

**A dissection of the Protection, Promotion, Development and Management of indigenous Knowledge Systems Act 6 of 2019: substantive issues and foreseeable consequences for creative industries in South Africa.**

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## DECLARATION

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# **1: Introduction and brief history of the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act 6 of 2019**

## **1.1 Introductory remarks**

Indigenous knowledge is a broad term that is used to describe various knowledge systems that are intimately linked with traditional communities.<sup>1</sup> It is communicated orally and stored in the memories of people belonging to traditional communities; it is also expressed through the art of traditional communities, their practices, community laws, cultural values, folklore, proverbs and activities.<sup>2</sup> The World Intellectual Property Organization (WIPO), defines ‘indigenous knowledge’ as a living body of knowledge - know-how, skills and practices that are formed, sustained and passed on through generations of a traditional community, often forming part of its cultural or spiritual identity.<sup>3</sup> There is no internationally accepted definition of indigenous knowledge as the protection of indigenous knowledge is a recent discourse amongst relevant global institutions and countries protecting intellectual property. The term ‘traditional knowledge’ is sometimes used in place of ‘indigenous knowledge’ and this may create confusion. Therefore, for the purposes of this dissertation, it must be noted that these terms are used interchangeably.

Furthermore, it must be expressly established that indigenous knowledge is the property of indigenous communities. Indigenous communities, in their interaction with the environments in which they have resided, have developed a body of knowledge, skills and creative expressions over the centuries and this knowledge has formed an integral part of their cultural heritage.<sup>4</sup> Such knowledge is now termed indigenous or traditional knowledge and as the true and original creators of such knowledge, indigenous communities are the rightful owners of it.

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<sup>1</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa’s Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 8.

<sup>2</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 1 – 25. Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

<sup>3</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa’s Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 8.; WIPO. 2020. Traditional Knowledge and Intellectual Property – Background Brief. Available at: [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional](https://www.wipo.int/pressroom/en/briefs/tk_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional). [2020, May 25].

<sup>4</sup> Bruchac, M. 2014. Indigenous Knowledge and Traditional Knowledge. *Encyclopedia of Global Archaeology*, 3814 – 24; Ogwezy MC. 2012. Protection of Indigenous or Traditional Knowledge Under Intellectual Property Laws: An Examination of the Efficiency of Copyright Law, Trade Secret And Sui Generis Rights. *International and Comparative Law Review* 12(1), 7 – 37.

Such ownership is recognized in Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples which states that indigenous peoples have the right to maintain, protect and develop their own cultural heritage, traditional knowledge, and cultural expressions.<sup>5</sup> All claims on the infringement of the ownership right on indigenous knowledge, which shall follow, are based on this recognition of ownership rights held by indigenous communities in their indigenous knowledge.

## 1.2 Justification and Impact

Indigenous knowledge has been exclusively used by local traditional communities for centuries.<sup>6</sup> The rapid increase in international and local cultural exchange, i.e. globalization, has resulted in people who do not belong to traditional communities using the indigenous knowledge of those communities.<sup>7</sup> The advent of intellectual property law which seeks to protect the intangible creations of human intellect has inspired and further recognized the necessity to protect indigenous knowledge held by traditional communities. WIPO expressed that the recognition and protection of traditional forms of creativity and innovation would amount to a “historic shift” in international law - it would enable traditional communities to have control over the external use of their indigenous knowledge, set conditions for such use and benefit from the commercial exploitation of the use of their indigenous knowledge.<sup>8</sup>

In South Africa, it is reported that the local and international trade of indigenous products, including medicine, agricultural products, handicrafts and non-wood forest products (NWFP) such as nuts and mushrooms, provide significant financial benefits for traders in the country.<sup>9</sup> International trade of NWFP alone generates approximately US\$11 billion annually.<sup>10</sup> Indigenous knowledge is also widely used either solely or as an input in the pharmaceutical, cosmetics, botanical and biological industries.<sup>11</sup> The market value of such, ranging in millions

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<sup>5</sup> United Nations Declaration on the Rights of Indigenous Peoples.

<sup>6</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 24.

<sup>7</sup> *Ibid.*

<sup>8</sup> WIPO. 2020. *Traditional Knowledge and Intellectual Property – Background Brief*. Available at: [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,known%2C%20genetic%20resources%20and%20traditional](https://www.wipo.int/pressroom/en/briefs/tk_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,known%2C%20genetic%20resources%20and%20traditional). [2020, May 25].

<sup>9</sup> The Department of Trade and Industry. 2004. *The Protection of Indigenous Knowledge through the Intellectual Property System: A Policy Framework*. Available at: <http://www.rci.uct.ac.za/usr/rcips/resources/policy.pdf>. [2020, May 20].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

of US dollars.<sup>12</sup> These statistics serve as an indication that there is substantial economic value in indigenous knowledge. Unfortunately, there is insufficient evidence showing the financial value of indigenous knowledge in creative industries, which is the focus of this dissertation. However, the increase in the use and commercial exploitation of indigenous designs in fashion trends can be said to be common cause as it has resulted in global socio-political debates and terms such as ‘cultural appropriation’ being created.<sup>13</sup> Cultural appropriation is usually defined as “taking an idea or reproducing an artifact for one’s own particular use, altering its original meaning, and doing so without the original producer’s consent. Cultural appropriation is usually done for commercial gain”.<sup>14</sup> The analysis of the impact of cultural appropriation is outside the scope of this dissertation and will not be discussed further. Additionally, as the traditional music industry continues to grow in South Africa, artists who often sing songs originating from their traditional communities continue to thrive financially. Huge theatre productions such as Africa Umoja that are based on the traditional music and dances of traditional communities in South Africa have graced global stages, received many accolades and significant revenue.<sup>15</sup> It can therefore be appreciated that there is notable economic value in the indigenous knowledge or indigenous cultural expressions of traditional communities falling under creative industries.

More importantly, indigenous knowledge holds sentimental value for traditional communities. It is knowledge that has been passed down from their ancestors and forms part of their culture, which is fundamental to their identity.<sup>16</sup> The sustenance of traditional communities’ cultures includes the sustenance of their indigenous knowledge systems.<sup>17</sup> Therefore, the call for the recognition and protection of indigenous knowledge by societies around the world does not come as a surprise.<sup>18</sup> Based on the foregoing, it is paramount that policies are formulated and legislation enacted to protect indigenous knowledge. Additionally, where such policies exist,

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<sup>12</sup>*Ibid.*

<sup>13</sup> DeRoche, A. 2018. *Appropriation of Indigenous Culture in the Fashion Industry*. Available at: <https://medium.com/@a.deroche/appropriation-of-indigenous-culture-in-the-fashion-industry-6f02387ebd26>. [2020, May 27].

<sup>14</sup> *Ibid.*

<sup>15</sup> Herwig, S. 2013. *Musical sensation 'AFRICA UMOJA - The Spirit of Togetherness' conquers US theater stages*. Available at: <https://news.cision.com/international-arts-foundation/r/musical-sensation--africa-umoja---the-spirit-of-togetherness---conquers-us-theater-stages,c9415515>. [2020, May 27].

<sup>16</sup> Australian Human Rights Commission. 2009. *The Protection of Indigenous Knowledge*. In *Native Title Report 2008*. Available at: [https://humanrights.gov.au/sites/default/files/content/social\\_justice/nt\\_report/ntreport08/pdf/chap7.pdf](https://humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport08/pdf/chap7.pdf). [2020, May 10].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

they must be dissected so that they are well understood by those concerned and where needed, subsequently improved.

### 1.3 Research Question

The main research question is: What does the Protection, Promotion, Development and Management of indigenous Knowledge Systems Act 6 of 2019 (PPDMIKA) mean for the creative industries in South Africa, specifically the music, art and fashion industries? This Act forms part of the initial responses by the South African government to the call to protect indigenous knowledge. It will be critically assessed and reviewed for consequences it will have on already existing users of indigenous knowledge, in the creative industries.

### 1.4 Methodology

This dissertation will rely primarily on South African intellectual property legislation and the applicable case law. Where comparative assessment with foreign jurisdictions is relevant, foreign legislation as well as case law will also be used. Additionally, reliable secondary resources including published textbooks, journals and relevant internet sources will be considered in this paper for alternative opinions and finally, well rounded evaluations. No further research method will be used because this paper only aims to analyse the newly signed yet not promulgated PPDMIKA, a purely academic evaluative exercise.

### 1.5 Brief history of PPDMIKA

#### 1.5.1 International Efforts to Protect Indigenous Knowledge

The first international instrument to afford recognition to indigenous knowledge and expressly call for its protection is the UN Convention on Biological Diversity (CBD), adopted in 1992 during the Earth Summit conference.<sup>19</sup> The objective of the CBD is to facilitate the conservation and sustainable use of biological diversity while providing for fair and equitable sharing of the benefits generated from the use of genetic resources.<sup>20</sup> Article 8(j) of the CBD states that “each contracting party shall as far as possible, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities”.<sup>21</sup> South Africa

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<sup>19</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa’s Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 25.

<sup>20</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 3. Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf> [2020, May 10].

<sup>21</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa’s Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 25.

signed and ratified the CBD as well as its Nagoya Protocol, adopted in 2010; and used its policy approaches to create a legal framework for the protection of biological and genetic resources.<sup>22</sup>

In 2007, the United Nations (UN) adopted the UN Declaration on Rights of Intellectual Property. Article 31 of this declaration provides that it is a right of indigenous persons to maintain, protect and develop knowledge as well as their intellectual property rights over such knowledge.<sup>23</sup> By adopting this declaration, the UN provided an important foundation for the international and local protection of indigenous knowledge. Since the existing international intellectual property system does not fully protect indigenous knowledge, numerous governments have expressed a need for an international legal instrument that provides *sui generis* protection for indigenous knowledge.<sup>24</sup> This legal instrument would provide an international definition of indigenous knowledge and indigenous cultural expressions, provide a mechanism by which indigenous knowledge holders can be identified as well as a way to resolve conflict arising out of competing claims for indigenous knowledge and further provide for the complexities of agreements for the use of indigenous knowledge by third parties within traditional communities' countries and foreign third parties.<sup>25</sup> Essentially, this international legal instrument would ensure that the holders of indigenous knowledge are provided adequate protection globally.<sup>26</sup> Notwithstanding this, the international legal instrument required should only provide minimum standards to leave respective governments some room to mold a national system best suited for their needs.<sup>27</sup>

The WIPO General Assembly established the Intergovernmental committee on Intellectual Property, Genetic Resources and Traditional Knowledge (IGC) in 2000 to be an international forum for discussions pertaining to the protection of traditional knowledge and to work on an

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<sup>22</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 3. Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

<sup>23</sup> Naidoo, U. 2019. A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 28.

<sup>24</sup> WIPO. 2020. Traditional Knowledge and Intellectual Property – Background Brief. Available at: [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional](https://www.wipo.int/pressroom/en/briefs/tk_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional). [2020, May 25].

<sup>25</sup> *Ibid.*

<sup>26</sup> Naidoo, U. 2019. A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 25.

<sup>27</sup> *Ibid.*

appropriate international instrument to protect traditional knowledge.<sup>28</sup> The IGC has shared numerous proposals on this subject and continues to work with governments as well as traditional knowledge holders to develop an effective *sui generis* instrument protecting traditional knowledge.<sup>29</sup> For reasons mentioned above, the need for an international instrument protecting indigenous knowledge is urgent and critical to the achievement of a complete protection of indigenous knowledge in relevant national laws. The work of the IGC is noted with utmost respect.

Furthermore, WIPO finds that there are two types of protection called for by the international community: positive protection and defensive protection.<sup>30</sup> Defensive protection aims to prevent unauthorized people outside of traditional communities from acquiring intellectual property rights over indigenous knowledge.<sup>31</sup> An example of this kind of protection can be found in India where a searchable database has been compiled for patent applications which assesses the applications' similarities to already existing traditional knowledge.<sup>32</sup> It is said that this idea was inspired by a case in the United States Patent and Trademark Office where the office mistakenly granted, later revoking, a patent for the use of turmeric in wounds which was well known to traditional communities in India.<sup>33</sup>

Positive protection, on the other hand, aims to grant ownership rights of indigenous knowledge to respective traditional communities so that they are empowered to control the use of their knowledge systems and benefit from its commercial exploitation.<sup>34</sup> Legal commentators argue that neither one form of protections is better, however, seven different national initiatives which have adopted a legal instrument to protect indigenous knowledge have used the positive

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<sup>28</sup> Naidoo, U. 2019. A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 27.

<sup>29</sup> *Ibid.*

<sup>30</sup> WIPO. 2020. *Traditional Knowledge and Intellectual Property – Background Brief*. Available at: [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional](https://www.wipo.int/pressroom/en/briefs/tk_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional). [2020, May 25].

<sup>31</sup> WIPO. 2020. *Traditional Knowledge and Intellectual Property – Background Brief*. Available at: [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional](https://www.wipo.int/pressroom/en/briefs/tk_ip.html#:~:text=In%202000%2C%20WIPO%20members%20established,knowledge%2C%20genetic%20resources%20and%20traditional). [2020, May 25].

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid*; Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 30.

protection approach.<sup>35</sup> Both forms of protection offer valuable protection in different ways; this paper holds that a watertight protection of indigenous knowledge should include both positive and negative protection.

### *1.5.2 South Africa's Efforts to Protect Indigenous Knowledge*

As briefly mentioned above, the National Department of Environmental Affairs, in fulfilment of South Africa's obligations under the CBD, created a domestic framework for the protection of indigenous biological and genetic resources under the National Environmental Management: Biodiversity Act of 2004 (NEMBA).<sup>36</sup> The Access and Benefit Sharing Regulations (ABS Regulations) were also promulgated for the implementation of NEMBA to create a rigorous process of approval for people who are interested in bio-prospecting activities involving indigenous biological resources and indigenous knowledge.<sup>37</sup> It is acknowledged that bio-resources form an integral part of indigenous knowledge, however, the focus of this paper is indigenous cultural expressions and indigenous knowledge falling under the creative arts, therefore, further discussion of NEMBA and ABS Regulations will not be undertaken. In brief, it must be noted that the form of protection afforded by NEMBA and ABS Regulations is defensive protection that ensures that the bio-resources of traditional communities in South Africa are used in a sustainable way and the benefits accruing from such use are shared equitably with the relevant traditional communities.<sup>38</sup>

#### *1.5.2.1 The Intellectual Property Laws Amendment Act*

South Africa's first attempt at providing positive protection for indigenous knowledge is the amendment of the domestic intellectual property statutes in the Intellectual Property Laws Amendment Act (IPLAA) promoted by the then Department of Trade and Industry (DTI).<sup>39</sup> The IPLAA was signed into law in 2013 and amends four intellectual property statutes, namely:

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<sup>35</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at:

[https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 30.

<sup>36</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 6. Available at:

<https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 23. Available at:

<https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

the Copyright Act, the Performer's Protection Act, the Designs Act and the Trademarks Act.<sup>40</sup> The Act aims to provide protection for indigenous knowledge through these existing intellectual property statutes.<sup>41</sup> With respect to the Copyright Act, the IPLAA states that copyright will only be conferred on a traditional work if such work is an indigenous work or is a derivative indigenous work which was developed on or after the date of the IPLAA commencement.<sup>42</sup> The Act also provides that no right provided by the IPLAA in a derivative indigenous knowledge shall be registrable, unless prior informed consent is obtained from the relevant traditional community or relevant authorities, the traditional community has been disclosed to the Companies and Intellectual Property Commission (CIPC) and a benefit sharing agreement has been concluded between the user of indigenous knowledge and the relevant traditional community.<sup>43</sup>

Section 43(B) of the IPLAA concerns trademarks and states that a traditional community would be able to register a traditional term or expression under collective trademarks, certification marks or geographical indications.<sup>44</sup> The requirement for such registration is that the traditional term or expression in question must meet the 'capable of distinguishing' criterion which is applied to ordinary trademark applications.<sup>45</sup> With regards to the Designs Act, section 53(B) of the IPLAA provides that derivative indigenous designs may be registered if they are 'new' – meaning that they do not form part of state of the art and have features which are derived from an indigenous design that belongs to an indigenous community.<sup>46</sup> Additionally, this

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<sup>40</sup> Van der Merwe. 2016. *Comments on the Protection Promotion, Development and Management of Indigenous Knowledge Systems Act*. Available at: <https://www.golegal.co.za/iks-bill-indigenous-knowledge-systems/>. [2020, May 29].

<sup>41</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 23. Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

<sup>42</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 11.

<sup>43</sup> *Ibid.*

<sup>44</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 12.

