traditional Knowledge under their existing Intellectual Property rights system.¹⁷⁴ WIPO is actually responsible for various activities promoting the protection of Indigenous Traditional Knowledge

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Estimates by the Secretariat of the Convention on Biological Diversity, 2000. See also World Health Organization (WHO) 2000a p.vi.

¹⁶⁹ Correa 'Protection And Promotion Of Traditional Medicine' 9.

¹⁷⁰ Ibid.

¹⁷¹ Correa 'Protection And Promotion Of Traditional Medicine' 30.

¹⁷² Simeone 'Indigenous Traditional Knowledge' 6.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

across the world. The organisation has in fact conducted a number of studies on the role the Intellectual Property system plays when it comes to protecting Traditional Knowledge.¹⁷⁵ In the year 2000, member states of the organisation established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. This committee acts as an international forum for debate and discussions concerning the interplay between Intellectual Property and Traditional Knowledge, genetic resources as well as cultural expressions (folklore).¹⁷⁶

It is clear, from the discussion above, that there are two main issues which arise when it comes to protecting Traditional Knowledge. The first issue is that indigenous communities need to protect their Traditional Knowledge so that they can benefit from that knowledge. Without, for example, registering a patent or trademark they cannot grant licenses to others in order to allow the usage of their Intellectual Property and hence they do not earn any money from their Intellectual Property. The second issue is that Traditional Knowledge needs to be protected so that other people from the outside do not claim that Intellectual Property and then earn money from that Intellectual Property without acknowledging who that Intellectual Property belongs to or without paying the previous owners for that Intellectual Property.

It is submitted that these two points are important points that need to be made throughout the paper. If we rely on the existing system to protect Intellectual Property then outsiders can claim Traditional Knowledge for themselves because this is in line with existing principles. For example, if you hear traditional stories, even as an outsider you can write those stories down and publish a book without acknowledging where you got the stories and you can claim copyright over the stories. Sometimes this may even mean that the indigenous community loses copyright over their own stories.

4 INTELLECTUAL PROPERTY LAW AND THE PROTECTION OF TRADITIONAL KNOWLEDGE

Having established that it is necessary to protect Traditional Knowledge, I will now move on to discuss an appropriate system for protecting such knowledge. It is important to note that the current system of Intellectual Property does provide some protection for Traditional Knowledge and so this will have to be discussed first. The purpose of this section is to basically outline the relevant laws. Shortcomings in these laws will also be discussed.

¹⁷⁵ WIPO www.wipo.org (Accessed 17 October 2014).

¹⁷⁶ WIPO Report (note 10 above).

The main areas of the law which are relevant to this discussion include: 1) the protection of undisclosed information/trade secrets; 2) patents; 3) copyrights; 4) trademarks; 5) geographical indications; 6) layout designs and industrial designs.

4.1 Trade secrets

4.1.1 Introduction

A trade secret is any information which is kept secret within an entity. Within the corporate industry, items or data such as customer lists, financial information, recipes for food or beverage products, technical subject matter of a patent, marketing procedures, or a professional questionnaire can be protected as a trade secret.¹⁷⁷ Trade secrets also protect any kind of undisclosed information. The objective here is to prevent information within the control of a person from being disclosed to, acquired by, or used by others without consent, in a way which is contrary to honest commercial practices.¹⁷⁸ As such, trade secret is a practice which is kept protected within a business or similar entity in order to give an advantage over competition.¹⁷⁹ Since the law relating to trade secrets falls under the common law, the reasonable person test is used to determine whether there has been any misuse of the information.¹⁸⁰

Knowledge which is limited to and secured by an unidentifiable number of people is subject to trade secret protection provided that there is a clear intention to treat it as a secret.¹⁸¹ Corporate trade secrets can be protected by agreements with either specific employees in a department, or the entire company may have knowledge of the confidential information.¹⁸²

¹⁷⁷ For a full discussion of the law relating to trade secrets see J Van Heerden-Neethling *Unlawful Competition* second edition Lexis Nexis 2008 213. S Ragavan 'Protection Of Traditional Knowledge' www.law.ou.edu 1999 24 (Accessed on 28 November 2013) discusses the position in Australian law. This is referred to because in Australia there has been extensive discussion about the protection of Traditional Knowledge through the use of the law relating to trade secrets, patents, copyright and trade marks. See also J E Anderson *Law Knowledge and Culture: The Production of Indigenous Knowledge in Intellectual Property Law* Edward Elgar 2009 chapter 3.

¹⁷⁸ Neethling *Unlawful Competition* 215.

¹⁷⁹ Simoene 'Indigenous Traditional Knowledge' 6.

¹⁸⁰ Correa 'Protection and Promotion of Traditional Medicine' 9.

¹⁸¹ Ragavan 'Protection Of Traditional Knowledge' 23.

¹⁸² *Ibid.*

4.1.2 Trade secrets and Traditional Knowledge

The ground for trade secret protection rests "on the commercial value of the matter to the claimant."¹⁸³ Trade secret has been used for years in order to protect Traditional Knowledge and is in fact the traditional means of passing down secret knowledge.¹⁸⁴ Certain recipes of popular products such as *Coca-Cola* are protected by using trade secret.¹⁸⁵ Also, indigenous Traditional Knowledge can, for example, be protected as trade secrets if it has to safeguard certain secrets from competitors in the treatment or harvesting of certain plants.¹⁸⁶ Fortunately, the absence of registration formalities, minimal costs involved and desire for perpetual protection make secrecy an attractive option for traditional communities.¹⁸⁷

Trade secrets are regarded as possibly one of the best ways to protect Traditional Knowledge. A trade secret can consist of any pattern, device, compilation, method, technique, or process that gives a competitive advantage.¹⁸⁸ The legal requirements for proving that a trade secret exists seem to be more flexible than those for obtaining other forms of Intellectual Property like a patent.¹⁸⁹ As such, information that is not susceptible to patent or copyright protection can be protected under trade secrets.¹⁹⁰ Where there is an infringement such as using information without the permission of the community, such can be prevented by suing for the misappropriation of trade secrets benefiting the community.¹⁹¹

If Traditional Knowledge is protected as a trade secret, the Traditional Knowledge holders will be able to retain the right to decide whether or not to disclose the information.¹⁹² However, the exception in this regard is the CBD which mandates the sharing of genetic resources for the benefit of the general good subject to prior consent.¹⁹³ Under the existing Intellectual Property system, it seems that an inventor cannot be forced to disclose his invention under patent law, nor can an author be forced to publish his work under copyright law.¹⁹⁴ Ragavan suggests that

¹⁸³ Correa 'Protection and Promotion of Traditional Medicine' 34.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Van der Merwe *Law Of Intellectual Property* 376.

¹⁸⁷ Van der Merwe *Law Of Intellectual Property* 377.

¹⁸⁸ Ragavan 'Protection Of Traditional Knowledge' 22.

¹⁸⁹ Correa 'Protection and Promotion of Traditional Medicine' 9.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Neethling *Unlawful Competition* 217.

¹⁹³ Ragavan 'Protection Of Traditional Knowledge' 25.

¹⁹⁴ Ibid.

in the same way, indigenous people should also be given the right to keep their knowledge a secret.¹⁹⁵

An example of where an indigenous community was able to use the common law of trade secrets successfully was in Australia. The case concerned publication of a book titled *Nomads of the Desert* by anthropologist, Charles Mountford.¹⁹⁶ The publication contained essential and secret ceremonial information of the Pitjantjatjara people.¹⁹⁷ Mountford refused to withdraw the book from sale, which led to an injunction (interdict) against the sale of the book within the Northern Territory of Australia.¹⁹⁸ The court recognised the legitimacy of the claim of the indigenous communities (Pitjantjatjara, Yankuntjatjara and Ngaanyatjara peoples) that the disclosure of the information had serious and potentially dangerous consequences for the community social structures.¹⁹⁹

4.1.3 Shortcomings in the law of trade secrets

A limitation in protecting Traditional Knowledge as being a trade secret is the fact that once the information has been disclosed, it is no longer a secret and therefore cannot be protected as a trade secret. However, where the person disclosing such information had a duty to keep the information secret, the trade secret is protected and the knowledge holder has legal recourse against the discloser.²⁰⁰ Unfortunately, the information will now be in the public domain and will no longer be a trade secret.

Another limiting factor is that, like other Intellectual Property rights, traditional holders need the capacity, including financial capacity, to enforce their rights.²⁰¹ This is because these rights have to be enforced generally through costly and lengthy court procedures which indigenous people cannot afford.²⁰²

¹⁹⁵ Ibid.

¹⁹⁶ *Forster v Mountford and Rigby Ltd* 1976 14 ALR 71.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Anderson 'Indigenous/Traditional Knowledge' 2.

²⁰¹ Correa 'Protection And Promotion Of Traditional Medicine' 68.

²⁰² Ibid.

4.2 Patents

4.2.1 Introduction

A patent is a statutory monopoly granted for a limited period of time by the state for inventions that are commercially viable.²⁰³ They are regarded as encouraging research and development by offering a reward for developing an invention and making it public after a specified period of time.²⁰⁴ In South Africa, patent applications are regulated by the Patents Act.²⁰⁵ The Act provides for the registration and granting of patents for inventions as well as connected matters.²⁰⁶ Section 25 of the Act specifies that a patentable invention includes new inventions in the fields of trade and industry or agriculture.²⁰⁷ However, the Act states that the following cannot be patented: new discoveries; new scientific theories; new mathematical methods; new schemes, rules or methods for performing mental acts, playing games or doing business; new computer programs; and presentation of information.²⁰⁸

A patent provides legal protection for new and industrially applicable inventions.²⁰⁹ An invention, which constitutes either a product or process, can only be patented if it has been brought about as a result of an inventive step.²¹⁰ Essentially, this new product or process has to represent a new way of doing things or has to provide a technical solution to a real life industrial problem. An invention is only considered to be new and based on an inventive step if the same idea has not been expressed in writing, orally or practically, or in any other way, anywhere immediately prior to the priority date of the invention.²¹¹ The Act provides that the duration of a patent is 20 years from the date of the application and is subject to payment of the prescribed renewal fees by the patentee concerned or an agent.²¹²

²⁰³ Ragavan 'Protection Of Traditional Knowledge' 8.

²⁰⁴ Ibid.

²⁰⁵ Patent Act No.57 of 1978.

²⁰⁶ Ibid.

²⁰⁷ Section 25(1) of the Act.

²⁰⁸ Section 25(2) of the Act.

²⁰⁹ Section 25(1) of the Act.

²¹⁰ Ibid.

²¹¹ Section 25(5) of the Act.

²¹² Section 46(1) of the Act.

4.2.2 Patents and Traditional Knowledge

Patents are also considered as one of the best Intellectual Property tools for protecting Traditional Knowledge as the scope for ownership and commercial sharing is great.²¹³ The rationale for patent protection is to enable the patent holder to exclude all others from either making, selling or using the subject matter of a valid patent.²¹⁴

There are a number of examples where patents have been granted over Traditional Knowledge that relates to medicinal plants. Unfortunately these patents have not been granted to the communities to whom the Traditional Knowledge belongs. Instead it is granted to third parties who make use of this knowledge in order to obtain a patent.

Bio-prospectors use the knowledge that indigenous people have of local flora and fauna to develop new drugs.²¹⁵ As a result of the patents registered by the bio-prospectus on the new drugs, huge profits are earned by Pharmaceutical companies.²¹⁶ In South Africa, the San people had already recognised the appetite suppressing qualities of the *Hoodia Cactus* that was being developed in an anti-obesity drug.²¹⁷ The South African Council for Scientific and Industrial Research recognised the potential market for this cactus outside of South Africa.²¹⁸ The Council obtained over the product a patent and sold the licensing rights in 1997 to Phytopharm, an English biopharmaceutical firm.²¹⁹ This firm then sold the license to Pfizer in America for 25 million dollars.²²⁰ In 2001 the Council for Scientific and Industrial Research in South Africa then filed for several international patents on the *Hoodia* plant.²²¹ During the whole pursuit of attaining patents over this plant, the San people were never involved as stakeholders, or acknowledged as the originators of the knowledge that led to the patents.²²² The Council's argument in this regard was that it was difficult, if not impossible, to identify who the owners of the Indigenous Knowledge were as it was widely shared.²²³

²¹³ The Department of Trade & Industry 'A Policy Framework' 16.

²¹⁴ SM Besen & LJ Raskind 'An Introduction To The Laws And Economics Of Intellectual Property' The Journal of Economic Perspectives 1991 5(1):3 – 27.

