PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: KENYA'S PRACTICAL EXPERIENCES, INITIATIVES AND PROJECTS

1. DIGITIZING TRADITIONAL CULTURE IN KENYA

Case Study: The Maasai Pilot – A Success Story

- In 2006, following a request from a Maasai community in Kenya, WIPO undertook an exploratory mission with the International Labour Organization (ILO) to identify their needs and explore assistance possibilities.
- Two years later, a pilot program with the community and the National Museums of Kenya was launched.
- A follow-up course took place in 2009, where the trainees were instructed on how to use recording equipment.
- The WIPO-UNTV video Digitizing Traditional Culture in Kenya (on YouTube) tracks the efforts of two trainees in their quest to document the TCEs handed down by generations of elders.

- WIPO provided assistance to the Maasai community in protecting, preserving and documenting their rich cultural heritage.
- Two young Maasai in Kenya, John Ole Tingoi and Ana Tome made camera tracks efforts, in their quest to document valuable cultural expressions handed down by generations of Maasai elders.
- The effort is nicely summarized by John when he says “Culture is identity and identity is very important,” adding ”when an elder dies, it’s just like a light burning out so we want to get that knowledge before this generation goes.”
- WIPO provided the Maasai community with digital equipment to record its own traditions and creative expressions.
- This WIPO hands-on practical assistance is helping an indigenous community to document and preserve its own cultural traditions while simultaneously managing its intellectual property interests.

- The project enabled the community to create a piece of its own intellectual property in the form of photographs, sound recordings and community databases.

- The project has empowered the Maasai to seize control over the recording of their own histories, their own stories, turning indigenous custodians of their knowledge systems into intellectual property owners.

2. BRINGING IP AND BRANDING TO BASKET WEAVING IN KENYA

- A training workshop for a branding project took place on February 17 and 18, 2016 in Voi (Kenya), bringing together 30 female basket weavers from surrounding small villages.
- The objective was to learn the importance of the trademark system, standards and quality control for branding products.
- The workshop hosted basket weavers, representing their respective basket-weaving groups, in Taita Taveta County.
- A "Taita Basket" is the collective name of the sisal baskets made by women in Taita Taveta County.

- The baskets are laboriously crafted according to the traditional art from hand-twisted thin sisal fibers dyed with natural plants.
- They are remarkably soft, thanks to the tightly woven fine mesh and they boast resistance to color fading.
- The knowledge of basket making has been passed down from mothers to daughters from generation to generation.

- The workshop was the first step in a multi-step intellectual property-related branding project focusing on Taita Baskets.

- The all-female participants welcomed the idea of having a collective mark to protect and promote their baskets as a brand. They also learned the importance of standards and quality control

3. THE PROTECTION OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS ACT, 2016

- Date of Assent: 31st August, 2016
- Date of Commencement: 21st September, 2016
- Kenya's Traditional Knowledge and Cultural Expressions Act 2016 seek to enable communities to control the use of culturally significant and economically valuable knowledge and expressions.

- It does this by creating a new form of intellectual property right (IPR), held by community itself. The Act meets a Parliament's constitutional obligation on to pass legislation ensuring that 'communities receive royalties for the use of their cultures and cultural heritage' (Article 11(3(a)).
- The Act also sets up a system to ensure that the rights are effectively protected.
- Misuse of TK and TCEs is now a criminal offence. Communities are given the power to stop misuse by obtaining a court injunction forcing companies to pay over any profits where the commercialization of TK and TCEs has not been agreed in advance.

PART III-PROTECTION OF CULTURAL EXPRESSIONS

- Protection criteria of cultural expressions.
- Formalities relating to cultural expressions.
- Right of protection.
- Duration of protection of cultural expressions.

Section 14: Protection criteria of cultural expressions.

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

(a) the products of creative and cumulative intellectual activity, including collective creativity or individual creativity where the identity of the individual is unknown;

(b) characteristic of a community's cultural identity and cultural heritage and have been maintained, used or developed by such community in accordance with the customary laws and practices of that community;

(c) generated, preserved and transmitted from one generation to another, within a community, for economic, ritual, narrative, decorative or recreational purposes;

(d) individually or collectively generated;

(e) distinctively associated with or belongs to a community; and

(f) integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.

Section 15: Formalities relating to cultural expressions.

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

(2) Notwithstanding subsection (1), county governments shall collect information document and

register cultural expressions within the respective counties for the purposes of recognition.

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

(4) Where a community in Kenya shares cultural expressions with a community outside Kenya, the national and county government shall register the owners of the cultural expression in Kenya and maintain relevant records.
(5) Where more than one community in the same or different counties share the same cultural expressions, respective country governments shall register the owners of the cultural expressions and maintain relevant records.
(6) Where concurrent claims arise from different communities, national government or county government shall while determining the claim consider customary law and protocol of the communities in question, local information sources and any other means that may be applicable.
(7) Registration shall have a mere declaratory function and shall not in itself confer rights.

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

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

CHALLENGES

First, the Act defines 'community' very broadly as a group with any of the following attributes: shared ancestry, language, culture, community of interest, ecological or geographical space. Since communities may consist of millions of people stretching from remote rural areas to city suburbs, decision making about consent and benefit sharing may be difficult.

Second, the fact that TK and TCE are now potentially wealth generators provides an incentive for communities to seek exclusive control when in fact many of these resources are shared between groups. Disputes over ownership may be difficult to settle using customary law or other means, as the Act provides .

Third, there is a potential tension in the Act between local interests and those of the nation as a whole.

'Compulsory licensing' provisions in the Act would allow the government to bypass the community in permitting commercialization where TCEs are not being 'sufficiently exploited'.

Fourth, TK and TCEs are often shared with communities in neighbouring countries.

However, the Act does not make sufficient provision for cross-border cooperation mechanisms to assist in dispute resolution or management and enforcement of rights in transboundary or foreign TK and TCEs. This may increase conflict between countries and within transboundary communities, and reduce regional bargaining power in enforcing community rights.