<sup>45</sup> *Ibid.*

<sup>46</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 12.

section provides that where a derivative indigenous design is subject to a release date, an application for registration should be made within two years of the release date.<sup>47</sup>

Overall, the general objective of the IPLAA is to provide for the commercialization and licensing of indigenous knowledge for the economic empowerment of traditional communities.<sup>48</sup> The mechanism employed to achieve the objective of the IPLAA is the establishment of a National Council whose functions is mostly of an advisory nature, advising the Minister of Trade and Industry on issues relating to indigenous knowledge and traditional communities, advising the registrars of copyright, designs, patents and trademarks on issues pertaining to the registration of indigenous knowledge.<sup>49</sup> The National Council is also expected to perform other tasks that are specified in the already existing intellectual property statutes.<sup>50</sup> Another mechanism employed is the establishment of the National Database which allows access to information on indigenous intellectual property.<sup>51</sup> In addition to these, the IPLAA provides for the establishment of a National Trust and a Trust Fund for indigenous knowledge. The purpose of this is to allow the facilitation of commercial transactions relating to indigenous knowledge and to ensure that the income generated is used to benefit relevant traditional communities.<sup>52</sup> The CIPC is the institution responsible for the administration of the National Trust for indigenous knowledge and the National Trust is responsible for creating a trust fund.<sup>53</sup> Other responsibilities of the National Trust include facilitating the development of traditional communities with regards to their understanding of intellectual property, associated rights and helping traditional communities to apply the IPLAA and other legislation dealing with indigenous knowledge.<sup>54</sup>

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<sup>47</sup> *Ibid.*

<sup>48</sup> Van der Merwe. 2016. *Comments on the Protection Promotion, Development and Management of Indigenous Knowledge Systems Act*. Available at: <https://www.golegal.co.za/iks-bill-indigenous-knowledge-systems/>. [2020, May 29].

<sup>49</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 14.

<sup>50</sup> *Ibid.*

<sup>51</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 14.

<sup>52</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 16.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

The IPLAA has been mainly criticized for inserting ‘new forms’ of intellectual property in already existing and well-established intellectual property law statutes.<sup>55</sup> Critics argue that these ‘new forms’ of intellectual property fundamentally differ from the forms protected by the intellectual property statutes and that they do not belong in these statutes and are inappropriate.<sup>56</sup> The criticism is grounded on the acknowledgement that indigenous knowledge does not always meet the requirements stipulated in the current intellectual property statutes.<sup>57</sup> Intellectual property is founded on the concept of individual, personal creators or inventors while indigenous knowledge, in stark contrast, is developed by a community and is of a collective nature.<sup>58</sup> Additionally, indigenous knowledge and indigenous cultural expressions are created for perpetual existence while intellectual property rights have a limited duration of protection.<sup>59</sup> Therefore, many legal commentators hold that the IPLAA does not adequately recognize the unique nature of indigenous knowledge and that as a result of its unique nature, indigenous knowledge requires *sui generis* protection.<sup>60</sup>

#### *1.5.2.2 The Protection, Promotion, Development and Management of indigenous Knowledge Systems Act (PPDMIKA)*

The then Department of Science and Technology (DST) now Department of Science and Innovation (DSI) drafted the Indigenous Knowledge Bill in 2014 in pursuit to protect, promote, develop and manage indigenous knowledge systems by means of *sui generis* protection.<sup>61</sup> The Bill was tabled in parliament in 2016 and the portfolio committee on science and technology called on the public to share written comments on the Bill.<sup>62</sup>

Summarily, the PPDMIKA provides for the formal establishment of National Indigenous Knowledge Systems Office (NIKSO). NIKSO will be responsible for the implementation of

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<sup>55</sup> Naidoo, U. 2019. *A Comparative Assessment of South Africa’s Proposed Legislation to Protect Traditional Knowledge*. Available at: [https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo\\_Comparative\\_2019.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/69946/Naidoo_Comparative_2019.pdf?sequence=1&isAllowed=y). [2020, May 05]. LLM: University of Pretoria. 17; Cross, J.T. 2010. Property Rights and Traditional Knowledge. *Potchefstroom Electronic Law Journal* 13 (4), 12 – 47; Oguanaman, C. 2004. The Protection of Traditional Knowledge: Towards a Cross-cultural Dialogue on Intellectual Property Rights. *Australian Intellectual Property Journal* 15(1), 12 – 47.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 6. Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

<sup>61</sup> Sabinet. 2015. *Science and Technology draft indigenous knowledge bill*. Available at: <https://legal.sabinet.co.za/articles/science-and-technology-drafts-indigenous-knowledge-bill/>. [2020, May 15].

<sup>62</sup> Sabinet. 2016. *CSIR unveils petaflop machine*. Available at: <https://legal.sabinet.co.za/articles/csir-unveils-petaflop-machine/>. [2020, May 15].

the Act, including creating a registration office controlled by an indigenous knowledge curator.<sup>63</sup> Indigenous communities' trustees must apply to the curator for the registration of their indigenous knowledge.<sup>64</sup> It must be noted that the Act exclusively protects registered indigenous knowledge.<sup>65</sup> In implementing the Act, NIKSO must maintain a register of indigenous knowledge, facilitate redress and development of indigenous knowledge in traditional communities.<sup>66</sup> The Act also provides for the recordation and controlled dissemination of indigenous knowledge systems, in the Patents Office particularly, through the National Recordal System (NRS) and the National Indigenous Knowledge Management System (NIKMAS).<sup>67</sup> These systems specifically provide defensive protection in that they reduce the probability that patents would be improperly issued on a subject matter belonging to a traditional community.<sup>68</sup> PPDMIKA provides positive protection by stating that indigenous knowledge is regarded as being property of traditional communities as defined in section 25 of the Constitution of the Republic of South Africa.<sup>69</sup> It further confers exclusive rights on indigenous knowledge holders such as the right to share in benefits accruing from any commercialization of indigenous knowledge, the right to be acknowledged as the source as well as the right to restrain any unauthorised use of indigenous knowledge.<sup>70</sup>

## 1.6 Thesis structure

Chapter 2 of this paper the dissertation will discuss the general substantive legal issues that appear from the PPDMIKA as it stands, such as the dual system of indigenous knowledge protection that results from its co-existence with the IPLAA. Chapter 3 will deal with the provisions for musical and sound expressions; chapter 4 will deal with the provisions for indigenous cultural expressions through the visual arts and chapter 5 will deal specifically with the provisions protecting cultural expressions through fashion, focusing on clothing and decorations. These chapters aim to outline the requirements for protection, provide a comparative discussion of such provisions with alternative intellectual property statutes in

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<sup>63</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 21. Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Bagley, MA. 2018. Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa. *Centre for International Governance Innovation*. 27: 21. Available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>. [2020, May 10].

<sup>68</sup> *Ibid.*

<sup>69</sup> Van der Merwe. 2016. *Comments on the Protection Promotion, Development and Management of Indigenous Knowledge Systems Act*. Available at: <https://www.golegal.co.za/iks-bill-indigenous-knowledge-systems/>. [2020, May 29].

<sup>70</sup> *Ibid.*

South Africa, consider the practical application of these provisions and the consequences of this to already existing users of indigenous works and finally, make recommendations on a way forward and the implementation of the Act.

## Chapter 2: Substantive Issues

This chapter will briefly outline and discuss some substantive legal and philosophical issues that emerge from the PPDMKA. Based on the issues identified, recommendations will be made for the effective implementation of this Act.

### 2.1 Legal Issues

#### 2.1.1 Definition of 'Indigenous communities'

It is salient for any statute to clearly define who it seeks to protect. The PPDMKA seeks to protect indigenous communities and it defines such communities as any recognizable community of people developing from, or historically settled in a geographic area or areas located within the borders of the Republic.<sup>1</sup> It continues that an indigenous community must be characterized by social, cultural and economic conditions which distinguish it from other sections of the national community and that such community must identify themselves as a distinct collective.<sup>2</sup> This definition conforms to the UN/international understanding of 'indigenous peoples' which includes four main elements; (i) communities settled before the establishment of present state borders, (ii) identifying themselves as distinct collectives, (iii) practicing their own customs, laws and languages and (iv) being determined for the protection and preservation of their customary institutions.<sup>3</sup> However, it is inconsiderate of the reality of South Africa.

The colonization of Africa subverted the structures of many ethnic communities existing within the borders of Africa.<sup>4</sup> Upon independence, African states, including South Africa, established states with new political structures that were similar to those of their colonizers – further confounding the problem of destabilized ethnic groups.<sup>5</sup> In the post-colonization states, various ethnic groups settled together as equals in pursuance of new national goals that reflected the needs of all citizens.<sup>6</sup> In South Africa, this phenomenon was termed "the rainbow nation". In the "rainbow nation", it is difficult to identify communities fitting the PPDMKA definition of "indigenous community". Firstly, according to historians and the most recent theory on human settlement in South Africa, only the Khoisan community is 'developing from or historically settled in South Africa' over two thousand years ago.<sup>7</sup> The Bantu

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<sup>1</sup> Section 1 of Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 Of 2019.

<sup>2</sup> *Ibid.*

<sup>3</sup> Geyer, S. 2020. Towards a clearer definition and understanding of "indigenous community" for the purposes of the Intellectual Property Laws Amendment Bill, 2010: An exploration of the concepts "indigenous" and "traditional". *Potchefstroom Electronic Law Journal* 13(4), 127 – 43.

<sup>4</sup> Gashaw, T. 2017. "Colonial borders in Africa: Improper design and its impact on African borderland communities" Available at: <https://africaupclose.wilsoncenter.org/colonial-borders-in-africa-improper-design-and-its-impact-on-african-borderland-communities/>, accessed 22 November 2020.

<sup>5</sup> *Ibid*; Sarkin, J & Cook, A. 2012. 'Who is Indigenous?: Indigenous Rights Globally, in Africa and Among the San in Botswana'. *Tulane Journal of International and Comparative Law* 18, 93 – 217.

<sup>6</sup> Sarkin & Cook supra at 16, 110; Nwauche, ES. 2010. Protecting Expressions of Folklore withing the Right to Culture in Africa. *Potchefstroom Electronic Law Journal* 13(4), 49 -92.

<sup>7</sup> Facing History And Ourselves (online). "Before Apartheid" Available at: <https://www.facinghistory.org/confronting-apartheid/chapter-1/introduction>, accessed 22 November 2020.

(Nguni, Sotho, Tswana, Tsonga and Venda) groups gradually migrated from the west-central African regions into South Africa either voluntarily or by force.<sup>8</sup> The term ‘historically settled’ is not defined in the PPDMIKA, however, rules of interpretation provide guidance that when interpreting a statute one must first give words their ordinary meaning except where such ordinary meaning brings about an absurd interpretation.<sup>9</sup> ‘Historically’ means in the past and ‘settled’ means to permanently be in one area. As mentioned above, the Bantu communities were not permanently resident in South Africa in the past, unless the ‘past’ is defined to include the migration period of these communities. Therefore, it cannot be strictly said that these groups are developing from or historically settled in South Africa. Secondly, black communities in the rural areas and townships of present-day South Africa are characterized by the same or similar socio-economic conditions; poor standards of living and poor service delivery.<sup>10</sup> Such conditions do not distinguish any community from the national community. Therefore, considering these realities, the definition for ‘indigenous community’ is vague and does not clearly define the communities it seeks to protect.

This challenge on the definition of ‘indigenous community’ was also raised during the drafting stages of the PPDMIKA. Some communities objected to this definition on the basis that it was/is wide and vague.<sup>11</sup> The drafters disagreed with this and responded that this definition was/is acceptable and would stand.<sup>12</sup> As discussed above, the definition is unclear, and this can be further highlighted when the definition is compared to other definitions of ‘indigenous community’ in similar South African statutes. For example, the ABS Regulations provide that an indigenous community must be “living or having rights or interests in a distinct geographical area within the Republic of South Africa” and must have a “leadership structure”.<sup>13</sup> The Traditional Framework and Governances Act<sup>14</sup> also provides a detailed definition of ‘indigenous community’ and requires that such community must be subject to a system of traditional leadership and observe a system of customary laws.<sup>15</sup> Seemingly, the definition of ‘indigenous community’ in the PPDMIKA could have been much clearer and detailed. However, maybe the wideness of the definition will serve the subverted realities and landscape of ethnic groups in South Africa by ensuring that no deserving communities are excluded by narrow and strict definitions. Accordingly, for the purpose of clarity, it is recommended that the policy on the implementation of the PPDMIKA provides a definition of the words “developing from or historically

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (2) All SA 262 (SCA).

<sup>10</sup> United Nations Human Rights Office of the High Commissioner (online). 2018. “Informal Settlements and Human Rights in South Africa”: Available at: <https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf>, accessed 22 November 2020.

<sup>11</sup> Parliamentary Monitoring Group (online). 2017. “Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill: Public Hearings Day 3” Available at: <https://pmg.org.za/committee-meeting/23878/>, accessed 19 November 2020.

<sup>12</sup> Parliamentary Monitoring Group (online). 2017. “Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill: Department Responses to Submissions” Available at: <https://pmg.org.za/committee-meeting/23957/>, accessed 19 November 2020.

<sup>13</sup> Geyer *supra* at 16, 133.

<sup>14</sup> Act 41 of 2003.

<sup>15</sup> Geyer *supra* 3 at 16, 133.

settled”. Furthermore, it is recommended that the policy on the implementation of the PPDMIKA addresses the status of those individuals belonging to the listed communities but have chosen ‘modernize’ and leave their traditional communities for different lifestyles in different areas, in relation to the rights afforded by the statute. This is because as stated above, it is important for a statute to clearly define who it seeks to protect.

### *2.1.2 Dual system – PPDMIKA and IPLAA*

Secondly, the dual system of indigenous knowledge protection resulting from the co-existence of the IPLAA and the PPDMIKA presents a fundamental issue with indigenous knowledge protection. Indigenous communities making presentations at WIPO IGC meetings have expressed that they doubt the ability of existing intellectual property rights to adequately protect indigenous knowledge, their innovation and practices.<sup>16</sup> They further expressed that their resistance to the existing intellectual property rights system is based on the concern that such systems do not adequately protect the various forms of indigenous knowledge and have facilitated the misappropriation of indigenous knowledge.<sup>17</sup> Modern intellectual property systems have been used to grant private rights to applicants who use indigenous knowledge in their inventions, which allows such private applicants to exclude indigenous communities from gaining the commercial benefits of their indigenous knowledge.<sup>18</sup> Another significant issue in this discussion is that indigenous people must constantly translate and transplant their concepts into western legal frameworks that are not appropriate to address their needs.<sup>19</sup> Finally, indigenous communities expressed concern that legal frameworks that seek to extend existing intellectual property law systems to protect indigenous knowledge might undermine the customary and traditional systems.<sup>20</sup> They hold that extending such systems shows a lack of recognition of and a threat to the customary law systems.<sup>21</sup>

The interests and concerns of these indigenous communities are shared by indigenous communities in South Africa. This is because the misappropriation of indigenous knowledge and the historically motivated tensions between western legal systems and customary legal systems also exist in South Africa.<sup>22</sup> Additionally, during the hearings on the public comment on the Protection, Promotion,

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<sup>16</sup> The Centre for International Environmental Law (online). (2007). “The Gap Between Indigenous People’s Demands and WIPO’s Framework on Traditional Knowledge”, 5. Available at [https://www.wipo.int/export/sites/www/tk/en/igc/ngo/ciel\\_gap.pdf](https://www.wipo.int/export/sites/www/tk/en/igc/ngo/ciel_gap.pdf), accessed 25 July 2020.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Dr Anderson, J. (2010). “Indigenous/traditional knowledge & Intellectual Property” Available at [https://static1.squarespace.com/static/55cfbe2de4b02774e51fac68/t/55d0eef4e4b0c22f9be71a59/1439756020838/IP\\_Indigenous-Traditional+Knowledge.pdf](https://static1.squarespace.com/static/55cfbe2de4b02774e51fac68/t/55d0eef4e4b0c22f9be71a59/1439756020838/IP_Indigenous-Traditional+Knowledge.pdf), accessed 25 July 2020.

<sup>20</sup> The Centre for International Environmental Law (online). (2007). “The Gap Between Indigenous People’s Demands and WIPO’s Framework on Traditional Knowledge”, 5. Available at [https://www.wipo.int/export/sites/www/tk/en/igc/ngo/ciel\\_gap.pdf](https://www.wipo.int/export/sites/www/tk/en/igc/ngo/ciel_gap.pdf), accessed 25 July 2020.

<sup>21</sup> *Ibid.*

<sup>22</sup> World Intellectual Property Organization (WIPO). “Customary Law, Traditional Knowledge And Intellectual Property: An Outline of Issues” Available at: [https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview\\_customary\\_law.pdf](https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf), accessed 14 March 2021.