²¹⁵ Z Ismail & T Fakir 'Trademarks Or Trade Barriers? Indigenous Knowledge And The Flaws In The Global IRP System' International Journal of Social Economics vol 31 no.1/2 2004 177.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Anderson 'Indigenous/Traditional Knowledge'.

²²² Ibid.

²²³ Ibid.

4.2.3 Shortcomings in the law of patents

A significant shortcoming when it comes to patents is the limited time frame, which does not allow for perpetual benefits to the knowledge holders.²²⁴ The Patents Act provides that if 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."²²⁵ There are also certain limitations to this protection namely that the Act limits the protection to "the knowledge that an indigenous community has regarding the use of an indigenous biological resource or a genetic resource" and traditional use to "the way in which or the purpose for which an indigenous community has used an indigenous biological resource or a genetic resource."²²⁶ A further limitation is that the protection does not apply to inventions that are patented outside of South Africa, even though Traditional Knowledge from South African indigenous communities has been used.²²⁷ A further problematic requirement of the Patents Act, involves the concept of novelty.²²⁸ This is because it is trite that Traditional-Knowledge-based inventions that have been developed over time and have been passed down from generation to generation will in many cases not be regarded as sufficiently novel to be patentable.²²⁹ However, this can also be seen as advantageous towards Traditional Knowledge holders and their communities, as this will prevent people from outside an indigenous community from obtaining a patent for that Traditional Knowledge.²³⁰

Issues of patentability also arise with regards to traditional medicine. These include knowledge of traditional cures, the curing properties of herbs, leaves and other treatments not known to the rest of the world.²³¹ These also include the genetic makeup of people who are immune from diseases which are considered incurable.²³² Multinational corporations have sought to patent or attain rights over forms of these treatments.²³³ For example, the rosy periwinkle which is unique to Madagascar, contains properties that can cure certain forms of cancer.²³⁴ The anti-cancer drug developed from this plant resulted in annual sales of around 100 million United States

²²⁴ Correa 'Protection and Promotion of Traditional Medicine' 33.

²²⁵ Van der Merwe *Law Of Intellectual Property* 383.

²²⁶ Van der Merwe *Law Of Intellectual Property* 384.

²²⁷ Ibid.

²²⁸ Section 25 of the Act.

²²⁹ Van der Merwe *Law of Intellectual Property* 367.

²³⁰ Ibid.

²³¹ Ragavan 'Protection of Traditional Knowledge' 8.

²³² Ibid.

²³³ Ibid.

²³⁴ N Roht-Arriaza 'Of Seeds And Shamans: The Appropriation Of The Scientific And Technical Knowledge Of Indigenous And Local Communities' *Michigan Journal of International Law* 1996 922.

dollars.²³⁵ The island of Madagascar and its people did not receive anything for their Traditional Knowledge.²³⁶

There have been instances where indigenous peoples have tried to adopt the strategy of entering into agreements with companies in relation to their Traditional knowledge, where these contracts have not been upheld. For example, a small tribe in Peru entered into a contract with the California based Shaman Pharmaceuticals Incorporated in order to protect its knowledge.²³⁷ The pharmaceutical company focuses on isolating bioactive compounds from tropical plants having a history of medicinal use and thereafter the research team collects information on the use of plant medicines to treat various illnesses.²³⁸ The tribe demanded that an agreement be entered into with short-term and long-term benefits.²³⁹ Various benefits were addressed with the long-term benefit involving returning a portion of the profits to the indigenous communities once a commercial product had been realized.²⁴⁰ However, the pharmaceutical company did not share the patents or part of the proceeds from the patents with the indigenous people who had provided the initial material.²⁴¹

4.3 Copyright

4.3.1 Introduction

Copyright protection is regulated by the Copyright Act.²⁴² The Act sets out those works which are eligible for copyright protection. These are: (a) literary works;(b) musical works;(c) artistic works; (d) cinematograph film; (e) sound recordings;(f) broadcasts; (g) programme-carrying signals;(h) published editions;(i) computer programs.²⁴³ A work is eligible for copyright protection if it is original and if it has been reduced to material form.²⁴⁴ The meaning of original has a special meaning in copyright law. The work does not have to be completely new. The author must have used his own skill and labour to create the work and must not have simply

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ D E Bierer, T J Carlson & R King 'Shaman Pharmaceuticals: Integrating Indigenous Knowledge, Tropical Medicinal Plants, Medicine, Modern Science And Reciprocity Into A Novel Drug Discovery Approach' www.icimod.org (Accessed 3 March 2015).

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ragavan 'Protection Of Traditional Knowledge' 22.

²⁴² Copyright Act No.98 of 1978.

²⁴³ Section 2(1) of the Copyright Act 98 of 1978.

²⁴⁴ Section 2(1) and (2) of the Copyright Act 98 of 1978.

copied someone else's work.²⁴⁵ Therefore it is possible to create new works from existing works.²⁴⁶ Section 3(2) of the Act provides for the duration of the copyright protection which is generally 50 years provided that the identity of the author is known.²⁴⁷

4.3.2 Copyright and Traditional Knowledge

It is possible to use copyright law to protect Traditional Knowledge provided that the Traditional Knowledge is original and it has been reduced to material form. This means that Traditional Knowledge which is part of an oral tradition is not protected until it is written. The copyright owner can then license other people to make use of such Traditional Knowledge and can also earn royalties from end-users.

There are also important implications for literary and artistic works. Indigenous communities can use copyright law to protect their works, however, this does not stop other people outside the indigenous community from making use of these works for the creation of further works.

There are problems with relying on copyright law to protect Traditional Knowledge. These are dealt with in the next section.

4.3.3 Shortcomings in the law of copyright

The Copyright Act can protect Traditional Knowledge in the form of folklore, songs, dance, textile patterns and architectural designs.²⁴⁸ However, there are cost implications for Traditional Knowledge holders should they want to enforce their copyright by instituting proceedings in a court of law.²⁴⁹ Another limitation is that copyright is usually attached to one identifiable author or composer whereas Traditional Knowledge arises from a combined effort of contributions across generations.²⁵⁰ The requirement of copyright arising only when the work is reduced to a material form, results in the problem of identifying the author.²⁵¹ These are concerns that prevent the use of copyright law for protecting folk material.²⁵² This is because copyright cannot be vested over the entire tribe or community as the law does not recognize any form of

²⁴⁵ O H Dean 'Copyright' www.spoor.com/articles/copyright271.html (Accessed 13 November 2014).

²⁴⁶ Ibid.

²⁴⁷ Section 3(2) of the Copyright Act 98 of 1978.

²⁴⁸ Copyright Act no. 98 of 1978.

²⁴⁹ Correa 'Protection And Promotion of Traditional Medicine' 7.

²⁵⁰ Correa 'Protection And Promotion of Traditional Medicine' 9.

²⁵¹ Ragavan 'Protection Of Traditional Knowledge' 14.

²⁵² Ragavan 'Protection Of Traditional Knowledge' 19.

perpetual protection that is needed to protect the originality of the folk materials.²⁵³ Also, stories that are orally transmitted are not protected under copyright laws, unless they have been reduced to a material form.²⁵⁴

Another feature of copyright is that it is held for a certain period of time, where thereafter, it falls into the public domain.²⁵⁵ Therefore, works that are very old, where the original creator passed away more than 50 years ago, are not protected.²⁵⁶ This factor is the reason why many Traditional Knowledge works that have been passed down through generations are not protectable, as they are considered to have fallen into the public domain.²⁵⁷

Of all Traditional Knowledge, folklore is said to have been the most infringed upon, followed by folk art.²⁵⁸ There have been a number of cases of misuse, exploitation, mutilation, or dilution of these materials.²⁵⁹ The exploitation seems to range from copying songs or mixing songs with other forms of popular music, to displaying and collecting sacred items.²⁶⁰

Other similar forms of misuse include instances where Traditional Knowledge is made into a commodity for commercial profit.²⁶¹ For example, a case where a tribal person notices that images of his family are printed on a t-shirt and sold.²⁶² However, in such cases, there is very little that copyright law can do to protect such violations.²⁶³

Copyright also seems to be inadequate for the protection of the arts of indigenous people.²⁶⁴ For example, in a dance, the performer has a style which has been manifested in many ways but as a sequential unique style over several performances.²⁶⁵ Where the dance is then removed from the main song and theme and is incorporated into western music, there is no

²⁵³ Ibid.

²⁵⁴ World Health Organization Regional Office for Africa 'Promoting The Role Of Traditional Medicine' (note 68 above).

²⁵⁵ Correa 'Protection And Promotion of Traditional Medicine' 34.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ S Ragavan 'Protection Of Traditional Knowledge' 15.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ragavan 'Protection Of Traditional Knowledge' 17.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ M Blakeney 'Milpurrurru & Others v Indofurn & Others: Protecting Expressions Of Aboriginal Folklore Under Copyright Law' *elaw: Murdoch Electronic Law Journal* www.murdoch.edu.au/elaw/issues/v2nl/blakeney.txt 1995 vol 2 no. 1 (Accessed 24 November 2014).

²⁶⁵ Ragavan 'Protection Of Traditional Knowledge' 15.

protection if the dance was copied without permission, as the dance will be regarded as in the public domain.²⁶⁶

Similarly, where a tribal painting is copied with minor alterations, the indigenous tribes have no rights under copyright law.²⁶⁷ This stems back to certain basic principles of copyright law. These basic principles are that there is no copyright in ideas.²⁶⁸ The copyright only exists in the material expression of those ideas.²⁶⁹ A work does not have to be entirely original, it can be based on something which already exists provided the new author uses his own skill and labour to produce a work that is new.

The courts seem to have a tendency of deviating from established principles when deciding such cases.²⁷⁰ As an alternative, they choose to create an exception in order to afford protection, especially in instances where the conduct does not fall strictly within the definition of copyright violation.²⁷¹ However, in such an instance, there is in fact a clear violation of the rights of the indigenous people.²⁷² Some matters are even settled out of court, for example the matter of Mr. Bulun, an aboriginal artist, who discovered that some of his paintings were reproduced on t-shirts without his permission.²⁷³ Here, Mr. Bulun sued for copyright violation.²⁷⁴ The court considered the possibility of breach of confidence when the company withdrew the t-shirts from sale and decided that it was best to settle the dispute.²⁷⁵

4.4 Trade marks

4.4.1 Introduction

A trade mark is a mark which is used by a person in relation to his goods or services in order to differentiate his goods or services from that of another person which are the same or similar, and which are also used in the course of trade.²⁷⁶ The Trade Marks Act provides for the registration of trademarks, certification trademarks and collective trade marks.²⁷⁷ Section 9 sets out the requirements which must be met before a trade mark is registerable. In order to be

²⁶⁶ Ibid.

²⁶⁷ S Ragavan 'Protection Of Traditional Knowledge' 18.

²⁶⁸ W Alberts 'Basic Requirements For Copyright Protection' www.uj.ac.za (Accessed 11 November 2014).

²⁶⁹ Ibid.

²⁷⁰ Supra (note 267 above).

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ *Bulun Bulun v Nejalm Pty Ltd, Golvan* E.I.P.R 346 1992.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Trade Marks Act No.194 of 1993.

²⁷⁷ Trade Marks Act No.194 of 1993.

registerable, a trade mark needs to differentiate between the goods or services of a person to whom it is registered from the goods or services of another person.²⁷⁸ Where a trade mark is registered subject to certain limitations, it must be able to differentiate the goods within those limitations.²⁷⁹ A mark is considered capable of distinguishing as per sub section (1) if, at the date of application for registration, it is capable of distinguishing or it is capable of distinguishing by reason of prior use thereof.²⁸⁰ The registration of a trade mark is valid for a period of 10 years, but may be renewed from time to time in accordance with the provisions of this section.²⁸¹ Therefore, provided that the registration of a trade mark is renewed, it can last forever.

4.4.2 Trade marks and Traditional Knowledge

Ragavan is of the view that trade marks are used to provide a link between the customer and the manufacturer of the goods as it helps identify the place of origin of the goods.²⁸² Therefore, trade marks can be used by indigenous people to identify a variety of goods and services.²⁸³ These may be useful for indigenous people to protect their trade interests.²⁸⁴ This would be in line with one of the objectives of trade mark protection which is to "prevent a second entrant from unfairly appropriating the value of a successful trademark, service mark, or trade dress".²⁸⁵

According to the Trade Marks Act, the registration of Traditional Knowledge as a trade mark is also an option for securing Intellectual Property rights provided that the legal requirements are met. However, there are certain limitations here as well. Firstly, the registration of the trade mark is limited to marks that are intended for the purposes of trade.²⁸⁶ An indigenous community would therefore have to be operating as a trader and have the intention of using the mark in trade in order to meet such a requirement.

Trade marks can also be used as a mechanism for the protection of some forms of folk art. For example, a trade mark can represent a particular tribe or indigenous group, thereby identifying the tribe.²⁸⁷ Therefore a mark or indication can be used to refer to a tribe, an artist, or a

²⁷⁸ Section 9(1) of the Trade Marks Act No.194 of 1993.

²⁷⁹ Ibid.

²⁸⁰ Section 9(2) of the Trade Marks Act No.194 of 1993.

²⁸¹ Section 37(1) of the Trade Marks Act No.194 of 1993.

²⁸² Ragavan 'Protection Of Traditional Knowledge' 20.

²⁸³ The Department Of Trade & Industry 'Policy Framework' 11.

²⁸⁴ Ibid.

²⁸⁵ C A Masango 'Indigenous Traditional Knowledge' 77.

²⁸⁶ Trade Marks Act No. 194 of 1993.

²⁸⁷ Ragavan 'Protection Of Traditional Knowledge' 21.

combination of both. This also has the flexibility to be used for all forms of folk art, including even traditional medicines.²⁸⁸

4.4.3 Shortcomings in the law of trade marks

The requirement of trade marks to be used in the course of trade in order to be protected means that the Trade Marks Act is inappropriate for general protection. There has been an increase in the number of indigenous businesses and organisations attempting to make use of trade mark laws in an effort to register their own trade marks for the protection of their artistic works and other Indigenous Knowledge, particularly for indigenous commercial use.²⁸⁹ In most cases, the trade marks have not proceeded to registration. This is sometimes due to the fact that the proposed trade mark consists entirely of words that are purely descriptive.²⁹⁰ Also, the mark must be distinguishable from the trade marks of other competitors.²⁹¹ Marks that reflect the geographical origin of a product are not excluded from being registered as a trade mark.²⁹² This is problematic as the marks that indigenous communities use are usually directly connected to their geographical origin.²⁹³

It is therefore obvious that Traditional Knowledge can only be protected as a trade mark if it deals with a brand name of a specific plant or product that "provides an economic incentive".²⁹⁴ An example of such would be the previous situation with the Rooibos brand name. The United States owned the trade mark name Rooibos, and as a result, "the export potential of South African Rooibos in the American market was in jeopardy."²⁹⁵ This is because the name "serves as a mark of assurance" and holds financial considerations for the United States.²⁹⁶

The Intellectual Property dispute over the use of the word "Rooibos" started in 1994 when the word 'Rooibos' was registered as a trade mark at the United States Patent and Trademark Office (USPTO) by a skincare company, Forever Young.²⁹⁷ Thereafter, the trade mark was also sold to Burke International.²⁹⁸ Burke International then tried to enforce their rights in the United

²⁸⁸ Ibid.

²⁸⁹ T Janke 'Case Studies On Intellectual Property And Traditional Cultural Expressions' www.terrijanke.com.au 2003 43 (Accessed 17 October 2014).

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Van der Merwe (ed) *Law Of Intellectual Property* 380.

²⁹⁴ C A Masango 'Indigenous Traditional Knowledge' 77.

²⁹⁵ Ismail & Fakir 'Trademarks Or Trade Barriers?' 174.

²⁹⁶ Ismail & Fakir 'Trademarks Or Trade Barriers?' 176.

²⁹⁷ J van Harmelen (ENS law firm) 'Rooibos: Soothing The Storm In A Teacup' www.golegal.co.za 11 August 2014 (Accessed 13 November 2014).

²⁹⁸ Ibid.

States and also against various entities using it, of which included South African company Rooibos Limited.²⁹⁹ The registration of the trade mark was opposed by many entities including Rooibos Limited, on the ground that the word was merely a generic term meaning "red bush" in Afrikaans and therefore could not be registered as a trade mark.³⁰⁰ After many years of litigation, Burke International and Rooibos Limited have entered into a settlement (economic partnership agreement with the United Nations) which has ended Burke International's monopoly over the word "Rooibos".³⁰¹

Further, the trade mark industry does not adequately take indigenous cultural rights into account.³⁰² For example, there is no requirement for prior informed consent to be obtained before the registration of an indigenous word or symbol proposed.³⁰³

4.5 Geographical indications

4.5.1 Introduction

The TRIPS Agreement defines "geographical indications"(GI's) as indications that identify a good 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 geographic origin."³⁰⁴ Examples of GI's from the United States include: "FLORIDA" for oranges; "IDAHO" for potatoes; "VIDALIA" for onions; and "WASHINGTON STATE" for apples. GI's are considered as very similar to trade marks and have the same functions (for the purposes of trade), therefore proving valuable to producers.

GI's are not author specific nor do they require an element of innovation.³⁰⁵ Much like trade marks, these are meant to protect the producers or manufacturers of goods. As such, it follows that it is also irrelevant whether the producer is an organized corporation or whether he is a single individual.³⁰⁶

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ D Smith 'Rooibos Tea Trade Mark Awarded To South Africa In Deal With EU' www.theguardian.com 28 July 2014 (Accessed 13 November 2014).

³⁰² Janke 'Case Studies' 44.

³⁰³ Ibid.

³⁰⁴ Article 22(2) of the TRIPS Agreement.

³⁰⁵ Ismail & Fakir 'Trademarks Or Trade Barriers? 177.

³⁰⁶ Ibid.

GI's can be used to distinguish the goods and the protection will be perpetual.³⁰⁷ A collective mark may also sometimes qualify as a geographical indication.³⁰⁸ Unauthorised parties may not use GI's if such use is likely to mislead the public or consumers as to the true origin of the product.³⁰⁹ A way that local communities can ensure that their GI's do not become generic is by registering them and promoting their use in the public domain.³¹⁰ This is possible as countries do not have to follow formalities in declaring certain names to be GI's.³¹¹ This can be done unilaterally without consulting with any trading partners.³¹² Many countries have actually compiled registers of products that they deem to qualify as GI's and are commercially marketing them successfully.³¹³ In bilateral trade agreements, the countries request that these products should be recognised as GI's.³¹⁴ The salient point here is that countries do not have to wait for an international dispensation.³¹⁵ At the World Trade Organisation (WTO) level, there is no agreement to have an international register of geographical indications outside the realm of wines and spirits.³¹⁶

4.5.2 Geographical indications and Traditional Knowledge

GI's can be used by Traditional Knowledge holders to protect Indigenous Knowledge by recognising that certain products originate from a specific region.³¹⁷ This would prevent outsiders from using the Traditional Knowledge from an indigenous community.³¹⁸ However, the applicable legal system has to make provision for a registration system or another appropriate system which will recognise the Traditional Knowledge as a registered GI.³¹⁹

As previously mentioned, Traditional Knowledge seems to be particularly difficult to protect with the existing Intellectual Property laws due to its inability to satisfy the requirements for protection by a particular legislation. One of the most apparent reasons here is the nature of Traditional Knowledge being collectively owned by an indigenous community, whereas the current Intellectual Property laws focus on the protection of individual rights. However, the

³⁰⁷ The Department of Trade & Industry 'Policy Framework' 12.

³⁰⁸ 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' www.wipo.int 30 August 2010 (Accessed 2 March 2015).

³⁰⁹ Ibid.

³¹⁰ Brush 'Indigenous Knowledge' 653,657.

³¹¹ Ibid.

³¹² Ibid.

³¹³ The Department of Trade & Industry 'Policy Framework' 13.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Van der Merwe (ed) *Law Of Intellectual Property* 381.

³¹⁸ Ibid.

³¹⁹ Ibid.

situation is quite different when it comes to GI's. This is because GI's are essentially owned and exercised collectively, thereby making them very different from other Intellectual Property rights.³²⁰ This makes them particularly attractive for protecting Traditional Knowledge.

4.5.3 Shortcomings in the law of Geographical indications

The scope of the protection of GI's is limited to the particular class and/or location of that indigenous community who use the indication.³²¹ This suggests a prohibition on the part of the Traditional Knowledge holders to transfer the knowledge to other indigenous communities.

Gervais is of the opinion that many countries regard the higher level of protection afforded to the sphere of spirits and wines, as unfair.³²² He is in support of the view that the same amount of protection needs to be provided to spheres outside of the spirits and wines.

O'Connor states that GI's only protect the names of the goods rather than the Traditional Knowledge associated with such.³²³ As such, he is of the view that at most, GI's can only play a complementary role in the protection of Traditional Knowledge and that it is impossible to protect all forms of Traditional Knowledge solely by using this form of Intellectual Property.³²⁴

4.6 Design law

4.6.1 Introduction

In South Africa, the protection of designs is regulated by the Designs Act.³²⁵ This Act provides for the registration and protection of industrial designs.³²⁶ Here, industrial designs are divided into aesthetic designs and functional designs.³²⁷ The Act describes functional designs as including integrated circuits topography and mask works.³²⁸

³²⁰ F Addor & A Grazioli 'Geographical Indications Beyond Wines And Spirits: A Roadmap For A Better Protection Of Geographical Indications In The WTO TRIPS Agreement' *The Journal of World Intellectual Property* www.ige.ch November 2002 vol 5 no. 6 (Accessed 18 November 2014).

³²¹ M Singh Nair 'India: Role Of Geographical Indications In The Field Of Traditional Knowledge' www.mondaq.com 4 February 2008 (Accessed 18 November 2014).

³²² D J Gervais 'Traditional Knowledge: Are We Closer to the Answers? The Potential Role of Geographical Indications' *ILSA Journal of International and Comparative Law* http://works.bepress.com/daniel_gervais/18_15.2 2009: 551 – 567 (Accessed 18 November 2014).

³²³ B O'Connor 'Protecting Traditional Knowledge: An Overview Of A Developing Area Of Intellectual Property Law' *The Journal of World Intellectual Property* <http://onlinelibrary.wiley.com> vol 6 issue 5 2003 690 (Accessed 18 November 2014).

³²⁴ Ibid.

³²⁵ Designs Act No.195 of 1993.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

Design law protects registered designs, either aesthetic or functional, based on the shape, form, appearance, pattern, ornamentation and configuration of a product or article.³²⁹ Protection is afforded to aesthetic designs for a period of 15 years, and to functional designs for a shorter period of 10 years.³³⁰

4.6.2 Design law and Traditional Knowledge

The Design Act provides limited protection for indigenous traditional designs.³³¹ It is said to protect the designs in so far as the pattern or ornamentation, shape and configuration of an article manufactured for commercial purposes.³³² Therefore, one cannot register the rights to produce a particular design and have exclusive rights against third parties from making any other type of that design.³³³ The protection is only limited to the features of that particular article and any person could develop another shape or style and have a registerable design.³³⁴

4.6.3 Shortcomings in the law of designs

From the above mentioned, it is clear that the Design Act does not adequately protect Traditional Knowledge in that it does not prevent the unauthorised reproduction, adaptation, distribution or performance of traditional literary and artistic productions.³³⁵ There is also no protection against the use of traditional literary or artistic designs in an insulting derogating and/or culturally and spiritually offensive manner.

In Indonesia, there were issues with regards to the registration of batik designs. Batik is considered as a traditional practice as the designs and Traditional Knowledge have been passed down from generation to generation for centuries.³³⁶ These designs are infused with stories, histories and meanings which are not understood by outsiders.³³⁷

The Indonesian government developed legislation in order to protect Indonesia's traditional arts. This was in response to the increased reproduction of the batik styles in the regions within

³²⁹ Correa 'Protection And Promotion Of Traditional Medicine' 9.

³³⁰ Ibid.

³³¹ Designs Act No. 195 of 1993.

³³² Ibid.

³³³ The Department of Trade & Industry 'Policy Framework' 14.

³³⁴ Ibid.

³³⁵ The Department of Trade & Industry 'Policy Framework' 6.

³³⁶ Anderson 'Indigenous/Traditional Knowledge' 10.

³³⁷ Ibid.

Indonesia where some did not originate from as well as in other neighbouring countries.³³⁸ The artists of such traditional works were concerned about the reproduction of their designs by outsiders who don't know the meanings or significance of certain designs, and so in order to protect the traditional batik designs from misuse and misappropriation, local government developed a design patent program for the traditional designs, thereby requiring permission from the government to be obtained prior to the use of such designs by the batik makers as well as others.³³⁹

4.7 Concluding remarks

From the above discussion it can be seen that the current Intellectual Property system clearly proves itself inadequate when it comes to protecting Traditional Knowledge. On the one hand, there are limitations when indigenous people attempt to use the existing system to protect their Traditional Knowledge and on the other, the existing system allows outsiders to lawfully appropriate Traditional Knowledge for themselves without reference to the indigenous community from which that knowledge originated.