Development and Management of Indigenous Knowledge Systems Bill (PPDMIKS Bill), some indigenous community representatives, including the Kho San community, expressed that they do not believe that western systems are the correct platform to record, protect and manage indigenous knowledge as previous engagement with such systems and representatives of these systems has resulted in the unfair use of their knowledge and endless struggles with misinformation, the abuse of their intellectual property as well as inequality.<sup>23</sup> The Kei Korana indigenous community representative added that science and technology is the complete opposite of the value systems underpinning indigenous knowledge and that its use raised suspicions as to the intentions of the government.<sup>24</sup> Some constituencies recommended that the IPLAA must be repealed once the PPDMIKA is promulgated.<sup>25</sup>

The Department of Science and Trade responded to the latter suggestion by stating that the matter is the sole responsibility of the portfolio committee of the DSI and the portfolio committee of the DTI and would be accordingly dealt with by them at a later stage and that a meeting had been scheduled for that purpose.<sup>26</sup> At the meeting on the impact of the implementation of PPDMIKA on the IPLAA, it was concluded that, although further legal advice will be pursued on this matter, the question is no longer whether the IPLAA and PPDMIKA can co-exist but it is now how the NEMBA, the Traditional Health Practitioners Act<sup>27</sup>, the IPLAA and PPDMIKA can create a viable sector for the commercialization of indigenous knowledge.<sup>28</sup>

There is nothing inherently wrong with a dual system of law.<sup>29</sup> However, whenever there is duality, there are possibilities of clashes.<sup>30</sup> Clashes certainly exist between the IPLAA and the Indigenous Knowledge Act. Firstly, the IPLAA makes provision for individual claims of authorship in indigenous knowledge while the PPDMIKA does not.<sup>31</sup> It is true that some indigenous communities recognize individual authorship, however, the concern with the recognition of individual authorship stems from the acknowledgement that indigenous knowledge is not static but evolves over time, with each generation inheriting systems of knowledge which have been refined, refining those and passing them

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<sup>23</sup> Parliamentary Monitoring Group (online). 2017. "Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill: Public Hearings Day 3" Available at: <https://pmg.org.za/committee-meeting/23878/>, accessed 7 September 2020.

<sup>24</sup> *Ibid.*

<sup>25</sup> Parliamentary Monitoring Group (online). 2017. "Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill: Public Hearings Day 3" Available at: <https://pmg.org.za/committee-meeting/23878/>, accessed 7 September 2020.

<sup>26</sup> Parliamentary Monitoring Group (online). 2017. "Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill: Department Responses to Submissions" Available at: <https://pmg.org.za/committee-meeting/23957/>, accessed 8 September 2020.

<sup>27</sup> Traditional Health Practitioners Act 22 of 2007.

<sup>28</sup> *Ibid.*; National Environmental Management: Biodiversity Act 10 of 2004.

<sup>29</sup> Weyranch, O.W. (1996). Dual systems of family law: A comment. *California Law Review* 54(2), 781 – 91.

<sup>30</sup> Weyranch at p.789.

<sup>31</sup> Section 28D(2) of Copyright Act 98 of 1978; section 1 of Designs Act 195 of 1993; section 43D(5) of Trade Marks Act 194 of 1993; S 12.

on to the next generation.<sup>32</sup> It is improper to create legal opportunities for new generations of indigenous communities to deviate from the norm of ‘passing on refinements of the indigenous knowledge they inherited from the previous generation to the next generation’ and instead claim individualistic rights on the knowledge. It must be added that indigenous communities do not freely inherit indigenous knowledge; there are certain responsibilities regarding the preservation and transmission of that knowledge which are auxiliary to the inheritance of indigenous knowledge, prescribed by customary values.<sup>33</sup> It is possible that for some indigenous communities, such responsibilities include that the knowledge is refined and passed on to the next generation, not refined and individually claimed. This consideration is an example of the concerns by indigenous communities that western models sometimes undermine customary values and customary law.

Following from this, the PPDMIKA provides that where the indigenous community of the relevant indigenous knowledge cannot be identified, NIKSO is required to act as the custodian of that indigenous knowledge.<sup>34</sup> Similarly, the IPLAA makes the same provision but designates the National Trust, a different institution to act as the custodian of the relevant indigenous knowledge.<sup>35</sup> The existence of two institutions tasked with the same responsibilities is likely to create unnecessary confusion to the people who seek to use indigenous knowledge that is not designated to any indigenous community and it will add unnecessary administrative and financial costs to the government in the regulation of indigenous knowledge. Finally, the eligibility criteria set out by the PPDMIKA and those set out by the IPLAA vary considerably; the PPDMIKA requires that the indigenous knowledge must be developed within the indigenous community, passed from generation to generation and is associated with the cultural identity of that indigenous community<sup>36</sup>, while the IPLAA imposes, albeit with certain adaptations considering the nature of indigenous knowledge, the standards of western intellectual property systems.<sup>37</sup> The imposition of western intellectual property systems, as expressed by international indigenous communities and outlined above, means indigenous and cultural values must be squeezed and trimmed into ‘boxes’ it does not fit in.

The values underpinning western systems of intellectual property rewards authors for creation of work with the objective to encourage more creativity.<sup>38</sup> Thus, such systems are regarded as the property of the creators which can be commercialized.<sup>39</sup> Contrary to this, the customary laws of indigenous communities prioritize the interests of the community and sees indigenous knowledge as a means of

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<sup>32</sup> Dutfield, G. 2003. Protecting Traditional Knowledge and Folklore, UNCTAD – ICTSD Project on Intellectual Property Rights and Sustainable Development. Available at: [https://unctad.org/en/PublicationsLibrary/ictsd2003ipd1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ictsd2003ipd1_en.pdf), accessed 8 September 2020.

<sup>33</sup> Mackay, E. 2009. Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in the Protection and an Alternative Approach. *University of New South Wales Law Journal* 32(1), 1 – 26.

<sup>34</sup> S 12(3).

<sup>35</sup> S 28D(3) of Act 98 of 1978; S 1 of Act 195 of 1993; S 43D(5) of Act 194 of 1993.

<sup>36</sup> S 11.

<sup>37</sup> S 28B of Act 98 of 1978; s 53B of Act 195 of 1993; s 43B(3) of Act 194 of 1993.

<sup>38</sup> Tobias, M. 1999. Copyright Protection of Indigenous Expressions. *Philippine Law Journal* 73(4), 831 – 65.

<sup>39</sup> *Ibid*, at 840.

survival for the indigenous communities as well a means for social welfare and cultural celebrations.<sup>40</sup> This view is held by some South African indigenous communities and was the basis under which they rejected the PPDMIKS Bill at first. The Traditional and National Health Alliance's (TNHA) first reaction to the Bill was that the knowledge held by the traditional healers is knowledge passed on from the ancestors aimed at healing persons belonging to the indigenous communities, the donations healers receive is for their basic needs and not a reward or incentive for healing the community.<sup>41</sup> These varied value systems then lead to requirements that are incompatible with indigenous knowledge such as the requirement that indigenous designs must be 'new and novel' and for traditional trademarks must be 'capable of distinguishing goods in the course of trade'.<sup>42</sup>

Notwithstanding this, some legal scholars hold that a mixed system of *sui generis* protection of indigenous knowledge and the use of western intellectual property systems provides indigenous communities with varied and different strategies for protecting indigenous knowledge.<sup>43</sup> The argument advanced by these legal scholars is that indigenous communities are dynamic, changing and responding to different historical, socio-economic conditions that shape their experiences – it could be that for some types of indigenous knowledge, the western intellectual property systems offer the best protection and traditional cultural expressions are covered by these western intellectual property systems.<sup>44</sup> Finally, purely focusing on *sui generis* legislation for the protection of indigenous knowledge has the possibility of stagnating indigenous culture as individual creation is not encouraged.<sup>45</sup>

The way forward as proposed in the presentation to the portfolio committees of the DSI and the DTI is to implement these two statutes complementarily, *inter alia*, focusing the whole indigenous protection system in one office to create a one-stop shop concept, drawing the boundaries of the various institutions involved to prevent chaos and clashes, developing regulations collaboratively with all relevant authorities and developing a clear commercialization framework for indigenous knowledge.<sup>46</sup> It is possible that the two statutes can be well harmonized and the benefits of the dual system as outlined above result. However, some of the clashes highlighted above i.e., the different value systems underpinning the two statutes are seemingly irreconcilable. Secondly, there is serious concern that the protection of indigenous knowledge through intellectual property rights risks transforming such knowledge to mere 'products/commodities and taking away its symbolism, respect, and cultural

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<sup>40</sup> *Ibid.*

<sup>41</sup> Parliamentary Monitoring Group (online). 2017. "Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill: Public Hearings Day 3" Available at: <https://pmg.org.za/committee-meeting/23878/>, accessed 7 September 2020.

<sup>42</sup> section 53B of Act 195 of 1993; section 43B(3) of Act 194 of 1993.

<sup>43</sup> Carugno, C. 2017. How to Protect Traditional Folk Music? Some Reflections Upon Traditional Knowledge and Copyright Law. *International Journal of Semiot Law* 31, 261 – 74.

<sup>44</sup> Carpenter, M. 2017. "Chapter VI: Sui Generis Protection of Traditional Cultural Expressions" Available at: <https://silo.tips/download/sui-generis-protection-of-traditional-cultural-expressions>, accessed 09 September 2020.

<sup>45</sup> Tobia *supra* at 20, 840.

<sup>46</sup> Department of Science and Innovation (online). "Indigenous Knowledge Act (6 of 2019) Presentation to the dti portfolio committee" Available at: <http://www.thedtic.gov.za/wp-content/uploads/Science-IPLAA.pdf>, accessed 27 July 2020.

importance.<sup>47</sup> And thirdly, with the direction of the IGC towards a *sui generis* international statute protecting indigenous knowledge<sup>48</sup>, it is held that the dual system approach should not be preferred over a single *sui generis* approach.

### 2.1.3 Enforcement mechanism

Finally, the enforcement provisions in the PPDMIKA<sup>49</sup> present the third substantive legal issue. Section 28 states that any third party who knowingly makes commercial use of indigenous knowledge in a manner which is not in accordance with an agreement entered into with the indigenous community; and infringes the rights of that indigenous community, is guilty of an offence and on conviction liable to pay a fine as prescribed.<sup>50</sup> Fines as the only penalty for violations may be insufficient for the enforcement of indigenous knowledge rights because fines do not offer positive redress to the rights holders. Secondly, since indigenous knowledge rights provided in the PPDMIKA are territorial, infringers who do not reside in South Africa may be beyond the reach of fines. Civil suits adequately respond to the latter problems. They are an effective remedy against foreign infringers and they offer the possibility of financial redress; the holder of the infringed rights may seek actual damages resulting from the infringement and/or reasonable royalties in the profits attributable to the infringement.<sup>51</sup> Additionally, civil suits offer the possibility of restraining orders against infringers to desist from their infringing conduct and prevent future infringement.<sup>52</sup> Civil suits are suitable because the infringement of indigenous knowledge rights will be an economic issue as it takes away from the full economic benefit of the relevant indigenous knowledge; accordingly, this kind of infringement requires practical economic redress so that the relevant indigenous community can fully enjoy all commercial benefits arising from their indigenous knowledge. Adding civil suits as another enforcement mechanism in the Act will serve the objectives of the PPDMIKA, which is to economically empower indigenous communities through the regulation of the commercial use of their knowledge.

Notwithstanding this, it must be acknowledged that for many indigenous communities, the legal system is expensive, complicated, time consuming and often alien to their own customary laws.<sup>53</sup> Coupled with this, the defendants of infringement actions are likely to be big corporations which have huge financial muscles to employ the best legal service providers, at the detriment of indigenous communities. This may deter indigenous communities from seeking the enforcement of their rights.

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<sup>47</sup> Albino, V. 2018. "Traditional Cultural Expressions, a Protection Beyond Intellectual Property Law" Available at: <https://inventa.com/en/afr/news/article/288/traditional-cultural-expressions-a-protection-beyond-intellectual-property-law>, accessed 9 September 2020.

<sup>48</sup> Presentation to the dti portfolio committee (refer to footnote 46).

<sup>49</sup> S 28.

<sup>50</sup> Act 6 of 2019.

<sup>51</sup> Herbeck, D.A. & Hunter, C.D. (2001). LaMacchia to the No Electronic Theft Act: Criminal Copyright Infringement and the New Digital Media. *Free Speech Yearbook* 39, 112 – 28..

<sup>52</sup> *Ibid.*

<sup>53</sup> Rautenbach, C. (2015). Legal reforms of Traditional Courts in South Africa: Exploring the links between Ubuntu, Restorative Justice and Therapeutic Jurisprudence. *Journal of international and Comparative Law* 2(2), 275 – 304.

Therefore, it is further recommended that another infringement resolution method, preferably based on customary law, should be added to run parallel to the court system.

### 2.3 Philosophical issues

Indigenous knowledge is an integral part of indigenous communities; it is closely linked to their culture, values, socio-political and economic systems and it holds sacred value within indigenous communities.<sup>54</sup> It is generally said by the international community of legal scholars and experts involved in the conversation to protect indigenous knowledge that the real issue/demand with the protection of indigenous knowledge seems to be the protection of indigenous communities and the preservation of their lifestyles and their cultures.<sup>55</sup> Accordingly, the participation of indigenous communities in decision making is paramount because they usually have a better understanding of their knowledge systems, they know which issues exist to be addressed and have valuable input on how to address such issues – the suitable protection of indigenous knowledge can only be achieved if indigenous peoples are placed at the center of the discussions to protect indigenous knowledge.<sup>56</sup>

Any formalized legal system that will be imposed from 'above' without their participation will be received with serious suspicion and doubt by indigenous communities<sup>57</sup>, and this makes sense considering the history between of western civilizations and indigenous communities. Any system established to protect indigenous knowledge must establish trust in the indigenous communities for effectiveness, it should reflect their own customary laws.<sup>58</sup> Article 18 of the UN Declaration on the Rights of Indigenous Peoples (DRIP) expressly requires that indigenous peoples have a right to effective participation in the discussions involving their rights and requires that indigenous people must have fundamental input on how the domestic legislation protecting their rights will be designed.<sup>59</sup> Similarly, in the presentation of the South African Indigenous Knowledge Systems Policy to WIPO IGC, it was expressly acknowledged that a strategy for the protection of indigenous knowledge will only work if the indigenous and local communities are directly and actively involved in the development of a strategy to protect indigenous knowledge.<sup>60</sup> It was further added that numerous strategies to protect indigenous knowledge had failed in some African countries because indigenous communities, their leaders and indigenous authorities were excluded in the process.<sup>61</sup>

Contrary to this acknowledgement of the importance the involvement of indigenous communities, in

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<sup>54</sup> Verma, S.K. (2004). Protecting Traditional Knowledge: Is a sui generis system an answer. *The Journal of World Intellectual Property* 7(6), 765 – 805.

<sup>55</sup> *Ibid*, at 766.

<sup>56</sup> Dodson, M & Barr, O. (2007). Breaking the deadlock: Developing an indigenous response to protecting traditional knowledge. *Australian Indigenous Law Review* 11(2), 19 – 32.

<sup>57</sup> Verma *supra* at 23, 799.

<sup>58</sup> *Ibid*.

<sup>59</sup> Nwauche, ES. 2010. Protecting Expressions of folklore Within the Right to Culture in Africa. *Potchefstroom Electronic Law Journal* 13(4), 49 -180.

<sup>60</sup> World Intellectual Property Organization (WIPO). 2006. Intergovernmental Committee on Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore; Ninth Session Geneva – Republic of South Africa presentation: Indigenous Knowledge Systems Policy.

<sup>61</sup> *Ibid*.

his comments on the PPDMIKS Bill, given in 2016, van der Merwe stated that the parties that had been consulted on the Bill were other state departments, no indigenous communities or their leaders had been consulted.<sup>62</sup> Similarly, during the hearings of public comment held by the department of science and Innovation (DSI) on the first draft of the Bill, it was raised that the main concern about the Bill is that there had been inadequate consultation between the DSI, indigenous communities and traditional health practitioners.<sup>63</sup>

However, following these hearings of public comment, the DSI noted and corrected this error, acknowledging that the groups of people that will be impacted by the PPDMIKS Bill were mostly black, underprivileged and living in remote rural areas.<sup>64</sup> Accordingly, the DSI communicated the PPDMIKS Bill widely, consulting indigenous communities and creating awareness on the Bill in all nine provinces as well as meeting with traditional health practitioners prior the Bill being gazetted.<sup>65</sup> Additionally, the DSI was mindful of the contextual circumstances of the indigenous communities and traditional health practitioners, specifically that they were likely to not read the PPDMIKS Bill once it was published in the National Gazette because of illiteracy or other reasons; so the DSI ran a parallel process to orally explain the Bill to the communities and receive further inputs.<sup>66</sup> The PPDMIKS Bill was translated into different languages and presented in the local language of each province.<sup>67</sup> Moving forward towards the implementation of the Bill, the DSI has involved indigenous communities and plans to create more awareness campaigns during the period of September to November 2020. By August 2020, awareness campaigns had been conducted in Limpopo, North West, Kwazulu-Natal and Mpumalanga as planned.<sup>68</sup> The process of drafting Biocultural Community Protocols (BCPs) which are instruments that set out the terms and conditions of indigenous communities in engaging with the government, private sector and non-profit sectors on the access of their indigenous knowledge commenced in the North West, Free State and Mpumalanga and set to continue with the other provinces later on the year 2020.<sup>69</sup> Such drafting process did not continue in 2020 as the meeting report on the update on the PPDMIKA only states that such BCPs must be completed before the regulations on the PPDMIKA are

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<sup>62</sup> Van der Merwe, A. (2016). “Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems Bill”. Available at: <https://www.golegal.co.za/iks-bill-indigenous-knowledge-systems/>, accessed 25 July 2020.

<sup>63</sup> Parliamentary Monitoring Group (online). 2017. “Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill: Public Hearings Day 3” Available at: <https://pmg.org.za/committee-meeting/23878/>, accessed 7 September 2020.