The principle of unfair competition may be used to protect Traditional Knowledge. Article 10 of the Paris Convention provides that member states ensure that there is an effective protection against unfair competition in their jurisdictions.³⁴⁰ Acts of competition contrary to honest practices in commercial matters constitutes unfair competition.³⁴¹ Unfair competition law, trade practices and labelling laws could possibly be helpful in protecting Traditional Knowledge from exploitation in various ways. GI's, collective marks and certification marks are also considered to be helpful.³⁴²

Defensive protection can also be used to protect third parties from gaining or maintaining illegitimate Intellectual Property rights.³⁴³ However, such protection does not prevent others from actively using or exploiting Traditional Knowledge.³⁴⁴ The main focus of defensive protection has been in the patent system where applications are considered against "prior art", being the defined body of knowledge that is considered relevant to the validity of a patent.³⁴⁵

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ The Department of Trade & Industry 'Policy Framework' 17.

³⁴¹ Ibid.

³⁴² Simeone 'Indigenous Traditional Knowledge'.

³⁴³ Supra (note 340 above).

³⁴⁴ Ibid.

³⁴⁵ The Department of Trade & Industry 'Policy 18 para 1.

It is important to note that there are legal and practical considerations in protecting Traditional Knowledge by means of defensive protection. Legally, steps need to be taken to ensure that the criteria defining relevant "prior art" apply to Traditional Knowledge.³⁴⁶ This would include ensuring that orally disclosed information is taken into account since most Traditional Knowledge is orally transmitted.³⁴⁷ Practically, it is necessary to ensure that Traditional Knowledge is available and accessible to search authorities and patent examiners, and will likely be found in a search for relevant "prior art".³⁴⁸ The development implications of this issue are that, as the reach of Intellectual Property extends to indigenous and local communities, their Traditional Knowledge will constitute an increasingly relevant body of "prior art", the effect of identification of which will be increasingly important for the function of the Intellectual Property system.³⁴⁹

The creation of databases and registers of such knowledge could also be helpful.³⁵⁰ However, this would provide disclosure to the registers and possible failure to protect the information concerned is therefore a cause for concern to owners of the knowledge.³⁵¹ It is recommended that the knowledge should not be in the public domain and any user should pay a fee, thus allowing the owners of the knowledge to benefit.³⁵² Since countries such as India and Venezuela have actually created such registers unintended consequences have resulted as the communities who were supposed to benefit, were not benefitting at all.³⁵³

It is suggested that a *sui generis* type of protection needs to be considered. *Sui generis* is used to describe something which is unique or different. An Intellectual Property system is regarded as *sui generis* due to its modification of some of its features in order to properly accommodate the special characteristics of its subject matter (Traditional Knowledge) and the specific policy needs.³⁵⁴ Various countries have adapted existing Intellectual Property systems to accommodate Traditional Knowledge holders through *sui generis* measures.³⁵⁵ Several countries have also adopted *sui generis* laws for Traditional Knowledge protection.³⁵⁶ These include Peru, Costa Rica, Portugal and Thailand. When policy makers seek to develop a *sui*

³⁴⁶ The Department of Trade & Industry 'Policy 18 para 2.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ The Department of Trade & Industry 'Policy Framework' 18 para 3.

³⁵⁰ Ibid.

³⁵¹ The Department of Trade & Industry 'Policy Framework' 18 para 4.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ The Department of Trade & Industry 'Policy Framework' 18 para 5.

³⁵⁵ The Department of Trade & Industry 'Policy Framework' 19.

³⁵⁶ Ibid.

generis system, there are key issues which are paramount for consideration. These include: what the policy objective of the protection is; the subject matter which should be protected; the criteria the subject matter must meet in order to be protected; the beneficiaries of the protection; the rights; the rights acquired; the administration and enforcement of such rights and how the rights are lost and expire.³⁵⁷

Masango suggests that in order to protect Indigenous Traditional Knowledge, the Department of Trade and Industry needs to set up missions in various indigenous traditional communities in order to investigate the type of knowledge that the communities would want to protect.³⁵⁸ This is because "it is essential that traditional owners are able to define the rights and access to their resources..."³⁵⁹ Further, more attention needs to be given to indigenous initiatives.³⁶⁰

Indigenous people possess their own locally-specific systems of jurisprudence when it comes to the classification of different types of knowledge, proper procedures for acquiring as well as sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are rooted in each culture and its languages.³⁶¹ This stems from the indigenous world-view which prioritises the interests of the community as a whole over those of the individual.³⁶²

A mission which could be set up is one where the communities identify possible Indigenous Traditional Knowledge to be protected. Such communities would then be educated through workshops, colloquiums, seminars, or conferences, preferably in their mother tongue, as to how the communities would benefit financially from the protection of identified Indigenous Traditional Knowledge.³⁶³

In educating the communities, Masango suggests that the Department of Trade and Industry should set up lectures in communities on Traditional Knowledge issues raised by the communities.³⁶⁴ Such lectures need to be conducted by persons who are knowledgeable with Traditional Knowledge.³⁶⁵ During the process of educating the communities, those responsible for the lecture should then try to convince the members of the communities that the knowledge

³⁵⁷ Ibid.

³⁵⁸ Masango 'Indigenous Traditional Knowledge' 78.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Githaiga 'Intellectual Property Law' para 11.

³⁶³ Masango 'Indigenous Traditional Knowledge' 78.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

of how Traditional Knowledge would benefit the community is important as it may prevent third parties from exploiting their knowledge.³⁶⁶

Such an opinion is supported by the World Intellectual Property Organisation, which is of the view that the protection of Indigenous Traditional Knowledge is to prevent third parties from exploiting the knowledge for financial gains. Masango is of the opinion that if this is explained to the communities, lectures on Traditional Knowledge would receive serious attention from the communities. However such lectures need to also concentrate on potential areas such as myths, traditional beliefs, superstition, stories and customs that cannot be protected, as it may be difficult to attach financial gain to these.³⁶⁷

There are certain limitations when it comes to relying on the current Intellectual Property system in order to protect Traditional Knowledge. The Department of Trade and Industry has mentioned two main concerns with regard to the protection and commercialization of Traditional Knowledge in South Africa. Firstly, the current Intellectual Property system allows individuals to protect their inventions and Intellectual Property rights, but does not allow communities to collectively protect their knowledge in all areas, and secondly, in the areas where collective Intellectual Property registration is possible, communities are not exercising their rights.³⁶⁸ The existing western Intellectual Property rights regime on individual propriety rights does not address the collective nature of Traditional Knowledge.³⁶⁹ Since western Intellectual Property law is based on individual property ownership, its aims are often incompatible with, if not detrimental to, those of traditional communities.³⁷⁰ As a result, in both South Africa and internationally, Traditional Knowledge is generally not protected using the Intellectual Property system. There is an exception when it comes to wines and spirits where Traditional Knowledge has been protected by using GI's.

5. DEPARTMENT OF TRADE AND INDUSTRY

5.1 Introduction

The Department of Trade and Industry recognised that there was a need to protect Traditional Knowledge and so it published a policy document in 2004 where it set out the policy towards

³⁶⁶ Ibid.

³⁶⁷ Janke 'Case Studies' 79; Masango 'Indigenous Traditional Knowledge' 78.

³⁶⁸ The Department of Trade & Industry 'Policy Framework' 6.

³⁶⁹ Ibid.

³⁷⁰ Simoene 'Indigenous Traditional Knowledge' 5.

protecting Traditional Knowledge. The Department then drafted the publication of the Intellectual Property Law Amendment Bill of 2007 in order to implement its policy. The main aim of this legislation was to amend the existing laws relating to Intellectual Property in order to accommodate Traditional Knowledge. This Bill was passed as an Act in December 2013.

5.2 The policy document

The policy document explains that its purpose is “to create a guide for the recognition, understanding, integration and promotion of South Africa’s wealth of Indigenous Knowledge resources...the protection of Indigenous Knowledge, and the holders of such knowledge, against exploitation...ensuring that communities receive fair and sustained recognition and, where appropriate, financial remuneration for the use of this knowledge.”³⁷¹

The policy explains that various industries would immediately benefit from the adoption of such a policy for the protection of Traditional Knowledge.³⁷² These include the cultural industry; pharmaceutical industry; agricultural industry as well as the medical and health industry.³⁷³

The policy recognises South Africa’s diversity and therefore acknowledges that there is a need to update the existing laws, including the Intellectual Property laws, in order to protect such diversity.³⁷⁴ An important reason for the protection of Traditional Knowledge at a commercial scale is to incorporate the Traditional Knowledge holders into the mainstream of the economy by providing a fair environment for all role players.³⁷⁵

The policy is also concerned about the agricultural biodiversity not being catered for in the possible protection of Traditional Knowledge using the Intellectual Property system.³⁷⁶ Therefore there is a need for the National Department of Agriculture to amend its legislation like the Plant Varieties Act to be in line with the CBD and Food and Agriculture Organization (FAO) approaches.³⁷⁷ This means that Traditional Knowledge associated with plant varieties should be protected using international treaties.³⁷⁸ Equally, the Plant Varieties Act can be amended to be in line with both the Biodiversity Act and the Patents Amendment Act, without having to ratify

³⁷¹ The Department of Trade & Industry ‘Policy Framework’ 3.

³⁷² The Department of Trade & Industry ‘Policy Framework’ 7 para 2.

³⁷³ The Department of Trade & Industry ‘Policy Framework’ 7-8.

³⁷⁴ The Department of Trade & Industry ‘Policy Framework’ 8 para 1.

³⁷⁵ Ibid.

³⁷⁶ The Department of Trade & Industry ‘Policy Framework’ 8 para 2.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) or International Union for the Protection of New Varieties of Plants (UPOV).³⁷⁹

The policy document explains that the aims of the policy will be achieved through using the present system of Intellectual Property in order to protect Traditional Knowledge.³⁸⁰ As discussed above, the policy document explains that Intellectual Property has not been used to protect Traditional Knowledge but has been used to allow unauthorised people or entities to appropriate Traditional Knowledge, without any benefit to the knowledge holders.³⁸¹

Firstly, the policy document aims to improve the livelihoods of Traditional Knowledge holders and communities as these people depend on such knowledge for their livelihoods and well-being.³⁸² This will also allow the knowledge holders to manage and exploit their own knowledge.³⁸³ It also aims to benefit national communities by trading goods which have been developed from the use of the Traditional Knowledge on a local and international scale.³⁸⁴ It aims to conserve the environment by using traditional farming methods on the surrounding environment.³⁸⁵ Further, it seeks to prevent bio-piracy which relates to the unauthorised extraction of biological resources and associated Traditional Knowledge; or the patenting of inventions based on such knowledge or resources, without compensation.³⁸⁶ Lastly, it aims to provide legal protection as South Africa, like many other developing countries, has no legal redress that addresses the current dilemma relating to the misappropriation of Traditional Knowledge.³⁸⁷ There are also no legal instruments that deal with collective ownership of Traditional knowledge or benefitting Traditional Knowledge holders.³⁸⁸

The Policy makes recommendations on the how to improve the current Intellectual Property system in place in order to protect Traditional Knowledge. Its recommendations are based on making amendments to the Patents Act, Trade Marks Act, geographical indications, Design Act, Copyright Act, trade secrets and other related legislation in order to accommodate Traditional Knowledge.

³⁷⁹ Ibid.

³⁸⁰ The Department of Trade & Industry 'Policy Framework' 8 para 3.

³⁸¹ Ibid.

³⁸² The Department of Trade & Industry 'Policy Framework' 9 para 1.

³⁸³ Ibid.

³⁸⁴ The Department of Trade & Industry 'Policy Framework' 9 para 2.

³⁸⁵ The Department of Trade & Industry 'Policy Framework' 9 para 5.

³⁸⁶ The Department of Trade & Industry 'Policy Framework' 9 para 6.

³⁸⁷ The Department of Trade & Industry 'Policy Framework' 10 para 1.

³⁸⁸ Ibid.