<sup>64</sup> Parliamentary Monitoring Group (Online). 2018. “Protection, Promotion, Development and Management of the Indigenous Knowledge Systems Bill [B6B - 2016]: Department of Science and Technology Briefing” Available at: <https://pmg.org.za/committee-meeting/26232/>, accessed 7 September 2020.

<sup>65</sup> *Ibid.*

<sup>66</sup> Parliamentary Monitoring Group (Online). 2018. “Protection, Promotion, Development and Management of the Indigenous Knowledge Systems Bill [B6B - 2016]: Department of Science and Technology Briefing” Available at: <https://pmg.org.za/committee-meeting/26232/>, accessed 7 September 2020.

<sup>67</sup> *Ibid.*

<sup>68</sup> Parliamentary Monitoring Group (online). 2020. “DSI Quarter 1 report & Revised APP; Indigenous Knowledge Act Update; with Deputy Minister” Available at: <https://pmg.org.za/committee-meeting/30938/>, accessed 14 March 2021.

<sup>69</sup> Presentation to the dti portfolio committee (refer to footnote 46).

implemented.<sup>70</sup>

The commendable efforts of the DSI in considering the contextual circumstances of indigenous communities in South Africa and subsequently taking the conversation to indigenous communities in their languages and the comfort of their locale, symbolizes respect for indigenous communities and indigenous knowledge which could possibly 'right the wrong' of the exclusion in the beginning stages of the drafting of the PPDMIKS Bill. The continued efforts of the DSI to create awareness on the PPDMIKA is a positive indication of the potential success and acceptance of the PPDMIKA in South Africa.

In summation, this chapter has highlighted some substantive legal and philosophical issues relating to the PPDMIKA. The issues presented above are not fatal to this Act but only show some of its shortfalls. These shortfalls can be addressed through Regulations that will be drafted in the implementation of the PPDMIKA and where this does not happen, through the precedent to be set by the proper interpretation of this Act in relevant case law. The recommendations made in this chapter suffice to cure the issues highlighted. The first draft of the Regulations for the implementation of this Act have been concluded but not published for public consultation<sup>71</sup>, it exciting to see if the department recognized and/or addressed the issues in the PPDMIKA found by this dissertation.

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<sup>70</sup> Parliamentary Monitoring Group (online). 2020. "DSI Quarter 1 report & Revised APP; Indigenous Knowledge Act Update; with Deputy Minister" Available at: <https://pmg.org.za/committee-meeting/30938/>, accessed 14 March 2021.

<sup>71</sup> Parliamentary Monitoring Group (online). 2020. "DSI Quarter 1 report & Revised APP; Indigenous Knowledge Act Update; with Deputy Minister" Available at: <https://pmg.org.za/committee-meeting/30938/>, accessed 14 March 2021.

### Chapter 3: Musical or sound expressions

#### 3.1 Indigenous music in South Africa

Music is a sacred and integral part of indigenous communities; it serves as a united voice of the people and a record of their history.<sup>1</sup> The custom of group singing to express positive celebratory emotions, voice out concerns in society and teach younger generations life lessons throughout all activities of the community is at the very core of the life of indigenous communities.<sup>2</sup> South Africa is a colourful country, rich with unique, intricate cultures and cultural expression of several indigenous communities including the Nguni (Zulu, Xhosa, Ndebele and Swazi people), Sotho, Tsonga, Tswana, Venda, the native San and Khoi.<sup>3</sup> Each of these groups have their own complex and identifiable music sound. It would take a whole dissertation to delineate the full scope of the indigenous music that has come from these indigenous communities.

Summarily, the indigenous communities in South Africa use songs in their everyday cultural and ceremonial life; specific songs are continually composed and sung during weddings, funerals, initiation, circumcision, coming of age rituals, etcetera.<sup>4</sup> Whether in praise songs or songs of sorrow, the music sound of the Nguni is polyphonic in style and texture, meaning that simultaneous lines of melodies instead of one independent melody supported by voices or musical instruments is used in a complex manner.<sup>5</sup> The songs usually have a call and response element, they are rhythmic and singing is usually accompanied by a unique clapping of hands and dance.<sup>6</sup> The music of the Sotho, Tswana and Tsonga on the other hand, place considerable emphasis on praise and includes elements of ‘recitative praise’ and exultant ululations.<sup>7</sup> These groups also accompany songs with dance and their own unique style of clapping hands.<sup>8</sup> The Tsonga people are distinctively more dramatic in their music because the songs are created with the purpose to perform the tales of the community, this is called *tinsimu ta mintsheketo*. The music of the Venda community is highly responsorial; the lead voice/s directs the rest of

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<sup>1</sup> Tobia supra at 20, 831 – 855.

<sup>2</sup> Velasquez, G. 2017. No credit where credit is Due: Exploitation in copyright. *Journal of Patent and Trademark Office Society* 99(4), 693 – 707.

<sup>3</sup> Nissen, J. “The Music of South Africa” Available at: <https://www.guidetotheworldofmusic.com/articles/people-and-places/the-music-of-south-africa/>, accessed 17 September 2020.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

the group in changing the tone and texture of the song while leading in dance as well.<sup>9</sup> Finally the music of the San and Khoi is distinctly identifiable by complex vocal techniques including random cliques in between melodies, vocal based instrumentation and polyphonic chants.<sup>10</sup> As mentioned above and evidenced by the uniquely developed musical sounds of each indigenous community, music is an important part of South African indigenous communities, the infringement of the ownership right to it would also be the misappropriation of a valuable cultural object.<sup>11</sup> Additionally, when indigenous music is misappropriated for commercial interests and there is no requisite cultural understanding of the music when it is performed by third parties, the indigenous communities are not only robbed of the commercial benefits accruing from the music but it is also robbed of the cultural significance of the music.<sup>12</sup>

It is paramount to add that due to western colonization of South Africa and the oppressive legislations displacing indigenous communities, particularly forcing men to move to certain parts of the country to work as slaves in mines and factories, indigenous music developed in three ways; (1) pure original indigenous music continued to develop in the ‘homelands’ designated to each indigenous community, (2) those who were taken to work in the mines and/or factories adapted indigenous music into new genres including Maskandi, Isicathamiya or Mbube, *inter alia*, which mixed indigenous music idioms and textures with the western jazz style which was popular during the time and (3) the establishment of townships bringing many cultures together for the first time, resulted in new genres of music such as Marabi and Mbaqanga, pioneered by black musicians who had been taught western style composition in mission schools.<sup>13</sup> It is important to note that these styles of music are derivatives of indigenous music from the indigenous communities mentioned above because even though there are derivatives of indigenous music and usually have known authors, it partially belongs to indigenous communities and must be included in the conversation of the misappropriation of indigenous music. The following discussion under section 3.2 will outline the infringement on the ownership right of indigenous music in South Africa, highlighting the key drivers of such

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<sup>9</sup> Nissen, J. “The Music of South Africa” Available at: <https://www.guidetotheworldofmusic.com/articles/people-and-places/the-music-of-south-africa/>, accessed 17 September 2020.

<sup>10</sup> RateYourMusic (online). 2020. “Khoisan Folk Music” Available at: <https://rateyourmusic.com/genre/Khoisan+Folk+Music/>, accessed 17 September 2020.

<sup>11</sup> Inawat, R.J. 2015. Music as Cultural Heritage: Analysis of the Means of Preventing the Exploitation of Intangible Cultural Heritage. *The John Marshall Review of Intellectual Property Law* 14, 228 – 248.

<sup>12</sup> Tobia *supra* at 20, 834.

<sup>13</sup> Nissen, J. “The Music of South Africa” Available at: <https://www.guidetotheworldofmusic.com/articles/people-and-places/the-music-of-south-africa/>, accessed 17 September 2020.

infringement; section 3.3 will evaluate the effect of the PPDMIKA on the current reality of infringement of the ownership right of indigenous knowledge, section 3.4 will outline the consequences of the PPDMIKA on the music industry and finally, section 3.5 will highlight some foreseeable issues with the protection of indigenous music by the PPDMIKA and make recommendations, accordingly.

### **3.2 The infringement on the right of ownership of indigenous music**

#### *3.2.1 Globalization and development in digital technology as key drivers of infringement*

Globalization describes the phenomenon of the growing interconnectedness of the world due to technological advancements that make world travel, the trade of goods/services and the creation of free global markets much easier and more effective.<sup>14</sup> As markets have become more global and more dynamic, there is a growing need for new products, specifically unique and ‘raw’ products.<sup>15</sup> In the context of the “New Age movement” where people from western countries seek spirituality and self-realization in indigenous cultures all over the world, ICE, such as the music of indigenous cultures, have become highly valued commodities and are in high demand.<sup>16</sup> Consequently, ICEs are often found in modern day commercial markets; supplied by individuals or corporations not belonging to the relevant indigenous communities from which they originate, without the permission of the relevant indigenous communities who are holders of the knowledge and supplied without due regard to their cultural significance which sometimes leads to offensive use of these ICEs.<sup>17</sup> The increased demand for ICEs led to the booming commercial success of South African theatre productions such as Ipi Ntombi in the 1970s which later attracted controversy for “exploiting black heritage and its actors”<sup>18</sup> and Africa uMoja , still being performed today<sup>19</sup> - showcasing indigenous songs and dances originating from South African indigenous communities without their permission and without commercial benefits accruing being shared with them.

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<sup>14</sup> Investopedia (online). 2020. “Globalization” Available at:

<https://www.investopedia.com/terms/g/globalization.asp>, accessed 18 September 2020.

<sup>15</sup> Lewinski, S. 2004. Protecting Cultural Expressions: The Perspective of Law. *Deitrich Reimer Verlag*, 111 – 127.

<sup>16</sup> Lewinski, supra at 28, 111.

<sup>17</sup> Tobias supra at 20, 833.

<sup>18</sup> Canavan, C. 1997. “Ipi Tombi”. Available at: [https://esat.sun.ac.za/index.php/Ipi\\_Tombi](https://esat.sun.ac.za/index.php/Ipi_Tombi), accessed 18 September 2020.

<sup>19</sup> Africa Umoja (online). 2020. “About Us” Available at: <http://africaumoja.com/about-us/>, accessed 18 September 2020.

The problem outlined above is compounded by the rapid growth of technology in the fields of sound and audiovisual recordings, cinematography and digital technology from the 1980s.<sup>20</sup> The album ‘Deep Forest’ by two French-men Michael Sanchez and Erica Mouquet provides an example of how the development in sound recordings influenced the infringement on the ownership right of indigenous music.<sup>21</sup> The two stated artists, sought the music recordings from Ghana, the Solomon islands and the music of the African pygmies which are native groups in Central Africa, and infused the digital samples of the recordings in their album ‘Deep Forest’.<sup>22</sup> This was done without the knowledge or permission of these indigenous groups.<sup>23</sup> The album was a huge success; it sold over two million copies, received a Grammy nomination and remained the ‘top album’ in music charts for weeks.<sup>24</sup> Inspired by the success of ‘Deep Forest’, the artists released a second album titled ‘Boehme’ also which included digital samples of music by Eastern Europe, Mongolian, East Asian and Native American indigenous communities, without their knowledge or permission.<sup>25</sup> Digital technology has made indigenous music widely accessible to the world because once uploaded in network, it can be easily distributed, copied, altered or adapted without losing its quality.<sup>26</sup>

### *3.2.2 Inadequacies of existing laws to protect indigenous music reason for infringement on the ownership right of indigenous music*

The fundamental problem with protecting indigenous music using the existing copyright regime is that the requirements for, (i) a named author/s, (ii) originality, and (iii) for a work to be reduced to material form for copyright to subsist in a work are inherently incompatible with the nature of indigenous music and indigenous knowledge in general.<sup>27</sup> Firstly, it is rare for indigenous music to have an identifiable author/s: it is usually communally owned.<sup>28</sup> And even though the Copyright Act<sup>29</sup> makes provision for ownership by multiple authors, in order for multiple authors to have ownership in a work, they must all intend to form a joint authorship

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<sup>20</sup> Katty, PV for WIPO. 2020. “National experiences with the protection of expressions of folklore/traditional cultural expressions: India, Indonesia and the Philippines” Available at: [http://193.5.93.81/edocs/pubdocs/en/tk/912/wipo\\_pub\\_912.pdf](http://193.5.93.81/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf), accessed 18 September 2020.

<sup>21</sup> Mills, S. 1996. Indigenous Music and the Law: An analysis of National and International Legislation. *Yearbook for Traditional Music* 28, 57 – 86.

<sup>22</sup> *Ibid* 29, 59.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> Tobia *supra* 20, 833.

<sup>27</sup> Rees, H. 2003. The age of consent: Traditional music, Intellectual Property and Changing attitudes in the People’s Republic of China. *British Journal of Ethnomusicology* 12(1), 137 – 171.

<sup>28</sup> Inawat, *supra* 27, 236.

<sup>29</sup> Act 98 of 1978.

and all authors must have made a meaningful contribution in the creation of the work.<sup>30</sup> Indigenous music could not be assigned ‘multiple authors’ because firstly, each member of the indigenous group does not always add a copyrightable component to a music composition.<sup>31</sup> Secondly, there is no real intention by the members of the community who do contribute to ‘own’ or have rights in a song they contribute in composing. Instead, it is spontaneously done. Thirdly, it is not recorded which member contributed which melody or ululation in an indigenous song, therefore the value of contribution by members could not be ascertained.<sup>32</sup>

In *Klep Values (Pty) Ltd. v Saunders Value Company Ltd*, the supreme court of appeal in South Africa defined the originality requirement in the Copyright Act<sup>33</sup> and held that originality does not require that the work is a result of inventive thought which is novel and without precedent, all that is required is for the work to reflect the skills and labour of the author themselves and not be copied.<sup>34</sup> Indigenous music, as indicated above, is composed during everyday cultural practices by groups belonging to the indigenous community or the whole community at large, such compositions are a result of a process of spontaneous tunes and melodies which are varied over time through different contributions of members; one spontaneous melody for example, could result in one or many songs or one song which is changed over time.<sup>35</sup> Therefore, there is no way of assessing the contribution of an individual author/s in a musical work. The skills and labour that produce indigenous music are usually collective and continuous. Consequently, a significant amount of indigenous music often fails to meet the requirement for ‘originality’.

Finally, the existing copyright regime protects music that is reduced into material form and creators often use a recording of a musical work/song or the evidence of a score sheet to prove that the music is reduced into material form.<sup>36</sup> Indigenous music fails to meet this requirement because indigenous music plays a sacred role in indigenous communities, it is not seen as a product of the indigenous community but a part of the communities’ heritage, therefore, it is usually not reduced to any form but is living in nature, susceptible to variations and adaptations

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<sup>30</sup> Inawat, supra at 27, 248.

<sup>31</sup> Velasquez, G. 2017. No credit where credit is Due: Exploitation in copyright. *Journal of Patent and Trademark Office Society* 99(4), 700.

<sup>32</sup> Inawat, supra at 27, 237.

<sup>33</sup> Act 98 of 1978.

<sup>34</sup> *Klep Values (Pty) Ltd. v Saunders Value Company Ltd* [1987] 4 All SA 147 (AD) para 27.

<sup>35</sup> McCann. 2020. “Traditional Music and Copyright- The Issues” Available at: <https://pdfs.semanticscholar.org/b9de/e020396d8b182a0dd7236730bb01ef880ead.pdf>, accessed 23 September 2020.

<sup>36</sup> Inawat, supra at 27, 236.

at any time by any member as it is passed from generation to generation.<sup>37</sup> Additionally, indigenous knowledge is not reduced into material form because of its spiritual symbolism; many indigenous songs are for praising the ancestors and God and cannot be fixed because communications to the ancestors and God must be led by the spirit and spontaneous in whichever way the ‘spirits lead’.<sup>38</sup>

These fundamental incompatibilities between copyright and indigenous music have also facilitated the infringement on the ownership right of indigenous music by individual artists belonging to indigenous communities. These individual artists record indigenous songs or create derivatives of indigenous songs and add instrumentation or a new minimal element which then fulfils the requirements for copyright to subsist in a work (named author, originality and reducing works to material form). These artists then claim 100% ownership to these songs without sharing any commercial benefits with their indigenous communities. For example, the song selected to be the anthem of the 2010 South African football world cup, ‘Waka Waka’ by the United States based artist, Shakira, was substantially similar to ‘Zangelwa/Zamina’, a Cameroonian song made famous by the musical group, ‘the Golden Sounds’.<sup>39</sup> The Golden Sounds group claimed for the copyright infringement on the ownership right of the song by Shakira’s ‘Waka Waka’ and she agreed that the songs were more than similar; the parties then reached an agreement outside of court and the members of Golden Sounds were listed as the songwriters of the song.<sup>40</sup> It must be noted that the song has no named author, it is part of a repertoire of soldiers and a march song for boy scouts in Cameroon and had existed long before the Golden Sounds recorded it and made it famous.<sup>41</sup> This means that the three members of the Golden Sounds received commercial benefits and the right of attribution to a song that was not truly their own, robbing the true communities that composed the song of their legal and moral rights to the song.

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<sup>37</sup> McCann. 2020. “Traditional Music and Copyright- The Issues” Available at: <https://pdfs.semanticscholar.org/b9de/e020396d8b182a0dd7236730bb01ef880ead.pdf>, accessed 23 September 2020.

<sup>38</sup> Mdanda, MG. 2010. “The Indigenous Knowledge Systems Based on Religion and Healing as Encapsulated in O.E.H.M. Nxumalo and L.B.Z Buthelezi’s Poetry”(Doctoral thesis: University of Kwazulu-Natal) Available at: [https://ukzn-dspace.ukzn.ac.za/bitstream/handle/10413/6520/Mdanda\\_Mandlakayise\\_Gilford\\_2010.pdf?sequence=1&isAllowed=y](https://ukzn-dspace.ukzn.ac.za/bitstream/handle/10413/6520/Mdanda_Mandlakayise_Gilford_2010.pdf?sequence=1&isAllowed=y), accessed 19 November 2020.

<sup>39</sup> Velasquez supra at 32, 699.

<sup>40</sup> *Ibid.*

<sup>41</sup> Global Music Tribune. 2012. “African Music#5: Zangelwa, Zamina or Waka Waka?” Available at: <https://intermediaries.wordpress.com/2012/12/01/zangalewa-zamina-or-waka-waka/>, accessed 23 September 2020.

Another example which is closer to home, is the famous dispute over the Disney Lion King song, 'The Lion Sleeps Tonight'. It was alleged and proven that the song was actually composed by the South Africa Isicathamiya/Mbube artist, Solomon Linda who titled it 'Mbube'; the genre of music Isicathamiya was later also known as 'Mbube' because the song was famous in South Africa and made this genre of music popular.<sup>42</sup> The copyright infringement dispute was between the estate of Solomon Linda, since the artist passed away prior to the copyright infringement claim and Disney, the creators of Lion King. The parties settled out of court in 2006 with Disney agreeing to pay all royalties that accrued to the song to the family of Solomon Linda; Disney also transferred the relevant rights of the song to the family so that they can participate in the royalties which will accrue to the song in future, on a worldwide basis.<sup>43</sup> This case is a story of success for the family of Solomon Linda but it also shows how modern copyright law can marginalize indigenous communities and culture.<sup>44</sup> As mentioned above, Isicathamiya/Mbube is a derivative of the Zulu community's music and it uses the Zulu idioms and Zulu music textures. However, when the dispute was settled, the discussions did not consider any collective rights of the Zulu community over the music.<sup>45</sup>

Alternatively, it is argued that indigenous communities can rely on contract law and/or competition laws to protect indigenous music.<sup>46</sup> Contract law can be utilized by parties wishing to use indigenous music by concluding a legally valid and enforceable agreement with the relevant indigenous community setting out the terms for the use of the music.<sup>47</sup> In this way, indigenous communities would have the power to decide which aspects of the work can be used, place restrictions on certain uses and decide on a form of compensation for the use without being restricted to monetary compensation.<sup>48</sup> The one issue with using contract law in this context though is that parties wishing to use indigenous music must take the first step to approach indigenous communities and this is highly unlikely given that there is currently no consequence for using indigenous music without permission.<sup>49</sup> Therefore, there is no incentive for users of indigenous music to go through such a process. Additionally, even where there is an agreement, there are high possibilities of breach by users of indigenous music because they

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<sup>42</sup> Bachner, B. 2005. Facing the Music: Traditional Knowledge and Copyright. *Human Rights Brief* 12(3), 1 – 4.

<sup>43</sup> Aljazeera.com (online). 2006. "Disney settles Lion King song lawsuit" Available at: <https://www.aljazeera.com/archive/2006/02/2008491335677676.html>, accessed 17 September 2020.

<sup>44</sup> Bachner supra at 32, 4.

<sup>45</sup> Bachner supra at 32, 4.

<sup>46</sup> Inawat supra at 27.

<sup>47</sup> Inawat supra 27.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

know that indigenous communities may not have the resources and knowledge to challenge such breach. When the PPDMIKA was first introduced to indigenous communities, the Khoi community mentioned that previous engagements with users of indigenous music resulted in “endless struggles in terms of inequality, intellectual abuse and always certain levels of misinformation resulting in the gross neglect of the knowledge provider”.<sup>50</sup>

Furthermore, unfair competition laws in the United States prohibit the supply of goods with a false designation of origin and deceptive practices such as false advertising, misrepresentation of origin of goods and causing confusion or misunderstanding regarding the source of goods.<sup>51</sup> These laws can be used against a person who performs an indigenous song without attributing the relevant indigenous community as the origin of the song. The equivalent of such laws in South Africa can be found in the Consumer Protection Act<sup>52</sup> which states that in relation to the marketing of goods, suppliers must not, by words or conduct, directly or indirectly express or imply a misleading representation concerning a material fact of the goods.<sup>53</sup> It can be said that the origin of a song is a material fact to consumers of music. Nonetheless, such laws are inadequate because, (i) these laws prohibit the misrepresentation of commercial goods creating a narrow scope for their application in the context of indigenous music, (ii) indigenous communities do not have knowledge or the financial power to initiate such legal proceedings and (iii) since indigenous music is unregulated and assumed to be in the ‘public domain’ (available for all to use), initiating court proceedings claiming for the rights and interests of indigenous communities to be considered would be unjustifiable in law.<sup>54</sup>

### *3.2.3 Assumptions that indigenous music is in the public domain as a reason for infringement on the ownership right*

The intellectual property statutes do not define the term ‘public domain’, however, it is widely accepted that the term refers to works that are not protected by any type of intellectual property because they either do not meet the requirements for protection or the protection of the works has expired and therefore they have fallen into the public domain.<sup>55</sup> It must be noted that works in the public domain are free for any members of the public to use, no rights attach to such

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<sup>50</sup> Parliamentary Monitoring Group (online). 2017. “Protection, Promotion, Management and Development of Indigenous Knowledge Bill: Public Hearings Day 3” Available at: <https://pmg.org.za/committee-meeting/23878/>, accessed 23 September 2020.

<sup>51</sup> Inawat supra 11 at 27.

<sup>52</sup> Act 68 of 2008.

<sup>53</sup> Section 41(1) of Consumer Protection Act 68 of 2008.

<sup>54</sup> Inawat supra at 27.

<sup>55</sup> Okorie, C. 2019. “Exploiting arrangements of traditional (folk or gospel) music in South Africa” Available at <https://ipkitten.blogspot.com/2019/02/exploiting-arrangements-of-traditional.html>, accessed 28 September 2020).

works. Indigenous knowledge and its use have been left unregulated for years and therefore, it has not been classified as knowledge or property belonging to indigenous communities. The result of this is the creation of the assumption that indigenous knowledge is in the public domain and free for use by all. The ‘non-classification’ of indigenous knowledge has further increased the infringement on the ownership right of indigenous music and apparently facilitated such infringement by individual artists using indigenous music.

In 2018, it came to light that the Southern African Music Rights Organization (SAMRO) has been unlawfully deducting royalties from gospel, mbaqanga, maskandi and kwela artists since 1963.<sup>56</sup> Upon investigation, it was found that SAMRO has a rule that the artists of latter mentioned genres only receive 16.7% of all the royalties from their music and the remaining 83.3% is paid to a composer named ‘DP’, an abbreviation for *dominus publicus* meaning public domain.<sup>57</sup> The investigation shows that artists such as Hlengiwe Mhlaba, Mbongeni Ngema, Brenda Fassie and Miriam Makeba have lost millions to billions of Rands in revenue for their music as a result of this rule.<sup>58</sup> The irony is that these artists who have infringed the ownership right in indigenous music are being exploited in the name of ‘preventing infringement on ownership rights’ of indigenous music in the public domain which are supposed to be free since in the public domain.

### 3.3 A new dawn: PPDMIKA the ‘saviour’ of indigenous music

The PPDMIKA protects registered indigenous<sup>59</sup> cultural expressions which are defined as expressions with cultural content, which have been developed within an indigenous community and have assimilated into the cultural and social identity of that community – including, *inter alia*, musical or sound expressions.<sup>60</sup> Indigenous community is defined as any recognizable community of people who are (a) developing from, or historically settled in a geographic area or areas located within the borders of the Republic;(b) characterized by social, cultural and economic conditions, which distinguish them from other sections of the national community;

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<sup>56</sup> Blignaut, C. 2018. “Gospel shocker: How black musicians got screwed” Available at: <https://www.news24.com/citypress/news/gospel-shocker-how-black-musicians-got-screwed-20180401>, accessed 28 September 2020.

<sup>57</sup> *Ibid.*

<sup>58</sup> Blignaut, C. 2018. “Gospel shocker: How black musicians got screwed” Available at: <https://www.news24.com/citypress/news/gospel-shocker-how-black-musicians-got-screwed-20180401>, accessed 28 September 2020.

<sup>59</sup> S 9.

<sup>60</sup> S 1.

and (c) who identify themselves as a distinct collective.<sup>61</sup> An indigenous community holding registered indigenous musical or sound expressions has the exclusive right to, (a) any benefit arising from its commercial use, (b) to be acknowledged as its origin and (c) to limit any unauthorised indigenous musical or sound expressions.<sup>62</sup> If any person, even if they are a member of the indigenous community, wishes to utilize indigenous musical or sound expressions for commercial purposes, they are required to apply in the prescribed manner for a license authorizing the use of that indigenous knowledge; and enter into a license agreement with the trustee of the relevant indigenous community for the use of that indigenous knowledge, as facilitated by NIKSO.<sup>63</sup> That person's obligation to pay royalties as per the license agreement expires 50 years after the date of the agreement.<sup>64</sup> It must be noted that no prior informed consent will be required for a person using indigenous musical and sound expressions for (a) criticism or academic review; (b) reporting news or current events; (c) judicial proceedings; (d) any use that is incidental to the above purposes; and (e) in circumstances of national emergencies or natural disasters, as long as the relevant indigenous community is compensated for the use of their indigenous knowledge.<sup>65</sup>

The Act goes on to state that ownership of indigenous musical or sound expressions belongs to the indigenous community and its custodianship vests in the trustee of that indigenous community who (a) holds the knowledge in trust on behalf of the indigenous community and (b) is responsible for and accountable to the indigenous community for the protection of their rights.<sup>66</sup> The indigenous musical or sound expressions are protected for as long as they meet the eligibility criteria (registration and definitional requirements) and if it ceases to meet such eligibility criteria, it falls into the public domain.<sup>67</sup> In short, the PPDMIKA protects indigenous music which has been registered; it requires people who want to commercialize it to enter into license agreements with the relevant indigenous community so that the community benefits from the commercial use of their indigenous music. This is good news considering the gross infringement on the ownership right of indigenous music robbing indigenous people of commercial benefits and the moral rights of attribution and having control of how their indigenous music can be used. The PPDMIKA brings positive change for indigenous

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<sup>61</sup> S 1.

<sup>62</sup> S 13.

<sup>63</sup> S 26.

<sup>64</sup> S 26(3)(b).

<sup>65</sup> S 26(4) (a) – (e).

<sup>66</sup> S 12.

<sup>67</sup> S 10.

communities and is a step in the right direction for the empowerment of these communities in South Africa.

As a result of this Act, indigenous communities can use globalization and the developments in technology, discussed above, to their advantage instead of these developments working against them. The PPDMIKA requires NIKSO to assist indigenous communities in commercializing their knowledge, their music and states that NIKSO must, in respect of commercial use of indigenous knowledge promote partnerships for innovation and product development; coordinate funding; develop market strategies; and promote commercial use of products, services, processes and the use of technology.<sup>68</sup> There is a demand for indigenous music as outlined above, indigenous communities can exploit this opportunity once the Act come into force. Additionally, the gross commercial exploitation of indigenous knowledge by members and non-members of the relevant indigenous communities will discontinue since the Act has proclaimed that indigenous music is the cultural property of indigenous communities within the meaning of section 25 of the Constitution, empowering the communities with full control over the use of indigenous knowledge and procuring NIKSO to assist in license agreements with third parties so that indigenous communities set the most beneficial terms for them contextually and are not manipulated into signing agreements that are unfavourable. Finally, the SAMRO rule that 83.3% of royalties accruing to indigenous songs must be paid to an unknown *dominus publicus* composer will be invalidated because indigenous knowledge has now been classified as the property of indigenous communities and they have exclusive rights and control over their indigenous music now.

### **3.4 Consequences for the Music Industry**

The implementation of the PPDMIKA will mean that music artists wishing to make any commercial use of indigenous music whether by incorporating certain elements of indigenous music into new musical creations or mashing indigenous songs with new music, or any other use, will have to observe the process set out in section 13 (2) of the PPDMIKA.<sup>69</sup> This section requires that a third party wishing to make commercial use of indigenous music must apply through NIKSO for a license authorizing such use in accordance to section 26.<sup>70</sup> Section 26 requires that the application is completed in the prescribed form and a license agreement is

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<sup>68</sup> S 25.

<sup>69</sup> Act 6 of 2019.

<sup>70</sup> S 13.

entered into with the trustee of the relevant indigenous community.<sup>71</sup> Section 26 further states that NIKSO must consult with the trustee for the terms of the license agreement and the benefits payable by the licensee.<sup>72</sup> This implies that individual artists or their representatives will not be required to approach indigenous communities to negotiate and agree on terms of the license agreement but NIKSO will mediate the agreement between the artist and the indigenous community. This is a considerate and commendable procedure. It would be burdensome on individual artists or their representatives to negotiate and draft agreements with every indigenous community whose music they wish to make commercial use of. Therefore, the music industry will not be inconvenienced by the implementation of this Act.

Notwithstanding this, section 13(2) does place some burdensome requirements on a third party applying to make commercial use of indigenous knowledge.<sup>73</sup> This section requires the applicant to indicate the following: (i) the identity of the indigenous community, (ii) the place of origin of the indigenous knowledge and (iii) whether prior informed consent of the indigenous community has been obtained and a benefit sharing arrangement entered with that indigenous community. The latter requirement only needs the applicant's knowledge on their engagement with the relevant indigenous community and this is not burdensome at all. However, the first and second indications to be made by an applicant require research which may not be readily available. This means that music artists or their representatives may have to hire researchers who will provide them with the necessary information to make an application to use indigenous music. This adds an expense to the costs of making the music. The music industry will be negatively affected in this regard because the time and costs of such research cannot be quantified, it could be quick and cost efficient in one instance and unreasonably expensive and time consuming in another instance.

Further, section 26 states that in term of ICEs, a third party making commercial use of indigenous knowledge or indigenous music in this instance, would pay the benefits accruing to the use of the indigenous music for a period of 50 years after the date the agreement is concluded between themselves and the indigenous community. This is opposite the free rein given to copyright holders in determining the term/duration under which an agreement for a license authorising use of copyrighted work would run. It is plausible that the legislature, in protection of third-party users of indigenous knowledge, included a specific term/duration

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<sup>71</sup> Act 6 of 2019.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

where benefits may be payable in consideration that indigenous knowledge is protected in perpetuity unlike other intellectual property categories which have limited terms of protection. The addition of this clause protects third party users of indigenous knowledge, or indigenous music in this instance from unfair terms to pay benefits in perpetuity. Finally, Section 26(6) provides any third-party users of indigenous knowledge who is aggrieved by conditions or terms set in the license agreement for the use of indigenous knowledge, an option to refer the dispute to a dispute resolution committee established by section 27 of the PPDMIKA.<sup>74</sup> This is good news for the music industry because it means that there is an efficient method to resolve disputes which may arise from license agreements. There is a dedicated dispute resolution committee which excludes the financial costs of seeking relief from the courts. It can be said, therefore, that the PPDMIKA balances the rights of indigenous communities in reaping the benefits from the use of their indigenous knowledge with the rights of third parties wishing to commercialise indigenous knowledge.

### **3.5 Foreseeable challenges and recommendations**

One foreseeable challenge in the implementation of the PPDMIKA with regards to the protection of indigenous music is the requirement for registration. As discussed above, the composition of indigenous music is usually quite unique; it is not written down and then recorded but it is spontaneously created by the communities and later changed or developed into something new. Therefore, the question of who will constantly register indigenous music as it is created and/or at which stage of its development it will be registered, may be a conundrum. It is recommended that this issue is addressed and discussed with the custodians of indigenous knowledge so that a clear strategy is devised on the way forward so that this law is fully and well exercised by those it seeks to protect.

The second problem is that due to the economic marginalization of indigenous communities in South Africa<sup>75</sup>, such communities do not participate in the mainstream music culture and are often technologically unacquainted. This means that indigenous communities might find it difficult to police the unauthorised use of indigenous music. Additionally, indigenous communities do not have an equivalent organization to SAMRO, or any other music

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<sup>74</sup> Act 6 of 2019.

<sup>75</sup> Philip, K. 2010. Inequality and Economic Marginalization. *Law, Democracy and Development* 14, 1 -27.

organization protecting the rights of artists and doing the work of policing intellectual property infringement on their behalf.<sup>76</sup>

It can be argued that indigenous communities together with members of the public can police a significant amount of infringement on the ownership right as this has been a successful strategy for many artists today. For example, in 2017, members of the public (listeners) noticed striking similarity between TLC's 'no scrubs' and Ed Sheeran's 'Shape of You'.<sup>77</sup> A copyright infringement claim ensued, and TLC was able to protect their rights – the group and the producer of the 'no scrubs' song are now listed as writers on Ed Sheeran's 'Shape of You' song. However, it must be borne to mind that indigenous communities and indigenous music is not popular like the latter mentioned artists. Therefore, relying on members of the public may be detrimental for indigenous communities. It is recommended that as part of NIKSO's duties to assist indigenous communities in the commercialization of products<sup>78</sup>, NIKSO must also assist indigenous communities in subscribing to technologies that will police intellectual property infringement of indigenous music.