The policy mentions methods additional to the current Intellectual Property legislation such as contractual arrangements; principles of unfair competition, defensive protection and *sui generis* legislation, which can be used to protect Traditional Knowledge, and makes recommendations for such as well.³⁸⁹

5.3 The Intellectual Property Law Amendment Act No. 28 of 2013 (Government's Act)

5.3.1 The Government's Act

The Government's Bill, has now been enacted, and seeks to amend various Acts which are currently in place. The Act "tries to prevent the acquisition of Intellectual Property rights in Intellectual Property derived from Traditional Knowledge without the permission of the Traditional Knowledge holders and provides for benefit-sharing with Traditional Knowledge holders."³⁹⁰

The Act seeks to introduce a special form of protection for so-called "Traditional Knowledge" into each of the Trade Marks, Copyright, Designs Act and Performance Protection Acts.³⁹¹ Daniels suggests that it aims to, "improve livelihoods of Indigenous Knowledge holders and communities, benefit the national economy, prevent bio-piracy, provide a legal framework for protection and empower local communities and prevent exploitation of Indigenous Knowledge."³⁹²

A first draft prepared by the Department of Trade and industry was done in 2007. After 3 years of introspective effort on the part of the Department, the Bill came before the Portfolio Committee.³⁹³ The Committee realised that the Bill was "unworkable" and that it could not advance in its current state.³⁹⁴ The Committee acknowledged that there was very little prospect of the Department of Trade and Industry coming up with anything better and so decided that, it would itself, redraft the Bill.³⁹⁵

³⁸⁹ The Department of Trade & Industry 'Policy Framework' 18, 20, 21.

³⁹⁰ Correa 'Protection And Promotion Of Traditional Medicine' 7.

³⁹¹ Dean 'Inside Views' 1.

³⁹² L Daniels 'South Africa Hopes New Bill Brings Traditional Knowledge Protection' www.ip-watch.org 17 May 2012 (Accessed 17 October 2014).

³⁹³ Dean 'Golden Oldies' 4.

³⁹⁴ Ibid.

³⁹⁵ Ibid.

The Portfolio Committee greatly improved the Bill and made various alterations in the following manner:³⁹⁶

In broad terms, the Bill purports to create monopolies in the use of traditional works which become the property of an indigenous community.³⁹⁷ This term is defined to mean any recognisable community of people that originated, or historically settled, in a particular geographic area(s) located in South Africa, and such group is characterised by social, cultural and economic conditions separating it from other sections of the national community, and which identifies itself, and is recognised by other groups, as a distinctive collective.³⁹⁸

Such communities' ownership of their Traditional Knowledge allows them to demand royalties for the use of their Traditional Knowledge.³⁹⁹ They can also exercise their rights over the use of works derived from, or containing significant elements of their Traditional Knowledge.⁴⁰⁰ This stems from the notion that Traditional Knowledge needs to be protected because the creators or possessors have the "right to receive a fair return on what the communities have developed".⁴⁰¹ The Traditional Knowledge which they have rights of ownership over includes works, whether in a tangible or intangible form, where Traditional Knowledge or culture is embodied and passed down from generation to generation.⁴⁰²

Licences for the use of conventional Intellectual Property works can be obtained informally, however, licences in respect of Traditional Knowledge are subject to certain conditions and formalities and therefore certain agreements pertaining to such licences are required to be scrutinised and approved by state entities.⁴⁰³ These conditions and formalities are such that in the modern business world they are likely to frustrate the economic use of Traditional Knowledge.⁴⁰⁴

A database for the recording of Traditional Knowledge, in the form of a trust fund for the collection and distribution of royalty and revenue, as well as a council for giving advice

³⁹⁶ Supra (note 392 above).

³⁹⁷ Dean 'Inside Views' 3.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Correa 'Protection And Promotion Of Traditional Medicine' 23.

⁴⁰² The Anton Mostert Chair of Intellectual Property 'Traditional Knowledge – Legislation In The NEW Tradition' <http://blog.sun.ac.za> 18 September 2011 (Accessed 25 November 2014).

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

regarding the Traditional Knowledge is provided for.⁴⁰⁵ The Act could possibly satisfy the Government's objective of creating jobs.⁴⁰⁶ The regulatory impact assessment on the Bill suggested that the whole purpose of the Bill was not commercially viable and that the costs of operating the system would probably be more than the revenue made by it.⁴⁰⁷ The benefits attainable from the system were outweighed by the substantial costs and other disadvantages as well.⁴⁰⁸ However, this assessment was disregarded by the Portfolio Committee.⁴⁰⁹

5.3.2 Amendments by the Government's Act

5.3.2.1 Amendments to the Performers' Protection Act

The Act provides for the amendment of existing definitions in respect of the Copyright Act and provides that certain works are capable of being performed, which include musical, dramatic, dramatico-musical works and traditional works.⁴¹⁰

Section 8A(1) of the Act provides that the Act will apply to a performance of a traditional work, unless otherwise stated.⁴¹¹ Section 8A(2) provides that no rights will accrue to any person in respect of Intellectual Property which is not a performance of a traditional work.⁴¹²

Section 8B(1) provides for the accreditation of institutions by the Commission for Intellectual Property and Companies (CIPC) as having the necessary capacity to adjudicate any dispute arising from this Act and in respect of the performance of traditional works.⁴¹³ The National Council for Indigenous Knowledge shall function as the council for performances of traditional works under this Act.⁴¹⁴

⁴⁰⁵ The Intellectual Property Laws Amendment Bill 2010; Intellectual Property Laws Amendment Act (note 16 above).

⁴⁰⁶ The Department of Trade & Industry 'Policy Framework' 7.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Section 1 of the Act.

⁴¹¹ Section 2 of the Act.

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Ibid; Section 8C of the Performance Protection Act No.11 of 1967.

5.3.2.2 Amendments to the Copyright Act

Section 28A(1) provides that the provisions of this Act shall apply to traditional work, unless otherwise stated. Section 28B provides for the eligibility of a traditional work for copy right and provides certain requirements for the registration of a right in respect of a derivative indigenous work.⁴¹⁵ Section 28C regulates national databases and provides that databases of Indigenous Knowledge must be kept in the same offices of the registrars of patents, copyright, trade marks and designs for Indigenous Knowledge, in the prescribed manner.⁴¹⁶

Section 28D provides that for the purposes of ownership. An indigenous community is regarded to be a juristic person in terms of the Act. Further, the ownership of copyright in respect of a derivative indigenous work shall vest in the author, while ownership of copyright in respect of an indigenous work shall vest in the relevant indigenous community.⁴¹⁷ However, in certain circumstances, the ownership will vest in the national trust.⁴¹⁸

Section 28E sets out certain acts which can be committed by the copyright owner of the traditional work, within the Republic. However, the copyright is subject to any rights in respect of the traditional work acquired by any person prior to the commencement of this Act. The term of copyright for a derivative indigenous work is 50 years, commencing from the end of the year in which the work was first communicated to the public with the consent of the author, or the date of the death of the author or all authors concerned, whichever term expires last.⁴¹⁹

Section 28G regulates persons who intend on acquiring rights in respect of an indigenous work by requiring compliance with section 28B(4) and the conclusion of a benefit-sharing agreement with the indigenous community.⁴²⁰ This section also lists acts which do not amount to acts of infringement, provided that the applicable exclusions are adhered to and the copyright owner is acknowledged.⁴²¹

⁴¹⁵ Section 4 of the Act (Chapter 2A).

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid; Section 28F of the Copyright Act No.98 of 1978.

⁴²⁰ Ibid.

⁴²¹ Ibid.

Section 28I establishes a National Trust for Indigenous Knowledge that will create a Trust Fund for Indigenous Knowledge and will be responsible for the promotion and preservation of indigenous cultural expressions and knowledge.⁴²² The Trust will promote and preserve Indigenous Knowledge by providing awareness; training; commercialisation and exploitation of the knowledge to the indigenous communities.⁴²³ Section 28J prohibits the transmission of Copyright by assignment, testamentary disposition or operation of law, except in certain limited circumstances.⁴²⁴

Section 28K provides that the CIPC will grant certain institutions with the powers to adjudicate over disputes arising from this Act, which adjudications will take into account the existing customary dispute resolution mechanisms.⁴²⁵ Appeals may also be brought to the High Court in respect of decisions arising from the adjudication.⁴²⁶

Section 28L provides for the creation of a National Council by the Minister of Trade and Industry which will advise him and the Registrars on any matter concerning indigenous cultural expressions or knowledge.⁴²⁷

Section 28N of the Act provides that the Minister shall have power to comply with international agreements by way of notice in the Government Gazette and provide that any provision(s) of this Act applies to a specified country, in a general or a limited manner.⁴²⁸ The Minister also has the authority to provide guidelines on any aspect of the Act.⁴²⁹

5.3.2.3 Amendments to the Trade Marks Act

A traditional term or expression is capable of being a certification mark, collective trade mark, or a GI.⁴³⁰ Section 43B (3) requires a certification or collective trade mark, a traditional term or expression to meet the 'capable of distinguishing' criterion as well as satisfy the prerequisites set out by section 43B(8) before it can be deemed registerable.⁴³¹

⁴²² Ibid.

⁴²³ A van der Merwe 'The Old And The New: A Concise Overview Of The Intellectual Property Laws Amendment Act' De Rebus September 2014 issue.

⁴²⁴ Supra (note 420 above).

⁴²⁵ Ibid.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Ibid.

⁴²⁹ Section 6 of the Act; Section 39A of the Copyright Act No.98 of 1978.

⁴³⁰ Section 9 of the Act; Section 43B(1) of the Trade Marks Act No.194 of 1993.

⁴³¹ van der Merwe 'The Old And The New'.

In terms of section 43E, the term of protection of derivative indigenous terms or expressions and GI's is ten years, of which is renewable.⁴³² The term for the protection of an indigenous term or expression and GI's is perpetual.⁴³³

5.3.2.4 Amendments to the Designs Act

The Act defines a “derivative indigenous design” as being “any aesthetic or functional design forming the subject of this Act, applied to any form of indigenous design recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous design was derived before or after the commencement of this Act”.⁴³⁴

Section 53B(3) prohibits the registration of a derivative indigenous term or expression or knowledge, or a derivative indigenous design, unless prior informed consent has been obtained from the relevant authority or indigenous community.⁴³⁵ Further, there must be disclosure of the relevant term or expression to the Commission, and a benefit-sharing agreement must have been concluded.⁴³⁶ A derivative indigenous design will only be registrable if it is new and does not form part of the state of the art.⁴³⁷ Where the design is subject to a release date, then application for registration must be made within two years of the release date.⁴³⁸ The maximum term of protection of an aesthetic derivative indigenous design is 15 years, and ten years for a functional derivative indigenous design.⁴³⁹ However, the term of protection of an indigenous design shall be perpetual.⁴⁴⁰

5.3.3 Criticisms of the Government's Act

The approach adopted by the Department of Trade and Industry was to take the four pre-existing Intellectual Property statutes and write into them provisions aimed at granting protection to traditional works.⁴⁴¹ However, this approach seems to overlook a fundamental principle of the

⁴³² Supra (note 431 above).

⁴³³ Ibid.

⁴³⁴ Section 11 of the Act.

⁴³⁵ Section 6 of the Act.

⁴³⁶ Ibid; Section 12 of the Act.

⁴³⁷ Ibid; Section 53B(2) of the Designs Act No.195 of 1993.

⁴³⁸ Ibid.

⁴³⁹ Ibid; Section 53E of the Designs Act No.195 of 1993.

⁴⁴⁰ Ibid.

⁴⁴¹ van der Merwe 'The Old And The New'.

pre-existing legislation, namely that they are based on the philosophy that new creative works can be protected for the benefit of their individual creators for a strictly limited period of time subject to the condition that, upon the expiry of the term of protection, these then fall into the public domain.⁴⁴² Traditional works are already within the public domain and now must be removed from it and become the private property of traditional communities who will be entitled to remuneration for their use forever thereafter.⁴⁴³

The Bill, which has now been enacted, is seen as incorporating Traditional Knowledge into existing law, rather than being governed by its own separate act.⁴⁴⁴ Also, the imprecise nature of certain provisions such as the concept of “indigenous community” and how and by whom that community is determined is problematic because it creates uncertainty.⁴⁴⁵ It also creates retrospective subsistence of copyright, up to 50 years before the Act came into operation.⁴⁴⁶

It seems that the protection desired cannot be achieved by merely amending the aforementioned Intellectual Property statutes in place without doing serious damage to the basic principles of such statutes.⁴⁴⁷ This is due to the fact that specialised protection for Traditional Knowledge is not compatible with the fundamental principles of Intellectual Property law as embodied in such statutes.⁴⁴⁸ Therefore, the desired objective of protection cannot be achieved.