Finally, notwithstanding the positive change the PPDMIKA will bring, as highlighted above, it can be argued that a certain degree of retrospective application of this Act would further protect the rights and interests of indigenous communities. A retrospective statute is one where the laws apply to matters occurring prior to its enactment.<sup>79</sup> This means that it is recommended that the rights and remedies provided by the PPDMIKA apply to infringements occurring before the enactment of the PPDMIKA. The Constitution<sup>80</sup> permits the passing of retrospective laws in the civil sphere and such laws need not be only passed in "exceptional circumstances".<sup>81</sup> Retrospective laws are unfair because they may unexpectedly impose unfavourable consequences on legal subjects who relied on and acted in accordance to the known state of the

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<sup>76</sup> SAMRO (online). 2020. "The Value of Copyright – Your Lasting Legacy" Available at: <https://www.samro.org.za/news/articles/value-copyright-%E2%80%93-your-lasting-legacy>, accessed 29 September 2020.

<sup>77</sup> Velasquez supra at 32, 706.

<sup>78</sup> S 25.

<sup>79</sup> Australian Government (online). 2016. "Traditional Rights and Freedoms Encroachments by Commonwealth Laws; Final Report (Sydney, ALRC)" Available at: [https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_129\\_final\\_report.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report.pdf), accessed 30 September 2020.

<sup>80</sup> Constitution of the Republic of South Africa, 1996.

<sup>81</sup> *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and Another* [2017] 4 ALL SA 175 (GP) para 88 and 101.

law.<sup>82</sup> However, not all laws are fair or required to be fair by the Constitution; unfairness may be justified on the grounds of public interest.<sup>83</sup> The standard by which the Constitutional validity of such laws is tested is by the rationality test and the reasonableness test.<sup>84</sup> The scope of this dissertation does not warrant a full-fledged discussion of these tests. However, these tests seek to understand whether retrospective laws are just by, (i) determining whether the objectives of the legislature for passing retrospective laws connects with the means applied and (ii) whether the means applied are appropriate and proportional to the goals considering fairness and the interests of justice.<sup>85</sup>

The objective for passing the PPDMIKA retrospectively would be to economically empower indigenous communities in South Africa whose knowledge has been unfairly exploited for commercial gains while they largely remain in abject poverty. It would serve as redress for the economic loss and indignity suffered by indigenous communities as a result of the lack of recognition and protection of indigenous knowledge systems. It is recommended that such retrospective effect of the PPDMIKA is only implemented to a certain degree so that it does not impose an unnecessarily financial burden on individuals who utilized indigenous knowledge on a good faith belief that the knowledge was free for all to use. For example, it would only apply retrospectively to individuals who profited certain amounts that would be determined by the Minister in accordance with relevant market considerations and fairness.

The South African courts acknowledge that retrospective laws are an important tool for development and that such laws have been widely used in countries whose Constitutions are based on the Rule of Law like South Africa.<sup>86</sup> Additionally, the jurisprudence of the South African Constitutional Court shows that the Constitutional Court endorses the notions of

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<sup>82</sup> *Ibid* para 40; Australian Government (online). 2016. “Traditional Rights and Freedoms Encroachments by Commonwealth Laws; Final Report (Sydney, ALRC)” Available at: [https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_129\\_final\\_report.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report.pdf), accessed 30 September 2020.

<sup>83</sup> *Supra* note 75 para 47; Australian Government (online). 2016. “Traditional Rights and Freedoms Encroachments by Commonwealth Laws; Final Report (Sydney, ALRC)” Available at: [https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_129\\_final\\_report.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report.pdf), accessed 30 September 2020.

<sup>84</sup> *Supra* note 75; Brink, J & Brincker, E. 2017. “Important judgement on the constitutionality of retrospective legislation” Available at: <https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/Tax/tax-alert-9-june-Important-judgment-on-the-constitutionality-of-retrospective-legislation.html>, accessed 30 September 2020.

<sup>85</sup> *Supra* note 75; Curtis, C. 2011. Rationality, Reasonableness, proportionality: testing the use of standards of scrutiny in the constitutional review of legislation. *Constitutional Court Review* 4(1), 31 – 50.

<sup>86</sup> *Supra* note 75, para 88 and 101; Australian Government (online). 2016. “Traditional Rights and Freedoms Encroachments by Commonwealth Laws; Final Report (Sydney, ALRC)” Available at: [https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_129\\_final\\_report.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report.pdf), accessed 30 September 2020.

racially based measures of redress to achieve an equal and just society.<sup>87</sup> Therefore, it seems possible that a retrospective implementation of the PPDMIKA would pass Constitutional muster.

In summation, this chapter has highlighted the reality of indigenous music in South Africa, including the history of indigenous music leading to such reality. Advancing from this, the flagrant infringement on the ownership right held by indigenous communities in indigenous music was discussed followed by the effects of the relevant provisions of the PPDMIKA on such infringements. It was ascertained that the PPDMIKA will positively change the status quo on said infringements on indigenous music, and therefore that in theory, it has achieved the goals to protect and promote indigenous music as well as the communities it belongs. This provides hope that once implemented, the PPDMIKA will address the issues of not only infringement on the ownership right of indigenous communities but will further empower indigenous communities and subsequently contribute to the preservation of these sacred communities and their cultures. In the penultimate discussions, the effects of the provisions of the PPDMIKA were discussed and it was found that such provisions adequately balance the rights of indigenous music holders and the users of indigenous music – which is also a positive. Finally, some foreseeable issues were raised, and recommendation made accordingly.

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<sup>87</sup> De Vos, P. 2012. Looking backward, looking forward: race, corrective measures and the South African Constitutional Court. *Transformation* 79, 144 – 167.

## Chapter 4: Indigenous Cultural Expressions through the Visual Arts

The visual arts is an umbrella term for several types of artistic creations that are seen rather than heard including, *inter alia*, drawings, paintings, sculptures and photography.<sup>1</sup> Like music, the visual arts play an important role in the daily life of indigenous communities and the transmission of their cultures.<sup>2</sup> The indigenous communities of South Africa have a rich and vast variety of indigenous cultural expression (ICEs) through the visual arts.<sup>3</sup> The oldest and most renowned visual art to come from the South African indigenous communities is the rock paintings of the native San people.<sup>4</sup> The San people are known as Africa's oldest hunter-gatherers; they occupied the massive Drakensburg range of mountains in KwaZulu-Natal and created a vast collection of rock paintings on the walls of caves and on rocks over decades.<sup>5</sup> It is said that the San painting represent the spiritual life of the San indigenous communities.<sup>6</sup> In 2000, the Drakensberg was declared a mixed natural and cultural heritage site in honour of this collection.<sup>7</sup>

Contrary to the famed rock painting of the native San people, the art of the Bantu people, the Nguni, Sotho, Tsonga, Tswana and Venda is typically small and portable symbolizing its relation to the privacy of the home and intimacy of the communities.<sup>8</sup> The art of these indigenous communities is often intended for daily use and the complex history of the migrations of these communities from West-Central Africa to Southern Africa resulted in quite similar artistic styles between these communities.<sup>9</sup> The exquisitely designed everyday use objects/art include, *inter alia*, containers, beer vessels, war and hunting tools (shields &

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<sup>1</sup> Learn.org(online). 2020. "What is visual arts?" Available at: [https://learn.org/articles/What\\_is\\_Visual\\_Arts.html](https://learn.org/articles/What_is_Visual_Arts.html), accessed 20 October 2020.

<sup>2</sup> Fuentes, JA. 2003. Protecting the Rights of Indigenous Cultures Under the Current Intellectual Property Systems: Is it a good idea? *John Marshall Review of Intellectual Property Law* 3(88), 88 – 102; Farley, C. 1997. Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer. *Connecticut Law Review* 30(1), 1 – 58.

<sup>3</sup> South African Yearbook 2018/19 (online). 2019. "Arts and Culture" Available at: <https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/yb1919-4-Arts-and-culture.pdf>, accessed 20 October 2020.

<sup>4</sup> Brand South Africa (online). 2017. "An overview of the history of South African Art" Available at: <https://www.brandsouthafrica.com/people-culture/people/overview-history-south-african-art>, accessed 13 October 2020.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> The Cleveland Museum (online). 2020. "The Art of Daily Life: Portable objects from Southeast Africa" Available: <https://www.clevelandart.org/exhibitions/art-daily-life-portable-objects-southeast-africa>, accessed 21 October 2020.

<sup>9</sup> *Ibid.*

knobkieries), pipes and serving items for large gathering.<sup>10</sup> The differentiated aesthetic designs of these objects often represent the social status, age and gender of the individuals in these communities.<sup>11</sup> Quite distinctively from the rest of the Bantu communities, the Ndebele community uses its unique symmetrical designs and intricate patterns to express the creativity of the women in their community.<sup>12</sup> The women are responsible for painting colourful decorations on the walls of their houses using different shapes, drawn by hand and mixtures of earthly and bright colours.<sup>13</sup> The colourful designs of the Ndebele homes/homesteads serve to reinforce the distinctive identity of the indigenous group.<sup>14</sup> It is clear that the visual arts of South African indigenous communities is intimately connected to the livelihoods of these communities. Its acknowledgement and legal protection mean the protection and preservation of indigenous communities. In the following discussion, section 4.1 will discuss the continual infringement on the ownership right of the indigenous art discussed, section 4.2 will evaluate the significance of the PPDMKA in relation to the infringement on the ownership right of indigenous art, section 4.3 will discuss the consequences on the visual arts industry and section 4.4 will evaluate the relevant provisions of the PPDMKA and make recommendations, accordingly.

#### **4.1 Infringement on the ownership right of South African Indigenous Art**

##### *4.1.1 Infringement on the ownership right by individual white artists during the colonial era*

The infringement on the ownership right of South African indigenous art began during the colonization era when several white artists, inspired by the art and lifestyles of the native communities, created paintings and drawings depicting such lifestyles by using key aesthetic features of the indigenous communities' art.<sup>15</sup> A prime example of such artists is Walter Battis whose whole career in arts and literature was influenced by the rock painting of the San people and the Ndebele designs.<sup>16</sup> In 1967, Battis created an exhibition of paintings using the stick

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<sup>10</sup> The Cleveland Museum (online). 2020. "The Art of Daily Life: Portable objects from Southeast Africa" Available: <https://www.clevelandart.org/exhibitions/art-daily-life-portable-objects-southeast-africa>, accessed 21 October 2020.

<sup>11</sup> *Ibid.*

<sup>12</sup> Siyabona Africa (online). 2020. "Ndebele" Available at: [http://www.krugerpark.co.za/africa\\_ndebele.html](http://www.krugerpark.co.za/africa_ndebele.html), accessed 21 October 2020.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Brand South Africa (online). 2017. "An overview of the history of South African Art" Available at: <https://www.brandsouthafrica.com/people-culture/people/overview-history-south-african-art>, accessed 13 October 2020; Klemm, P. 2018. "African art and the effects of European contact and colonization" Available at: <https://www.khanacademy.org/humanities/art-africa/african-art-introduction/african-art-europe/a/african-art-effects-of-european-colonization>, accessed 13 October 2020.

<sup>16</sup> NLA Designs and Visual Arts (online). 2003. "Walter Battis (1902 – 1982)" Available at: <https://nladesignvisual.wordpress.com/2013/02/27/walter-battiss-1902->

figures and patterns of the native San people, titling it “*Symbols of life*”.<sup>17</sup> Battis created several similar exhibitions of paintings “inspired” by the rock paintings of the native San people throughout his life and gained significant popularity and respect in his field later contributing to the high value of his paintings today.<sup>18</sup> Even though Walter Battis did not directly receive any commercial gains for such paintings as he donated all his work to his museum, his heirs have profited tremendously from the sale of his paintings; these works have been and are still being offered at auctions with sales ranging from US\$58 to US\$291, 516 today.<sup>19</sup> Battis’ heirs continually gain financially on works that can be said to be derivative works of the native San people while the modern day San communities, whose ancestors created the rock painting concept Battis’ heirs benefit from till today, do not benefit from such works. Their financial gain benefit is not wrong or immoral per se as South African law did not protect indigenous ownership rights in indigenous works at the time of creation of the paintings. It is, however, unfair. And now that the PPDMIKA expressly states that indigenous knowledge, including ICEs, constitutes the property of indigenous communities within section 25 of the Constitution<sup>20</sup>; the point is further highlighted that its unauthorised use by third parties is an infringement on the ownership rights of the indigenous community/ies it originates. Where such infringement occurred before the PPDMIKA was passed into law, it can be said that the commercial gain from that infringement, to the exclusion of the rightful owners, is unfair. The images annexed in Appendix 1 below clearly show the similarities of Battis’ paintings to the indigenous rock paintings of the San people.

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1982/#:~:text=Symbols%20of%20Life%20is%20an,1960s%20based%20on%20Arab%20writings, accessed 22 October 2020.

<sup>17</sup> Brand South Africa (online). 2017. “An overview of the history of South African Art” Available at: <https://www.brandsouthafrica.com/people-culture/people/overview-history-south-african-art>, accessed 13 October 2020; NLA Designs and Visual Arts (online). 2003. “Walter Battis (1902 – 1982)” Available at: <https://nladesignvisual.wordpress.com/2013/02/27/walter-battiss-1902-1982/#:~:text=Symbols%20of%20Life%20is%20an,1960s%20based%20on%20Arab%20writings>, accessed 22 October 2020.

<sup>18</sup> *Ibid*; Mathias, G. 2003. Contemporary Bushment Art, Identity Politics and the Primitivism Discourse. *Anthropologica* 45(1), 95 – 100.

<sup>19</sup> *Ibid*; Mutual Art(online). 2020. “Walter Whall Battis” Available at: <https://www.mutualart.com/Artist/Walter-Whall-Battiss/BD6E04BD1AFE1AA9>, accessed 22 October 2020. Also see Source: <https://www.invaluable.com/artist/battiss-walter-6zdtll4jy2/sold-at-auction-prices/> < date of access>.

<sup>20</sup> S 9(2).

#### 4.1.2 *Misappropriation of indigenous sculptures by colonial government*

Closely related to this, European governments and missionaries in Africa appropriated a vast number of sculptures belonging to indigenous communities during the colonial era.<sup>21</sup> According to the United Nations Educational, Scientific and Cultural Organization (UNESCO), 90 – 95% of Sub-Saharan cultural art/objects taken during the colonial era are kept outside of Africa in museums across Europe and some ended up in North America.<sup>22</sup> There have been increasing global debates on the repatriation of these objects to their owners as many were taken without appropriate documentation of consent or compensation.<sup>23</sup> In response to these discussions, the French government released the Sarr-Savoy report in 2018 which: (i) acknowledges the plunder of African art through the appropriation of these sculptures, (ii) highlights that the “transfer” of such art took place under forced colonial agreements between colonial masters and the colonized African communities and (iii) expressly commits to returning indigenous African art in French museums to their legitimate owners to allow them to “reconstruct a discourse on themselves through these objects”.<sup>24</sup> It is acknowledged that the Sarr-Savoy report has been criticized for making repatriation recommendations that do not give African communities where the contemplated art originates full ownership of the art.<sup>25</sup> Instead it proposes that such art is digitally distributed on intellectual property open access platforms.<sup>26</sup> This criticism is endorsed by this dissertation because indigenous communities must be the rightful owners of the said art and should hold all ownership rights to it; however, further discussions on the merits or demerits of the recommendations is beyond the scope of the dissertation. The Sarr-Savoy report is solely included to illustrate the point of infringement of ownership rights on indigenous art.

Further illustrating the gross infringement of the ownership rights on indigenous art is that the response of the French government in the Sarr-Savoy report is not the general response of European museums. Instead these museums propose to loan the art to Africa, claiming that the

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<sup>21</sup> IFLA (online). 2020. “The Sarr-Savoy Report, the restitution of African cultural heritage” Available at: <https://blogs.ifla.org/lpa/2020/08/25/the-sarr-savoy-report-the-restitution-of-african-cultural-heritage/>, accessed 22 October 2020.

<sup>22</sup> Art & Design (online). 2019. “Across Europe, Museums Rethink What To Do With Their African Art Collections” Available at: <https://www.npr.org/2019/08/12/750549303/across-europe-museums-rethink-what-to-do-with-their-african-art-collections>, accessed 22 October 2020.

<sup>23</sup> IFLA (online). 2020. “The Sarr-Savoy Report, the restitution of African cultural heritage” Available at: <https://blogs.ifla.org/lpa/2020/08/25/the-sarr-savoy-report-the-restitution-of-african-cultural-heritage/>, accessed 22 October 2020.

<sup>24</sup> *Ibid.*

<sup>25</sup> Dr Mathilde, P & Dr Wallace, A. 2019. Statement: Response to the 2018 Sarr Savoy Report. *JIPITEC* 10, 115 – 129.