The Act seems to seek to force the protection of Traditional Knowledge into the Intellectual Property statutes, therefore “clothing” it with statutory protection and the facility to attract revenue for its use.⁴⁴⁹ This is referred to by Dean as, “dressing something in clothes which were not designed for it, thus making for an extremely uncomfortable fit.”⁴⁵⁰

Judge Louis Harms expresses the view that, “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.”⁴⁵¹ He is concerned that the Bill will not only fail to achieve its objective, but that by mixing Intellectual

⁴⁴² Dean ‘Inside Views’ 2.

⁴⁴³ Ibid.

⁴⁴⁴ Daniels ‘South Africa Hopes’.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

⁴⁴⁷ Dean ‘Breaking With Tradition’.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ O Dean ‘Traditional Knowledge Subverts Intellectual Property Principles’ – extract from letter to LSSA IP Law Committee blogs.sun.ac.za (Accessed on 17 July 2013).

⁴⁵¹ Ibid.

Property law as well as Traditional Knowledge, it will undermine the long established and internationally recognised principles of Intellectual Property law.⁴⁵² He states that, “legal structures that have grown over centuries can be destroyed by legislation that is politically expedient.”⁴⁵³

The Law Society of South Africa (LSSA) committee took place on the 23 January 2008 and supported the protection for Traditional Knowledge.⁴⁵⁴ However, the committee resolved that the Bill (now Act) in its current form could not be supported since it was in conflict with well-established principles Intellectual Property law and that such a piece of legislation would undermine South Africa’s international Intellectual Property relations.⁴⁵⁵ It was submitted that *sui generis* legislation would be more appropriate and as a result, comments on the Bill in its current format were not submitted.⁴⁵⁶

The International Association for the Protection of Intellectual Property (AIPPI) Resolution is of the view that harmonised treatment of Traditional Knowledge internationally is to be encouraged, that legal certainty is desirable, and that protection for Traditional Knowledge should be aligned with the principles of existing Intellectual Property systems which may be achieved by way of *sui generis* treatment.⁴⁵⁷

The World Intellectual Property Organisation (WIPO) has been working on a Traditional Knowledge model law for many years and its expert opinion still remains that such knowledge is best protected by *sui generis* legislation.⁴⁵⁸

There seems to have been a constant refrain stating that if one wants to protect Traditional Knowledge, it is to be done in a *sui generis* or customised piece of legislation designed to take into account the unique and special nature of Traditional Knowledge.⁴⁵⁹ The World Intellectual Property Organisation (WIPO) has also been struggling with the problem of protecting Traditional Knowledge for years and has been devoting its specialised expertise towards achieving a workable outcome.⁴⁶⁰ It anticipates that a model *sui generis* law and an international

⁴⁵² Ibid.

⁴⁵³ Supra (note 451 above).

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Dean ‘Inside Views’ 3.

⁴⁵⁸ Ibid.

⁴⁵⁹ Dean ‘Inside Views’ 2.

⁴⁶⁰ Ibid.

treaty providing for it will be presented to the international community.⁴⁶¹ The sensible approach therefore seems to be to wait for this development and then to pass domestic legislation which is in line with the model law and treaty, therefore enabling South Africa to be in line with the international movement.⁴⁶²

The fundamental purpose of the Intellectual Property legislation is to foster and promote creativity and innovation for the future benefit of everyone.⁴⁶³ However, this Act is not aimed at this purpose. Its goal seems to be to look backwards and not forward and to turn what already exists, and has existed for past centuries, into money making tools.⁴⁶⁴ It seems to do nothing that “promotes the progress of science and useful arts” and therefore does not adopt the common-sense principle which is required of the Intellectual Property legislation by the American Constitution.⁴⁶⁵

The Government's Act (formerly the Bill) was held up as an example of how not to go about providing for specialised protection for Traditional Knowledge, and more particularly expressions of folklore which is what the Bill is mostly concerned about.⁴⁶⁶ It has been heavily criticized by Dean.

Dean states that, by incorporating the protection of Traditional Knowledge as species of copyright, designs etc. and to apply the existing laws in these areas to it, the Bill (now Act) has created rights that are simply incapable of being enforced.⁴⁶⁷ Further, he suggests that it can be predicted with a measure of certainty that no claim based on a Traditional Knowledge right will ever succeed in the South African courts.⁴⁶⁸ According to Dean, South Africa has been made to look ridiculous in the international Intellectual Property community, and the country's ability to encourage innovation and business activity will suffer the consequences.⁴⁶⁹ He believes that most informed Intellectual Property lawyers will in the future, inform their clients to merely carry on as previously, in the belief that in practical terms the purported rights in Traditional Knowledge that have been created will not really be capable of being enforced.⁴⁷⁰

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Supra (note 457 above).

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Dean 'Inside Views' 1.

⁴⁶⁷ O H Dean 'Traditional Knowledge Bill Unworkable' blogs.sun.ac.za 4 November 2011 (Accessed on 17 July 2013).

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

The Vine Oracle also shares this view.⁴⁷¹ He also believes that there is a possibility that the Bill (now Act) may, in the future, face a constitutional challenge.⁴⁷²

Indigenous peoples within South Africa as well as the rest of the world have put forward the argument that the knowledge of the use of certain plants, for example, has been developed over generations, and therefore ask why only the present generation should benefit.⁴⁷³ There is also the question of why some governments or corporates are reaping the rewards of Indigenous Knowledge through products that have been patented, when the knowledge comes from the communities of indigenous peoples.⁴⁷⁴ Daniels states that the difficulties in answering these questions lies in the fact that Indigenous Knowledge systems do not have a clearly devised timeline to the origin or source of the knowledge.⁴⁷⁵ As a result, “western science has recently begun looking at Indigenous Knowledge as a source of new drugs...yet refusing to acknowledge its economic value and ownership”.⁴⁷⁶

Masango suggests that there are certain areas of the Act that indicate that financial considerations are core to the protection of Traditional Knowledge.⁴⁷⁷ For example, in recognising the protection of performances, the Bill (now Act) states that it provides “for the recognition and protection of traditional performances having indigenous origin and a traditional character; to provide for the payment of royalties in respect of such performances.”⁴⁷⁸ This is important because if communities “receive fair and sustained recognition” of traditional performances through the payment of royalties, it would benefit those communities, thereby ensuring the sustainable development of the communities.⁴⁷⁹

There are areas in the Bill (now Act) that may prove difficult to confer financial consideration.⁴⁸⁰ The Bill states that it is “to provide for the recognition and protection of copyright works of a traditional character.”⁴⁸¹ Masango says that these raise some concern as folklore, that is works

⁴⁷¹ Dean ‘Breaking With Tradition’.

⁴⁷² Dean ‘Inside Views’ 2.

⁴⁷³ Daniels ‘South Africa Hopes’.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ S Sahai ‘Protection Of Indigenous Knowledge And Possible Methods Of Sharing Benefits With Local Communities’ www.dgroups.org 2002 (Accessed 17 July 2013).

⁴⁷⁷ Masango ‘Indigenous Traditional Knowledge’ 77.

⁴⁷⁸ Ibid.

⁴⁷⁹ Masango ‘Indigenous Traditional Knowledge’ 77, 78.

⁴⁸⁰ Masango ‘Indigenous Traditional Knowledge’ 78.

⁴⁸¹ Ibid.

of traditional character and are considered traditional indigenous property which may not command financial consideration.⁴⁸²

6. AN ALTERNATIVE APPROACH – THE PROTECTION OF TRADITIONAL KNOWLEDGE BILL (WILMOT BILL)

As previously stated, Dean introduced a new *sui generis* Protection of Traditional Knowledge Bill (Wilmot Bill). This proposed Bill is regarded as proof that Traditional Knowledge is better protected by *sui generis* legislation.⁴⁸³ The intention of this Bill is to show how the Government's Bill (now Act) should have been drafted.⁴⁸⁴ It is said to be intended to mitigate the tragedy our Intellectual Property law will face if the Government Act, in its current format, becomes law.⁴⁸⁵

The purpose of the Bill is, "To protect Traditional Knowledge as a new category of Intellectual Property; to provide how said Intellectual Property rights will be protected; to determine what is eligible for Traditional Knowledge Intellectual Property right protection and the conditions for the subsistence or termination of said protection; to provide for ownership of Traditional Knowledge Intellectual Property rights; to provide for the duration, nature and scope of Traditional Knowledge Intellectual Property rights; to provide for the enforcement of Traditional Knowledge rights; to regulate the licensing of Traditional Knowledge Intellectual Property rights; to provide for the establishment of a National Register of Traditional Knowledge; to provide for the establishment of a National Council in respect of Traditional Knowledge; to provide for the establishment of a national trust and trust fund in respect of Traditional Knowledge; and to provide for the regulation of the applicability of the Bill to foreign countries; to provide for the protection of performers and to provide for matters incidental thereto."⁴⁸⁶

Sikwane, an Intellectual Property lawyer at the law firm Edward Nathan Sonnenbergs suggests that the main differences between the Government's Act and the Wilmot Bill are that instead of making amendments to various Intellectual Property Acts, 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.⁴⁸⁷ She adds that the Bill

⁴⁸² Ibid.

⁴⁸³ Jooste 'Sui Generis Protection'.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ The Protection Of Traditional Knowledge Bill (supra note 17 above).

⁴⁸⁷ A Vermeulen 'Traditional Knowledge To Be Protected Through Intellectual Property Legislation' www.polity.org.za 5 July 2013 (Accessed 17 October 2014).

deals with what is likely to be the most common form of Traditional Knowledge – literary, artistic and musical works – by establishing the traditional work.⁴⁸⁸

The Wilmot Bill defines traditional work as, “a literary, musical or artistic work which evolved in, or originated from, a traditional community, and in respect of which no individual owner is known.”⁴⁸⁹ In order to enjoy protection, the traditional work must be reduced to a material form by or for the community, and it must be recognised as being derived from, and characteristic of, that community by people outside that community.⁴⁹⁰ The owner has the exclusive right to perform the traditional work in public, and to broadcast, make adaptations and distribute copies of it.⁴⁹¹ The right is only infringed if the person who commits the unauthorised act has knowledge of the right, and the usual copyright exceptions, such as fair use apply.⁴⁹²

The Bill also creates a right for traditional design, meaning an aesthetic design that is applied to an article and which evolved in, or originated from, a traditional community.⁴⁹³ In order to enjoy protection, the design must be reduced to a material form by that community, and it must be considered as being derived from or characteristic of that community by people outside it.⁴⁹⁴ The owner has the exclusive right to make, use or dispose of an article embodying the protected design, and there can be no infringement without knowledge of the right.⁴⁹⁵

The Bill creates the traditional mark. This is defined to include, “a trade mark, collective mark or certification mark which evolved in, or originated from, a traditional community.”⁴⁹⁶ To be protected, a traditional mark must be represented graphically by, or for, the community, and it must be recognised as being derived from, or be a characteristic of, that community by people outside of that community.⁴⁹⁷ The owner has the exclusive right to register it, and the mark is deemed to enjoy repute for the purposes of bringing a passing-off or unlawful competition case.⁴⁹⁸ A traditional mark can only be infringed by someone who knows of the right.⁴⁹⁹

⁴⁸⁸ Ibid.

⁴⁸⁹ Section 1 of the Bill.

⁴⁹⁰ Section 2(a)-(c) of the Bill.

⁴⁹¹ Section 3(1) of the Bill.

⁴⁹² Section 3(2) of the Bill.

⁴⁹³ Section 8(a) – (c) of the Bill.

⁴⁹⁴ Ibid.

⁴⁹⁵ Section 9(1) and (2) of the Bill.

⁴⁹⁶ Section 1 of the Bill.

⁴⁹⁷ Section 13(a) – (c) of the Bill.

⁴⁹⁸ Section 14(1) and (2) of the Protection of the Bill; Section 17(1) of the Bill.

⁴⁹⁹ Section 17(2) of the Bill.

The Bill also uses the concept of a traditional community, which is defined as, “a natural, indigenous and homogeneous grouping of people that have a common language and customs and is generally recognised as having a separate and individual character.”⁵⁰⁰ The Bill provides that the Traditional Knowledge will belong to the traditional community in which it evolved and originated.⁵⁰¹ The traditional community can designate a person who will own the right in a representative capacity.⁵⁰²

The Bill also makes provision for the licensing of Traditional Knowledge.⁵⁰³ It provides for registration of Traditional Knowledge in a Register of Traditional Knowledge, and it creates a National Council for Traditional Knowledge and a National Trust Fund for Traditional Knowledge.⁵⁰⁴ To this extent, it is in line with the Government’s Act.