<sup>26</sup> *Ibid.*

art must be shared with the world audience and they have the facilities to do this.<sup>27</sup> The museums rely on the ancient doctrine of ‘inalienable and imprescriptible’ rights which prohibits the handing over of objects which have accessioned to the country’s institutions.<sup>28</sup> Additionally, the British Museum Act<sup>29</sup> prohibits an institution from disposing objects in its collection save in exceptional circumstances requiring government action.<sup>30</sup>

European museums continue to unfairly reap the commercial benefits of exhibiting African art belonging to indigenous communities at the exclusion of these communities. Such commercial benefits include, *inter alia*, tourist attractions, attracting foreign investment, creating jobs and skills as well as building infrastructure.<sup>31</sup> These opportunities to commercialize indigenous art could potentially provide a source of income for the South African government to empower the indigenous communities who are the legitimate owners of this indigenous art.<sup>32</sup> Moreover, the absence of these art objects represents a loss of indigenous communities’ heritage and sense of identity.<sup>33</sup> The images depicted in Appendix 1 show some examples of art belonging to South African indigenous communities.

#### *4.1.3 Infringement on the ownership right through libraries and museums’ digitization*

The misappropriation of indigenous art by European museums is exacerbated by the age of the internet and the new opportunities presented for museums and libraries to store “their” collections and offer them for viewing more accessibly.<sup>34</sup> This has been termed the ‘digitization’ movement where libraries and museums carrying collection of indigenous art avail such collection on the internet in formats which can be easily copied, reproduced and

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<sup>27</sup> Art & Design (online). 2019. “Across Europe, Museums Rethink What To Do With Their African Art Collections” Available at: <https://www.npr.org/2019/08/12/750549303/across-europe-museums-rethink-what-to-do-with-their-african-art-collections>, accessed 22 October 2020; Bailey, J & Ogbechie, S. 2020. “How to bring Africa’s artefacts back home from Europe’s museums” Available at: <https://qz.com/africa/1868754/how-to-bring-africas-artifacts-back-home-from-europes-museums/>, accessed 22 October 2020.

<sup>28</sup> Bailey, J & Ogbechie, S. 2020. “How to bring Africa’s artefacts back home from Europe’s museums” Available at: <https://qz.com/africa/1868754/how-to-bring-africas-artifacts-back-home-from-europes-museums/>, accessed 22 October 2020.

<sup>29</sup> Act of 1963.

<sup>30</sup> *Ibid.*

<sup>31</sup> Ratha, D & Kabanda, P. 2015. “African art needs to come home - and this is why” Available at: <https://www.theguardian.com/global-development-professionals-network/2015/oct/21/african-art-needs-to-come-home-and-this-is-why>, Accessed 22 October 2020.

<sup>32</sup> Fuentes, JA. 2003. Protecting the Rights of Indigenous Cultures Under the Current Intellectual Property System: Is it a good idea? *John Marshall Review of Intellectual Property Law* 3(88), 102.

<sup>33</sup> *Ibid.*

<sup>34</sup> Tarsen, M & Anderson, J. 2010. “Intellectual Property And The Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and African Archives” Available at: [https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo\\_pub\\_1023.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf), accessed 01 November 2020.

further disseminated.<sup>35</sup> The wide dissemination or making available of such collections is occurring at a time where there has been a rapid commercial demand and reproduction of indigenous artwork throughout the world in cheaper commodities such as t-shirts and coffee mugs.<sup>36</sup> The unfortunate consequence of this is that there are increased numbers of people unfairly exploiting indigenous art without compensating the legitimate owners of this art and worse, as more people use indigenous art without consent, indigenous communities further lose control over how their art can be used to maintain the meaning and integrity of it.<sup>37</sup>

#### 4.2 Significance of the PPDMIKA

The PPDMIKA protects registered ICES<sup>38</sup> which have been passed on from generation to generation within an indigenous community; developed within such community and is associated with the cultural and social identity of that community.<sup>39</sup> It is clear then that if the indigenous art discussed above was registered it would fall under the subject matter protected under the PPDMIKA. The significance of the PPDMIKA in protecting indigenous visual arts locally, is closely similar, if not the same, to its significance in protecting indigenous music. Therefore, a detailed discussion on the provisions and what they mean will not be pursued here but a discussion on the limitation on the significance of the PPDMIKA abroad will be discussed. This is because the conspicuous point of infringement highlighted in this chapter has been perpetuated by foreign nations.

The PPDMIKA as a domestic statute, only applies to South Africa and cannot be enforced beyond the borders of the country. Section 2 states that it only applies to all persons in the Republic, including the state.<sup>40</sup> Additionally, it is a general principle that South African courts do not have jurisdiction over offences committed outside the borders of the country except in instances where the offences relate to treason, theft, international crimes, or national crimes relating to breach of human rights.<sup>41</sup> The PPDMIKA creates criminal offences to the

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<sup>35</sup> *Ibid*; Navarette, T. 2020. Digitization in museums: In Bille, T; Mignosa, A and Towse, R (Eds), *Teaching Cultural Economics* (204 – 213) Edward Elgar Publishing Guides to Teaching.

<sup>36</sup> Farley, C. 1997. Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer. *Connecticut Law Review* 30(1), 7; Tarsen, M & Anderson, J. 2010. "Intellectual Property And The Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and African Archives" Available at: [https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo\\_pub\\_1023.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf), accessed 01 November 2020.

<sup>37</sup> *Ibid*.

<sup>38</sup> S 9.

<sup>39</sup> S 11.

<sup>40</sup> Act 6 of 2019.

<sup>41</sup> Mujuzi, JD. 2015. The Prosecution in South Africa of International Offences Committed Abroad: The Need to Harmonise Jurisdictional Requirements and Clarify Some Issues. *African Yearbook on International Humanitarian Law*, 96 – 117.

infringement of indigenous knowledge, and this creates a limitation in the enforcement of the PPDMIKA to persons who are not domiciled in South Africa.

This means that the PPDMIKA becomes insignificant in addressing the last two infringements to indigenous art discussed above. In terms of the first infringement discussed, even though Walter Batts was a South African artist, his heirs who have inherited the infringing works may not be domiciled in South Africa as well many other white artists who similarly infringed on indigenous art during the colonial era. These individuals are beyond the reach of the PPDMIKA, so are the European museums. This highlights a huge limitation of the PPDMIKA.

#### **4.3 Consequences for the Visual Arts Industry**

Parties in the visual art industry wishing to create commercial art inspired by indigenous art may no longer do so freely, without the permission of relevant indigenous communities and without recognizing the relevant indigenous communities but they will have to seek permission from said communities and share the commercial benefits that accrue to the art they subsequently create. Section 13(2) of the PPDMIKA<sup>42</sup> delineates the process to be followed by a third-party wishing to make commercial use of indigenous knowledge, this would include indigenous art. This process is detailed in chapter 3 above and same applies for artists in the visual arts industry as well as their representative companies/institutions.

The limitation of the reach of the PPDMIKA to foreign nations also means that there are no provisions applicable to foreign nations or individuals in following due process to use indigenous knowledge. For example, if an African Art Shop in the United States wished to obtain permission from relevant indigenous communities in South Africa and enter into a licence agreement to make commercial use of indigenous art, they would not be able to use the PPDMIKA as there is no provision in this Act that provides for such process. This further highlights the limitation of this Act in relation to foreign infringements occurring now or in the future. It also shows that until there is an international framework for the protection of indigenous knowledge, such knowledge will never be fully protected.

#### **4.4 Recommendations and conclusion**

Indigenous knowledge will not be adequately protected without an international framework establishing basic standards and principles for the WIPO member states. Therefore, it is commendable that South Africa has taken the lead, alongside others, to draft a domestic policy for the protection of indigenous knowledge as such actions generally put pressure on

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<sup>42</sup> Act 6 of 2019.

international bodies like the WIPO to finalize international frameworks and further provide guidance on how to approach regulation.

It is recommended that in its leading role, the South African executive seriously considers the retrospective implementation of the PPDMIKA so that such implementation can be attractive to international bodies drafting the international framework. Retrospective application of the Act will be effective in ensuring that the past infringements on the ownership rights of indigenous knowledge, and indigenous art in this instance is redressed and artists who have reaped significant financial rewards pay back certain amounts to the relevant communities. It is acknowledged that until there is an international framework protecting indigenous knowledge with retrospective effect, such redress will only occur within the Republic. However, as discussed above, indigenous communities such as the San people will be financially empowered in a significant way.

Developing countries have called for the retrospective application of an international framework to protect indigenous knowledge and the WIPO IGC has considered such retrospective implementation of an international framework to a certain degree.<sup>43</sup> Draft article 5 of the WIPO IGC 40 states that "... In addition, where such cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, member states shall/should use best endeavors to facilitate remuneration as appropriate".<sup>44</sup> If such retrospective implementation of an international framework succeeds, then African countries whose art has been in museum exhibitions in Europe will also be greatly empowered, both financially and culturally as there will be more than an acknowledgement of the appropriation of African art but also, compensation for such gross appropriation.

In summation, this chapter has outlined the indigenous art belonging to indigenous communities in South Africa, discussed the infringement on the ownership right of this art held by indigenous communities; mainly focused on infringement by foreign which is has been exacerbated by the digitization of museums and libraries. Essentially, the conclusion of this chapter is that the PPDMIKA can only become fully effective when there is an international instrument protecting indigenous knowledge.

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<sup>43</sup> World Intellectual Property Organization. 2019. "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; The Protection of Traditional Cultural Expressions: Draft Articles" Available at: [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_40/wipo\\_grtkf\\_ic\\_40\\_5.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_5.pdf), accessed 01 November 2020.

<sup>44</sup> *Ibid.*



## **Chapter 5: Indigenous Cultural Expressions through Fashion and Decorations**

The term ‘fashion’ describes the prevailing aesthetic elements of dressing up in a society at any given stage.<sup>1</sup> It encompasses items such as clothing, footwear, accessories, make-up and hairstyles.<sup>2</sup> Owing to the broad scope of fashion, this chapter will be limited to ICEs through fashion in clothing and accessories. Throughout history, clothing and accessories have been creatively used to mark the identity of communities and set them apart from other communities.<sup>3</sup> South African indigenous communities are no exception; additional to this, clothing and accessories are used to distinguish the status, age/stage, occupation, and gender of members within a South African indigenous community.<sup>4</sup> Homogenously, South African indigenous communities use complex patterns/designs on their clothing and accessories, intricate beading and leather from animal skin.<sup>5</sup> Notwithstanding this, these communities are also widely diverse in their clothing and accessories, making them clearly and easily distinguishable from one another.<sup>6</sup> This introduction will briefly highlight some indigenous communities’ expressions through fashion and accessories.

The Ndebele are renowned for complex beading designs on their accessories and clothes.<sup>7</sup> Traditionally, Ndebele girls and unmarried women wear short, beaded aprons called “isiphephetu” with the large hoop accessories called ‘isigolwani’ around their necks, arms, waist, and legs.<sup>8</sup> Married women wear longer aprons made with hardened animal skin and

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<sup>1</sup> Meinhold, R. 2013. A critical inquiry into fashion. In Meinhold, R *Fashion Myths*. (pp 1 - 19) Transcript Verlag; Steele, V. “Definition of Fashion” Available at: <https://fashion-history.lovetoknow.com/alphabetical-index-fashion-clothing-history/definitionn-fashion>, accessed 28 December 2020.

<sup>2</sup> *Ibid.*

<sup>3</sup> Lenjo, EM. 2017. Inspiration Versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry. *Marquette Intellectual Property Law Review* 21(2) 139 – 158; van der Merwe, N, Muller, K, & Mastamet – Mason, A. 2017. “History of African Indigenous Costumes and Textiles: Toward decolonizing a fashion design curriculum” Available at: [https://www.defsa.org.za/sites/default/files/downloads/2017conference/Mastamet-Mason\\_Muller\\_vdMerwe%23decolonise.pdf](https://www.defsa.org.za/sites/default/files/downloads/2017conference/Mastamet-Mason_Muller_vdMerwe%23decolonise.pdf)[https://www.defsa.org.za/sites/default/files/downloads/2017conference/Mastamet-Mason\\_Muller\\_vdMerwe](https://www.defsa.org.za/sites/default/files/downloads/2017conference/Mastamet-Mason_Muller_vdMerwe), accessed 28 December 2020.

<sup>4</sup> Eicher, B. 2021. “Sub-Saharan Africa: History of Dress” Available at: <https://fashion-history.lovetoknow.com/clothing-around-world/sub-saharan-africa-history-dress>, accessed 09 January 2021.

<sup>5</sup> Maluleka, P. 2019. “Traditional Jewelry and Intellectual Property Protection” Available at: <https://www.golegal.co.za/traditional-jewellery-ip-protection/>, accessed 28 December 2020.

<sup>6</sup> *Ibid*; Culture Trip (online). 2017. “An introduction to South African Traditional Dress” Available at: <https://theculturetrip.com/africa/south-africa/articles/an-introduction-to-south-african-traditional-dress/>, accessed 28 December 2020.

<sup>7</sup> *Ibid.*

<sup>8</sup> Maluleka, P. 2019. “Traditional Jewellery and Intellectual Property Protection” Available at: <https://www.golegal.co.za/traditional-jewellery-ip-protection/>, accessed 28 December 2020; Culture Trip (online). 2017. “An introduction to South African Traditional Dress” Available at: <https://theculturetrip.com/africa/south-africa/articles/an-introduction-to-south-african-traditional-dress/>, accessed 28 December 2020.

decorated with special geometric designs.<sup>9</sup> Married Ndebele women also cover their upper bodies with blankets which are multi-colored and designed.<sup>10</sup> Ndebele men, on the other hand, wear aprons made of animal skin with beaded breast-plates that hang from their necks called ‘iporiyana’.<sup>11</sup> Similar to the Ndebele community, Tsonga men wear animal skin while the women wear distinctive multi-layered and gathered skirts called ‘Xibelani’ with beads for the body.<sup>12</sup>

In the Zulu community, men and boys traditionally wear aprons and breast plates made only from leopard skin.<sup>13</sup> Zulu girls and unmarried women wear short grass-knitted skirts embellished with beads only called ‘isigege’, exposing their upper bodies while married women wear thick cowhide skirt softened with animal fat and charcoal called ‘isidwaba’ with cloth for their upper bodies to cover the entire body.<sup>14</sup> Colorful and intricately designed beads are also a huge part of the Zulu dress code.<sup>15</sup> Married women also wear a rounded flared hat called ‘isicholo’.<sup>16</sup> In the Xhosa community on the other hand; the main items of clothing for women include brightly colored and embroidered fabrics styled with unique patterns with beautifully designed beadwork ranging from long necklaces, earrings and traditional collars.<sup>17</sup> Face painting called ‘umchokozo’ where women decorate their faces with white/yellow clay in different patterns is also a huge part of the Xhosa accessories.<sup>18</sup> Similarly to the other indigenous communities, Xhosa women’s dress code shows the different stages of life, with girls wearing shorter skirts/aprons and the married women wearing long skirts and headdresses made up of two or more materials and colors.<sup>19</sup> Xhosa men wear wraparound cloth of the same

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<sup>9</sup> *Ibid.*

<sup>10</sup> Maluleka, P. 2019. “Traditional Jewellery and Intellectual Property Protection” Available at: <https://www.golegal.co.za/traditional-jewellery-ip-protection/>, accessed 28 December 2020; Culture Trip (online). 2017. “An introduction to South African Traditional Dress” Available at: <https://theculturetrip.com/africa/south-africa/articles/an-introduction-to-south-african-traditional-dress/>, accessed 28 December 2020.

<sup>11</sup> *Ibid.*

<sup>12</sup> Culture Trip (online). 2017. *supra*

<sup>13</sup> *ibid*

<sup>14</sup> *Ibid.*

<sup>15</sup> *ibid.*

<sup>16</sup> *Ibid*; Earth Africa (online). “Zulu hats from KwaZulu-Natal” Available at: <https://earthafriacurio.com/information/zulu-hats-south-africa>, accessed 29 December 2020.

<sup>17</sup> Taste of Southern Africa (online). 2020. “Cultural wear and fabrics from Southern Africa” Available at: <https://www.tasteofsouthernafrica.com/blog/2020/4/24/cultural-wear-and-fabrics-from-southern-africa>, accessed 29 December 2020; South Africa(Online). “Xhosa Culture: the Clans and Customs” Available at: <https://www.southafrica.net/na/en/travel/article/xhosa-culture-the-clans-and-customs>, accessed 29 December 2020.