Sikwane suggests that one major difference between the two pieces of legislation is that the Wilmot Bill makes provision for the protection of foreign Traditional Knowledge on an ad hoc basis by way of a special proclamation in the Government Gazette, but only in cases where that foreign country gives reciprocal protection to South African Traditional Knowledge.⁵⁰⁵ She adds that that the Wilmot Bill seeks to address the concerns that have arisen with the Government Bill (now Act), without overlooking the main objective which is to protect Traditional Knowledge.⁵⁰⁶

This Bill will establish a system that is customised to benefit the South African population and will adequately protect Traditional Knowledge. Further, it will ensure that the relevant indigenous communities financially benefit from their Traditional Knowledge, and rightfully so.⁵⁰⁷ However, in such instances, it could be difficult for example, to attach financial considerations to traditional myths, beliefs and superstition.⁵⁰⁸ Furthermore, it is questionable as to how a community would then benefit financially with a database for the recording of myths, traditional beliefs, superstition, stories and customs.⁵⁰⁹

⁵⁰⁰ Section 1 of the Protection of the Bill.

⁵⁰¹ Section 38(1) of the Bill.

⁵⁰² *Ibid.*

⁵⁰³ Section 38(3) of the Bill.

⁵⁰⁴ Chapter 4,5 and 6 of the Bill.

⁵⁰⁵ Vermeulen ‘Traditional Knowledge’.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Janke ‘Case Studies’ 79; Masango ‘Indigenous Traditional Knowledge’ 78.

⁵⁰⁹ The Department of Trade & Industry ‘Policy Framework’ 8.

The Wilmot Bill has been designed to achieve these goals, which the Government's Act will not be able to achieve⁵¹⁰ As previously mentioned, the Government Bill previously found itself with the serious objection where legal practitioners in South Africa felt that the Bill was entirely impracticable, thus advising their clients to either ignore it or bypassing its application with the law of contract.⁵¹¹

The Wilmot Bill proposes a *sui generis* approach to the protection of *sui generis* expressions.⁵¹² The World Intellectual Property Organization (WIPO) has actually been working on a Traditional Knowledge model law for many years now and its expert opinion remains that Traditional knowledge is best protected by *sui generis* legislation.⁵¹³ The organization is therefore in support of the Wilmot Bill.

The LSSA submitted its comments on the Wilmot Bill. The Law Society commended and advised that it strongly and fully supports the broad principle of the Bill, which is to provide *sui generis* protection for Traditional Knowledge.⁵¹⁴ It confirmed that the Law Society has always been opposed to the principle and provisions of the Government's Bill which proposed to protect Traditional Knowledge by including in, and amending, the present Intellectual Property Acts.⁵¹⁵ It is of the view that Traditional Knowledge does not equate with conventional norms of Intellectual Property requirements of the Intellectual Property Acts for granting protection to Intellectual Property.⁵¹⁶

The Law Society points out that this approach is in line with the *sui generis* approach adopted by developing countries regarding the protection of Traditional Knowledge and Folklore Expressions/ Traditional Cultural Expressions at WIPO.⁵¹⁷ It makes reference to the African Regional Intellectual Property Organisation (ARIPO) which has been recently adopted by our neighbouring countries as well as other African countries.⁵¹⁸ These members are: Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Rwanda, Sierre Leone, Somalia, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.⁵¹⁹ The

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Mugabe 'Intellectual Property Protection' 3.

⁵¹³ Ibid.

⁵¹⁴ LSSA Comments: Draft Protection Of Traditional Knowledge Bill (2013) 1.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ World Intellectual Property Organisation www.wipo.org (Accessed 17 July 2013).

⁵¹⁸ Supra (note 224 above).

⁵¹⁹ LSSA Comments 2.

Protocol has the full support of WIPO.⁵²⁰ The Law Society also mentions other countries in Africa who have also adopted their own *sui generis* laws in order to protect Traditional Knowledge, such as Tunis, Bangui, and the Agreement of OAPI (the regional Intellectual Property system in Africa of French speaking countries).⁵²¹

The Law Society confirmed its support of the broad principle of the Wilmot Bill and submitted that such customized *sui generis* legislation, with appropriate amendments, is warranted.⁵²² Its comments based largely on the approach used in the Protocol.⁵²³ The Law Society suggests that its comments should be regarded as a treaty or guide, as with the TRIPS Agreement.⁵²⁴

The Law Society suggests that the terminology used in South Africa for Traditional Knowledge is correct.⁵²⁵ There has been a tendency to refer to all traditional artistic, musical and literary matters as Traditional Knowledge.⁵²⁶ However, internationally the term “Traditional Knowledge” is used to refer to the technological traditional matters only.⁵²⁷ On the other hand, the term folklore or traditional cultural expressions is used internationally to refer to all other aspects which we refer to as Traditional Knowledge in South Africa.⁵²⁸ These include traditional performance; ceremonies; music; dances; songs; poems; patterns; designs etc.⁵²⁹

7. THE PROTECTION OF TRADITIONAL KNOWLEDGE IN AUSTRALIA – A BRIEF LOOK AT THE CURRENT SITUATION

The protection of indigenous folklore and knowledge has become a pressing issue in Australia as well.⁵³⁰ This is due to the development of a lucrative international trade in indigenous heritage, which has seen most of the economic benefits diverted to non-indigenous persons and institutions. For example, during 2008 in Australia, the indigenous arts and crafts industry had a

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² Ibid.

⁵²³ Ibid; Swakopmund Protocol On The Protection Of Traditional Knowledge And Expressions Of Folklore, ARIPO Swakopmund, Namibia 2010.

⁵²⁴ Supra (note 520 above).

⁵²⁵ Ibid.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

⁵²⁸ LSSA Comments 3.

⁵²⁹ Ibid.

⁵³⁰ Githaiga ‘Intellectual Property Law’ para 3.

turnover of almost 200 million United States dollars per annum, but the indigenous people only received about 50 million of this return.⁵³¹

Doubts have been cast in Australia about the inability of the current copyright regime to fully accommodate and protect indigenous folklore. The deficiencies of Australian copyright law exist in the requirements which pertain to ownership and authorship; material form; originality; duration and rights in derivative works.⁵³²

Copyright is seen as a propriety interest that cannot be traded.⁵³³ A copyright owner has the general right to either not exploit his or her material (which is a right subject to statutory exceptions), or to allow others to deal with it provided that the he receives compensation for his investment of time, capital or talent.⁵³⁴

However, there are shortfalls in the Intellectual Property system, for example, stories that are orally transmitted are often not protected under copyright, at least not in common law systems.⁵³⁵ Like in South Africa, works that are very old, where the original creator passed away more than 50 years ago, are not protected.⁵³⁶ The limited duration of copyright offers inadequate protection as it is said to conflict with the longevity of the indigenous folkloric works.⁵³⁷ The major concern for indigenous communities is that these works, which are currently protected, could end up in the possession of non-indigenous people once the copyright expires.⁵³⁸ As a result, the rightful owners of the works under traditional customary law would become “culturally dispossessed and impoverished”, relying on others to allow them access to knowledge that was initially and rightfully belongs to them.⁵³⁹

The requirement of originality cannot be satisfied because most folkloric works tend to be inspired by pre-existing traditions as well as successive patterns of imitation over time.⁵⁴⁰

⁵³¹ ATIS, National Aboriginal And Torres Strait Islander Cultural Industry Strategy, prepared by Focus with assistance from Sharon Boil & Associates, February 1997, cited in T Janke, “Our Culture, Our Future: Proposals For The Recognition And Protection Of Indigenous Cultural And Intellectual Property” 26.

⁵³² Githaiga ‘Intellectual Property Law’ para 9.

⁵³³ Githaiga ‘Intellectual Property Law’ para 11.

⁵³⁴ Ibid.

⁵³⁵ Ibid.

⁵³⁶ Ibid.

⁵³⁷ Githaiga ‘Intellectual Property Law’ para 26.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ Githaiga ‘Intellectual Property Law’ para 19.

Another shortfall is the fact that procedures for designs and trademark registration often affect indigenous people's access to the use of the Intellectual Property system.⁵⁴¹

Courts in Australia have acknowledged the failure of the copyright system to accommodate indigenous people's concept of ownership.⁵⁴² In the case of *Yumbulul v Reserve Bank of Australia*, French J observed that, Australia's copyright law does not provide adequate recognition of aboriginal community claims to regulate the reproduction and uses of works which are essentially communal in origin.⁵⁴³

Terry Yumbulul was authorised by tribal elders to craft the Morning Star Pole and license its display in selected museums.⁵⁴⁴ The Reserve Bank of Australia commissioned an agent to obtain authorisation from Yumbulul for the use of the pole on a ten dollar banknote.⁵⁴⁵ The agent subsequently obtained an assignment of copyright from Yumbulul and then authorised the Bank to print the pole on the bank note.⁵⁴⁶

The primary issue before the judge was whether there had been a valid assignment of copyright.⁵⁴⁷ The agent argued that even if there had been no lawful assignment, the reproduction of the pole on a banknote was still valid due to sections 65 – 68 of the Copyright Act of 1968.⁵⁴⁸ These provisions allow the reproduction of a sculpture that is on a permanent display without the permission of the copyright holder.⁵⁴⁹ As the judge ruled that the assignment of copyright had been valid, he did not have to decide on the correctness of the agent's defence. He, however, commented that if the agent was right, then it may be the case that some aboriginal artists laboured under a serious misconception as to the effect of public display upon their copyright in certain classes.⁵⁵⁰ The court held that this question and that of statutory communal interests in the reproduction of sacred objects were matters for considerations by law reformers and legislators.⁵⁵¹

⁵⁴¹ Ibid.

⁵⁴² Githaiga 'Intellectual Property Law' para 15.

⁵⁴³ *Yumbulul v Reserve Bank of Australia* 1991 21 IPR 481.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

Similarly, in the case of *Milpururru v Indofurn Pty Ltd* von Doussa J stated that, “the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under aboriginal law.”⁵⁵²

The factor of originality is particularly relevant to sacred ancestral designs, which have to be replicated either exactly or to a high degree of accuracy.⁵⁵³ WIPO has acknowledged that the very nature of many folkloric works is that they are repetitive; they rely on tradition and the scope for interpretation and individual expression is limited.⁵⁵⁴

In Australia, some commentators are of the view that, given the low threshold that the courts have generally set for the establishment of originality, it should not present a major obstacle in the protection of indigenous folklore.⁵⁵⁵ The Australian cases on indigenous Intellectual Property rights to date have involved artists who are well known both within indigenous and non-indigenous circles and therefore originality has been a non-issue.⁵⁵⁶ However, in dealing with less recognisable authors, a balance would need to be drawn between the “freedom of artistic expression” as well as the “recognition of an exclusive legal right in aboriginal people to significant and identifiable aboriginal designs.”⁵⁵⁷

An important feature of copyright law is the idea/expression dichotomy where the expression of ideas as opposed to ideas themselves, are protected.⁵⁵⁸ This has serious implications for indigenous people since most folkloric works tend to be orally and visually represented.⁵⁵⁹ In Australia, indigenous designs are regarded as ideas rather than expressions, indigenous people are thus free to commercially exploit indigenous works with no regard to customary law.⁵⁶⁰ Even where particular indigenous works are protected, non-indigenous people can still create their own versions of indigenous art which in themselves are protectable as original works, thus avoiding copyright infringement and at the same time violating indigenous customary law.⁵⁶¹

Australia uses common law to protect Traditional Knowledge. Janke confirms that indigenous Australians have explored and used Intellectual Property laws to protect their arts and cultural

⁵⁵² *Milpururru v Indofurn Pty Ltd* 1994 30 IPR 209.

⁵⁵³ *Supra* (note 450 above).

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Githaiga 'Intellectual Property Law' para 20.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Githaiga 'Intellectual Property Law' para 22.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

expressions.⁵⁶² This has been done through acquiring, exercising enforcing as well as managing Intellectual Property rights.⁵⁶³ The two main non-legislative proposals for protecting indigenous Intellectual Property rights have been firstly, the introduction of a Mabo-style claim and secondly, the use of breach of confidence action.⁵⁶⁴

In the case of *Mabo*, the High court held that where the relevant nexus to the land can be established, native title still subsists, irrespective of any changes to indigenous laws and customs over the years of Crown sovereignty.⁵⁶⁵ It has been suggested that such a reasoning can be applied to indigenous sacred objects, ceremonies or customs even if they have no basis in common law, provided that they are consistent with basic common law principles.⁵⁶⁶

However, there are several problems which are present in this Mabo-style approach. Firstly, most indigenous customary laws are orally passed on, and as such, there may be a lack of evidence in proving the existence and continuance of particular rules regulating the production and use of folklore.⁵⁶⁷ Secondly, the Mabo case does not grant indigenous law much room which it can operate within mainstream law.⁵⁶⁸ This would result in a “piecemeal” approach for determining whether particular customary laws relating to folklore apply in a particular case, as High Court decisions would need to be applied to each and every such customary law.⁵⁶⁹ Thirdly, one would have to ascertain whether there has in fact been any legislative extinguishment of customary law rights relating to the reproduction of folkloric works, which presently is not the case.⁵⁷⁰ Lastly, it seems unclear whether the courts would enforce customary law if a case were brought on such a basis, even if indigenous peoples adhered to such law and some non-indigenous people did so out of cultural sensitivity.⁵⁷¹

An action based on breach of confidence as an alternative framework for protecting indigenous folklore has been proposed in Australia. The action has three main elements, namely, (1) information of a confidential nature; (2) an obligation of confidence and (3) unauthorised use of the information.⁵⁷²

⁵⁶² Janke ‘Case Studies’ 6.

⁵⁶³ Ibid.

⁵⁶⁴ Githaiga ‘Intellectual Property Law’ para 33.

⁵⁶⁵ *MaboFors v State of Queensland* 1992 175 CLR 1.

⁵⁶⁶ Githaiga ‘Intellectual Property Law’ para 36.

⁵⁶⁷ Githaiga ‘Intellectual Property Law’ para 37.

⁵⁶⁸ Githaiga ‘Intellectual Property Law’ para 38.

⁵⁶⁹ Ibid.

⁵⁷⁰ Githaiga ‘Intellectual Property Law’ para 39.

⁵⁷¹ Githaiga ‘Intellectual Property Law’ para 41.

⁵⁷² Githaiga ‘Intellectual Property Law’ para 42.

In regards to the first element, the mere ability of the public to inspect a confidential document does not in itself suffice in the elimination of the quality of confidentiality.⁵⁷³ Therefore it can be argued that the publication or public scrutiny of aboriginal designs does not render the sacred information embodied in the designs any less confidential.⁵⁷⁴ As such, the design retains its quality of confidentiality as long as its secrets are known only to those authorised by aboriginal law to know them.⁵⁷⁵

It is not necessary for the recipient of the information to know that the information is confidential in order for the second element to be satisfied.⁵⁷⁶ The test for obligation of confidence is an objective one.⁵⁷⁷ The question here is whether the information was communicated in circumstances in which a reasonable person would know that the information is confidential.⁵⁷⁸ This would amount to unauthorised use and the type of detriment suffered will depend on indigenous law, and not simply on what the individual artist purports.⁵⁷⁹

The main advantage of a breach of confidence action is that the action possesses greater scope than any other legal remedy for taking into account “aboriginal” in making the decision, especially since it is not restricted by the notion that only an individual artist can satisfy its requirements.⁵⁸⁰

Janke emphasises the importance of noting that Intellectual Property law is merely one avenue that Indigenous Australians have explored regarding the protection of Traditional Knowledge.⁵⁸¹ Other strategies have also been used. These include: (a) the use of contracts; (b) the establishment of collective management systems; (c) the drafting of cultural protocols; (d) the use of knowledge management systems and (e) the strengthening of indigenous customary laws.⁵⁸²

Many have proposed that a basic framework for protecting indigenous folklore and knowledge, which contemplates the enactment of *sui generis* legislation.⁵⁸³ Jane states that Indigenous

⁵⁷³ Githaiga ‘Intellectual Property Law’ para 43.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

⁵⁷⁶ Githaiga ‘Intellectual Property Law’ para 46.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ Githaiga ‘Intellectual Property Law’ para 47.

⁵⁸⁰ Githaiga ‘Intellectual Property Law’ para 48.

⁵⁸¹ Janke ‘Case Studies’ 79.

⁵⁸² Ibid.

⁵⁸³ Githaiga ‘Intellectual Property Law’ para 7.

Australians still continue to call for *sui generis* legislation for the protection of aboriginal and Torres Strait Islander Traditional Knowledge as well as cultural expressions.⁵⁸⁴

"This means not only 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 Australian legal system are two parallel systems of law, both which need to be given proper weight and recognition."⁵⁸⁵

Janke states that traditional custodians and artists consent to the reproduction of artistic works of significance where such production is in a prestigious publication for the purposes of educating members of the non-indigenous community about aboriginal culture.⁵⁸⁶

The Designs Office of Intellectual Property Australia administers the system of design registration as well as registered designs.⁵⁸⁷ When it comes to indigenous arts and culture, there seems to be a disparity between the legal uses of the word "design".⁵⁸⁸ Design protection is limited to protection of the appearance of manufactured articles.⁵⁸⁹ Copyright law also recognises derivative works as original creations which can be protected.⁵⁹⁰ Indigenous designs have particular meanings in indigenous cultures.⁵⁹¹ As they are handed down through generations, these designs relate people back to the ancestral beings, their journeys and events as well as places associated with them.⁵⁹² Caruana suggests that it is through the use of these ancestrally inherited designs, that artists are able to assert their identity, rights and responsibilities.⁵⁹³

The differences between designs which are protected under the Designs Act have resulted in some confusion.⁵⁹⁴ Complex designs such as the "*rarrk*" style of cross-hatching are not protected by the Designs Act unless they are applied to an article or manufacture.⁵⁹⁵

⁵⁸⁴ Supra (note 582 above).

⁵⁸⁵ T Janke *Our Culture: Our Future – Report On Australian Indigenous Cultural And Intellectual Property Rights* Michael Frankel and Company 1999 112.

⁵⁸⁶ Janke 'Case Studies' 12.

⁵⁸⁷ Janke 'Case Studies' 72.

⁵⁸⁸ Janke 'Case Studies' 75.

⁵⁸⁹ Ibid.

⁵⁹⁰ Githaiga 'Intellectual Property Law' para 28.

⁵⁹¹ Supra (note 589 above).

⁵⁹² Ibid.

⁵⁹³ W Caruana *Aboriginal Art* Thames and Hudson, Singapore 1993 15.

⁵⁹⁴ Janke 'Case Studies' 76.

⁵⁹⁵ Ibid.

The Working Party on the Protection of Aboriginal Folklore, which was established in 1975, inquired into the adequacy of existing copyright and designs laws as well as the "need and nature of legislation required for adequate protection of Aboriginal artists in regard to Australian and international copyright."⁵⁹⁶ The Report of the Working Party on the Protection of Aboriginal Folklore was released in 1981 and found that the Copyright Act did not adequately protect aboriginal cultural as well as the artistic works.⁵⁹⁷ The Act does protect an author's work, however, this is an individualistic right which is likely to conflict with the traditional rights held by communities under aboriginal customary law.⁵⁹⁸

The Australian Law Reform Commission Report No. 74 Designs (1995) noted the importance of traditional indigenous designs to Australian design law.⁵⁹⁹ The report regards these as special issues that cannot be adequately addressed through general designs law and therefore should not be considered in isolation from other issues arising out of aboriginal art, culture and heritage."⁶⁰⁰

Submissions to the report specifically dealt with issues of indigenous designs.⁶⁰¹ A submission from the Aboriginal Legal Services in Hobart to the Designs Review, for example, suggested that any new design legislation must incorporate the recommendations contained in the Report of the Working Party on the Protection of Aboriginal Folklore, in regards to the prohibition of non-traditional uses of sacred-secret materials and to introduce a system of clearances for perspective users of items of aboriginal folklore.⁶⁰² The submission questions the effect of registration of aboriginal designs by non-aboriginal persons, especially in instances where such registration overrides possible common law rights of aboriginal communities to those designs, which will be determined by the courts.⁶⁰³ The Aboriginal Legal Services states that this is exactly why statutory protection and enforcement of aboriginal designs is needed.⁶⁰⁴

Indigenous performances and ceremonies are regarded as important expressions of indigenous cultures.⁶⁰⁵ Indigenous people exhibit and publicly perform their work at festivals attended by

⁵⁹⁶ Report Of The Working Party On The Protection of Aboriginal Folklore, Australian Government Printing Service, Canberra 1981 3.

⁵⁹⁷ Ibid.

⁵⁹⁸ Copyright Act, 1968.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

⁶⁰¹ Janke 'Case Studies' 78.

⁶⁰² Ibid.

⁶⁰³ Australian Law Reform Commission (ALRC) Report no 74 Designs, Australian Government Printing Service, Canberra 1995.

⁶⁰⁴ Ibid.

⁶⁰⁵ Janke 'Case Studies' 96.

both non – indigenous and indigenous people.⁶⁰⁶ There is a deficiency in the current Australian law of performer's rights protection under the Copyright Act which extends to audio and audio visual recordings and broadcasting.⁶⁰⁷ There have been instances where indigenous people in Australia have been photographed without their consent and the image commercially exploited in an entirely different context.⁶⁰⁸

In Australia, rock art represents the origins of indigenous culture and belief systems.⁶⁰⁹ Indigenous Australians have often complained about their rock art being photographed and reproduced by graphic designers and artists who are not entitled to.⁶¹⁰ They complain that such images are exploited commercially without their permission or without any royalties being returned to them.⁶¹¹

Rock art is perceived to be in the public domain under copyright laws because the author is often unknown and the antiquity of the art is such that the period of protection, if applicable to begin with, would have expired.⁶¹²

8. CONCLUSION

It is clear that Traditional Knowledge should be protected in order to allow indigenous people to use and/or exploit their own knowledge. The protection of Traditional Knowledge will also prevent unauthorised people from exploiting this knowledge.

A huge problem that currently exists is that many traditional holders are not aware of their Intellectual Property rights. In this regard, Masango is of the correct opinion that there is a great need for investigations as well as the education of communities about their Traditional Knowledge as well as Intellectual Property rights. If these investigations and lectures take place, then the indigenous communities will be able to obtain Intellectual Property rights over their Traditional Knowledge. In this way, non-members of indigenous communities will not be able to

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

⁶⁰⁹ Janke 'Case Studies' 112.

⁶¹⁰ Ibid.

⁶¹¹ Ibid.

⁶¹² M Blakeney 'Protection Of Traditional Knowledge Under Intellectual Property Law' European Intellectual Property Reports 2000 251.

acquire these rights over Traditional Knowledge originating from indigenous communities (misappropriation of Traditional Knowledge of Traditional Knowledge holders).

The main issue, therefore, is how to protect such knowledge. Should the protection be provided by redrafting the existing laws or by the introduction of specific legislation (*sui generis*)?

Government has suggested that the existing laws be amended, however, this appears to not be appropriate or even workable. A far preferable solution therefore would be to introduce specific legislation that focuses on Traditional Knowledge as a species of Intellectual Property, which is deserving of its own protection.

It is submitted that the Government's Act is unworkable, in its current state. The fundamental reason for such a view is that the Act's attempt to incorporate the protection for Traditional Knowledge into the existing legislation is not recommended. It has been argued that if such a method is followed, then the Intellectual Property legislation will lose its principle philosophy and purpose. The protection for Traditional Knowledge should not be forced into the current Intellectual Property system. It makes more sense to merely accept the fact that Traditional Knowledge is dissimilar from other Intellectual Property, and therefore requires a different and more suitable method of protection.

A *sui generis* Bill has been drafted by Professor Dean. It is submitted that the Wilmot Bill serves as an excellent alternative to the Government Act. The most important factor about this Bill is that it not only recognises, but incorporates the *sui generis* approach towards the protection of Traditional Knowledge. The Bill provides, "adequate; financially viable; and legally enforceable protection for Traditional Knowledge that will provide *sui generis* (of its own kind) protection for Traditional Knowledge".⁶¹³ It also complies with South Africa's international obligations."⁶¹⁴

As van der Merwe suggests, the final question is whether South Africa would be prepared to disregard the Government's Act if it proves unsuccessful in the future, and whether it will be prepared, in principle, to follow a *sui generis* legal approach in the years to come.⁶¹⁵

⁶¹³ Holly 'Member of Parliament, Dr. Wilmot James, Submits New Protection of Traditional Knowledge Bill' 16 April 2013 <http://natural-justice.blogspot.com> 16 April 2013 (Accessed 14 May 2014).

⁶¹⁴ Ibid.

⁶¹⁵ Van der Merwe 'The Old And The New'.

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