<sup>18</sup> *Ibid.*

<sup>19</sup> Taste of Southern Africa (online). 2020. “Cultural wear and fabrics from Southern Africa” Available at: <https://www.tasteofsouthernafrica.com/blog/2020/4/24/cultural-wear-and-fabrics-from-southern-africa>, accessed

fabrics that cover their lower bodies with a throw on scarf , paired with beads for the head, neck, arms and ankles.<sup>20</sup>

Finally, the Sotho community is famous for their conical shape straw hat called ‘modianyewe/mokorotlo’ made from grass and shaped like the Qiloane mountain in Lesotho; the hat is said to be a symbol of the power of the Basotho nation.<sup>21</sup> The significance and meaning of this hat has been lost through time as it was traditionally reserved to be worn by men who gave judgement on disputes in the chief’s courts.<sup>22</sup> It is now worn by ordinary men in the Sotho communities as well as people not belonging to the Sotho community.<sup>23</sup> It must be noted that the Sotho community is not the only indigenous community that has suffered the loss of meaning/symbolism of their clothing and accessories; most if not all other indigenous communities have suffered the same as a result of the westernization of African societies which is attributable to colonialism.<sup>24</sup> Westernization of African societies has also resulted in indigenous communities or their members primarily wearing western clothing and reserving their indigenous clothing for special occasions such as celebrations/festivities only.<sup>25</sup>

Furthermore, before the 19<sup>th</sup> century and contact with European people, Sotho people similarly had differentiated dress codes for different members of the community depending on age/the

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29 December 2020; South Africa(Online). “Xhosa Culture: the Clans and Customs” Available at: <https://www.southafrica.net/na/en/travel/article/xhosa-culture-the-clans-and-customs>, accessed 29 December 2020.

<sup>20</sup> *Ibid.*

<sup>21</sup> Bishop, SD. 1984. “Hats of Southern Sotho” Available at:

[https://scholar.ufs.ac.za/bitstream/handle/11660/10729/Culna\\_n26\\_a7.pdf?sequence=1&isAllowed=y](https://scholar.ufs.ac.za/bitstream/handle/11660/10729/Culna_n26_a7.pdf?sequence=1&isAllowed=y), accessed 29 December 2020.

<sup>22</sup> *Ibid.*

<sup>23</sup> Bishop, SD. 1984. “Hats of Southern Sotho” Available at:

[https://scholar.ufs.ac.za/bitstream/handle/11660/10729/Culna\\_n26\\_a7.pdf?sequence=1&isAllowed=y](https://scholar.ufs.ac.za/bitstream/handle/11660/10729/Culna_n26_a7.pdf?sequence=1&isAllowed=y), accessed 29 December 2020; South Africa (online). “The culture of BaSotho: history, people, clothing and food” Available at: <https://www.southafrica.net/za/en/travel/article/the-culture-of-basotho-history-people-clothing-and-food>, accessed 29 December 2020.

<sup>24</sup> Chulu, J. 2015. Africa is largely influenced by foreign culture especially western culture. Has Africa now sacrificed her own culture on the altar of expediency?. Thesis, Copperstone University, Zambia. Available at: <file:///C:/Users/User/Downloads/SSRN-id2671784.pdf>, accessed 29 December 2020; Nomvete, S. “Whose heritage is it anyway” Available at: <http://www.sabceducation.co.za/news-module/2541-whose-heritage-is-it-anyway>, accessed 29 December 2020; Eicher, BJ. “Sub-Saharan Africa: History of Dress” Available at: <https://fashion-history.lovetoknow.com/clothing-around-world/sub-saharan-africa-history-dress>, accessed 29 December 2020.

<sup>25</sup> Eicher, B. 2021. “Sub-Saharan Africa: History of Dress” Available at: <https://fashion-history.lovetoknow.com/clothing-around-world/sub-saharan-africa-history-dress>, accessed 29 December 2020; Mashile, KD. 2017. “Dressing up the African woman” Available at: <https://www.activateleadership.co.za/activator-opinions/dressing-up-the-african-woman/>, accessed 29 December 2020.

different stages of a person's life.<sup>26</sup> Sotho girls wore skirts made of threads obtained from the tsikitlane plant called 'thethana ea banana' with clay beads called 'sefaha sa letsopa'.<sup>27</sup> Following the coming of age, young women wore dresses made from ox skin and older women wore an outer garment on top of the dress called 'morepo' as a shawl or blanket during the day.<sup>28</sup> The boys would wear an undergarment called 'tseha' made out of sheep skin and triangularly shaped to cover the private parts; with age this garment was lengthened and men would add a blanket made of animal skin to cover their upper bodies.<sup>29</sup> Following the 19<sup>th</sup> century, this animal skin blanket was replaced with a cotton fleece blanket in a variety of colors, originally gifted to King Moshoeshoe by a British trader.<sup>30</sup> Similarly, the dresses and shawls of older Sotho women have been replaced with a traditional dress called 'seshoeshoe' purely made of synthetic indigo-dye fabric originating in Europe and introduced in South Africa by German settlers.<sup>31</sup>

Again, it must be noted that the Sotho community is not the only indigenous community that has been influenced by European contact. One stark example of this is the European influence on the type of beads used by indigenous communities today which dates to the 15<sup>th</sup> Century when Europeans introduced glass beads to African societies through trade.<sup>32</sup> Indigenous communities abandoned the shell beads they used before for the glass beads.<sup>33</sup> This then begs the question of authenticity of indigenous clothing and accessories. What can or should be protected? What is authentically indigenous clothing and accessories? Authenticity is a relevant discussion because the PPDMIKA expressly confers ownership of ICEs to relevant indigenous communities and further confers rights which will have serious consequences on the fashion

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<sup>26</sup> Pheto-Moeti, MB. 2005. "An assessment of Seshoeshoe Dress as cultural Identity for Basotho Women of Lesotho" Thesis, University of the Free State. Available at: <http://scholar.ufs.ac.za:8080/bitstream/handle/11660/1555/Pheto-MoetiMB.pdf?sequence=1&isAllowed=y> accessed 29 December 2020.

<sup>27</sup> *Ibid*; South Africa (online). "The culture of BaSotho: history, people, clothing and food" Available at: <https://www.southafrica.net/za/en/travel/article/the-culture-of-basotho-history-people-clothing-and-food>, accessed 29 December 2020.

<sup>28</sup> *Ibid*.

<sup>29</sup> *ibid*.

<sup>30</sup> Pheto-Moeti, MB. 2005. "An assessment of Seshoeshoe Dress as cultural Identity for Basotho Women of Lesotho" Thesis, University of the Free State. Available at: <http://scholar.ufs.ac.za:8080/bitstream/handle/11660/1555/Pheto-MoetiMB.pdf?sequence=1&isAllowed=y> accessed 29 December 2020.

<sup>31</sup> *Ibid*.

<sup>32</sup> Heath Action Charity Organisation MBE (online). 2021. "The hidden meanings of African clothing & Influence of African Fabrics on British Fashion Industry" Available at: <https://healthaction.co.uk/the-hidden-meanings-of-african-clothing-2/>, accessed 29 December 2020; The African Collection (online). 2016. "History and materials of bead working and African jewellery" Available at: <https://www.theafricancollection.com.au/history-and-materials-of-bead-working-and-african-jewellery/>, accessed 29 December 2020.

<sup>33</sup> *Ibid*.

industry, and this will be discussed below. Therefore, it is important that the claims to the ownership of ICEs by indigenous communities, whether direct or indirect, are discussed.

The following discussion aims to contextualize the provisions of the PPDMIKA within the reality of South Africa today. Section 5.1 will discuss the infringement on the ownership right of South African indigenous clothing and accessories, highlighting the need to protect it; section 5.2 will discuss the provisions of the PPDMIKA and its desired effect on the latter infringement, section 5.3 will discuss the effect of the PPDMIKA on the fashion industry and finally, section 5.4 will outline some foreseeable issues with the implementation of the PPDMIKA as well as offer some recommendations.

## **5.1 Infringement on the ownership right of Indigenous fashion**

### *5.1.1 Infringement on the ownership right through the creation of ‘new trends’*

The fashion industry can be said to be one of the most dynamic industries in the world as fashion is ever evolving and “new times call for new trends”.<sup>34</sup> The nature of fashion requires designers to frequently create new trends and introduce new products to customers.<sup>35</sup> This phenomenon, compounded by globalization and the rapid development in technology as discussed in chapter 1 make indigenous clothing and accessories easily accessible and attractive to fashion houses and fashion designers all over the world to draw inspiration upon and create new unique trends.<sup>36</sup> The ignorant and excessive use of indigenous clothing and accessories in the fashion world expanded to such an extent that it became conspicuous and attracted the public disapproval and rejection of this practice with terms such as ‘cultural appropriation’ being coined.<sup>37</sup> Cultural appropriation is defined as the taking of a culture’s ways or knowledge by a person not belonging to that culture without properly acknowledging that culture.<sup>38</sup> The underlying disapproval of unauthorised use of a culture’s knowledge can be likened to section 20(1) of the Designs Act which states that the effect of registering a design shall be to grant the proprietor whose registered the design a right to exclude others from making, importing, using, or disposing of any article embodying the design or a design not

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<sup>34</sup> Pozzo, B. 2020. Fashion between Inspiration and Appropriation. *Laws* 9(5), 1 -26; Vezina B. 2019. Curbing Cultural Appropriation in the Fashion Industry. *Centre for International Governance Innovation*, 1 -16.

<sup>35</sup> Pozzo supra at 52, 6; Vezina supra 34 at 52, 1.

<sup>36</sup> Doupnik, E. 2018. “How to Fix Fashion’s Cultural Appropriation Problem” Available at: <https://wwd.com/fashion-news/fashion-features/fashion-cultural-appropriation-1202597241/>, accessed 09 January 2021; Pozzo supra at 52, 8.

<sup>37</sup> Pham, MT. Racial Plagiarism and Fashion. *A Journal in GLBTQ Worldmaking* 14 (3), 67 – 80; Tsosie, R. 2002. Reclaiming native stories: An essay on cultural appropriation and cultural rights. *Arizona State Law Journal* 34(1), 299 – 358.

<sup>38</sup> Pham supra at 53, 68; Tsosie supra at 53, 310.

substantially different from the registered design.<sup>39</sup> Interestingly, this shows and confirms that society has actively recognized the need for the protection of indigenous knowledge and indigenous expressions.

Nonetheless, several multi-million fashion houses have been criticized and shamed for using elements of indigenous clothing or accessories. For example, in 2017, *Victoria's Secret* received condemnation from the public for using the feather war bonnet and clothing inspired by the Native American indigenous community.<sup>40</sup> A case closer to home would be the public outcry following Louis Vuitton's release of scarves with prints and colours identical to the indigenous Basotho blankets which originated from the Sotho community.<sup>41</sup> Commentators saw this as an unfair exploitation of the Sotho print stating that "designers often use culture as a muse to create trends, but sharing profits is rarely part of the business model".<sup>42</sup> Considering that Louis Vuitton made considerable profits from the sale of the "Sotho inspired scarves"<sup>43</sup> against the reality that indigenous communities (locally and globally) are destitute and make up a significant percentage of the world's extreme poor makes the infringement on the ownership right of indigenous expressions immoral.<sup>44</sup>

Furthermore, South African commentators on the Louis Vuitton and Sotho blankets saga correctly remarked that the Sotho blanket holds a sacred meaning/value to the Sotho indigenous community and its commodification without the involvement of the Sotho community is disrespectful to the cultural significance of the Sotho blankets and completely disregards the

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<sup>39</sup> Act 195 of 1993.

<sup>40</sup> Kong, T. 2019. "7 Fashion brands that have been accused of cultural appropriation and how they responded" Available at: <https://www.buro247.my/fashion/buro-loves/fashion-brands-cultural-appropriation-response.html>, accessed 09 January 2021.

<sup>41</sup> BBC News (online). 2017. "When does cultural borrowing turn into cultural appropriation?" Available at: <https://www.bbc.com/news/world-africa-41430748>, accessed 09 January 2021; eNCA (online). 2017. "Cultural appropriation or appreciation? Louis Vuitton turns Basotho blankets into expensive fashion items" Available at: <https://www.enca.com/life/cultural-appropriation-or-appreciation-louis-vuitton-turns-basotho-blankets-into-expensive>, accessed 09 January 2021.

<sup>42</sup> eNCA (online). 2017. "Cultural appropriation or appreciation? Louis Vuitton turns Basotho blankets into expensive fashion items" Available at: <https://www.enca.com/life/cultural-appropriation-or-appreciation-louis-vuitton-turns-basotho-blankets-into-expensive>, accessed 09 January 2021.

<sup>43</sup> Van Niekerk, G. 2017. "Louis Vuitton wants to wrap you up in a blanket" Available at: <https://www.news24.com/citypress/trending/louis-vuitton-wants-to-wrap-you-up-in-a-blanket-20170701>, accessed 09 January.

<sup>44</sup> Hall, G & Gandolfo, A. 2016. "Poverty and exclusion among indigenous peoples: The global evidence" Available at: <https://blogs.worldbank.org/voices/poverty-and-exclusion-among-indigenous-peoples-global-evidence>, accessed 09 January 2021; Perret, S, Anseuw, W, and Mathebula, F. 2005. "Poverty and livelihoods in rural South Africa: Investigating diversity and dynamics of livelihoods" Available at: <file:///C:/Users/User/Downloads/2005-01.pdf>, accessed 09 January 2021.

Sotho community.<sup>45</sup> This further highlights the need for the protection of indigenous expressions such as clothing and accessories – the infringement on the ownership right of indigenous clothing and accessories usually harms the community by disregarding honored symbols and meanings which form an integral role of the identity and livelihoods of indigenous people and their communities.<sup>46</sup> One commentator writes that “each time this happens, the heritage itself dies a little, and with its people”.<sup>47</sup>

Finally, the “incorporation of indigenous designs on modern/secular clothing” trend set by international fashion houses such as Victoria’s Secrets and Louis Vuitton influence local designers<sup>48</sup> and the infringement on the ownership right of indigenous cultural clothing and accessories is further perpetuated locally. Local fashion designers such as Laduma Ngxokolo, founder of the ‘MaXhosa’ brand and Nosipho Maketo, founder of the ‘Earth Nut’ brand are using/incorporating the clothing and accessories of indigenous South African communities in their designs for modern clothes.<sup>49</sup> Even though these designers belong to the indigenous communities whose clothing and accessories they use, and acknowledge such communities<sup>50</sup>, they do not obtain permission from the relevant indigenous community to use the said community’s ICEs. Belonging to an indigenous community does not mean one may use the knowledge of the indigenous community in whatever manner they like, this knowledge belongs to the community and not individuals in the community, therefore its use must be authorized by the community. The PPDMIKA specifically requires that an individual member belonging to an indigenous community and holding the knowledge of such indigenous community may only make commercial use of said knowledge by obtaining permission from the indigenous

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<sup>45</sup> eNCA (online). 2017. “Cultural appropriation or appreciation? Louis Vuitton turns Basotho blankets into expensive fashion items” Available at: <https://www.enca.com/life/cultural-appropriation-or-appreciation-louis-vuitton-turns-basotho-blankets-into-expensive>, accessed 09 January 2021; Kiunguyu, K. 2017. “Borrow do not steal: Louis Vuitton strikes again this time leaving behind the Maasai shuka for the Basotho blanket” Available at: <https://thisisafrica.me/lifestyle/borrow-not-steal-louis-vuitton-strikes-time-leaving-behind-maasai-shuka-basotho-blanket/>, accessed 09 January 2021.

<sup>46</sup> Pozzo supra at 52, 7; Matthes, EH. 2016. Cultural Appropriation without Cultural Essentialism? *Social Theory and Practice* 42(2), 343 – 366.

<sup>47</sup> Pozzo supra at 52, 6.

<sup>48</sup> Barker, A. 2017. “Influences of South African Fashion” Available at: <https://showcase.tempestamedia.com/influences-of-south-african-fashion-aid-23750/>, accessed 17 January 2021; Baker, K. “How has the globalization of Africa affected Western Countries” Available at: <https://www.arcgis.com/apps/Cascade/index.html?appid=2292553764564a4aa225957417ab2cb1>, accessed 20 January 2021.

<sup>49</sup> Maxhosa.Africa (online). 2021. “The Brand: Story” Available at: <https://maxhosa.africa/brand-story>, accessed 09 January 2021; Young, N. 2020. “South African women are forging new fashion frontiers by embracing their heritage” Available at: <https://qz.com/1866270/south-african-women-are-embracing-their-heritage-through-fashion/>, accessed 09 January 2021.

<sup>50</sup> *Ibid.*

community and in a manner subject to conditions that would be imposed by the indigenous community in a formalized agreement.<sup>51</sup> This will be further discussed below.

*5.1.1 Infringement on the ownership right of ICEs perpetuated by limitations of relevant laws*  
It has been established that intellectual property law does not expressly protect ICES yet. However, certain types of intellectual property such as ‘trademarks’ and ‘geographical indications’ can be and have been used by indigenous communities to protect ICES.<sup>52</sup> The Maasai people have successfully registered numerous trademarks on the name and renowned prints of the Maasai and it has become one of the biggest trademarks in the world receiving over 10 million dollars on revenue from licensing fees per year.<sup>53</sup> Notwithstanding this, however, the Maasai name and fabric prints continues to be infringed because trademarks do not offer comprehensive protection of the underlying cultural expression.<sup>54</sup>

Firstly, trademark protection only grants defensive protection against the use of the specific trademark registered and against uses and exploitations in trade or business.<sup>55</sup> It does not offer positive protection to own and control all types of uses of that trademark.<sup>56</sup> Additionally, trademarks can only be registered under limited class/es of goods which means that the trademark will only be protected against infringement in the trade of those specific class of goods.<sup>57</sup> This means that other parties may legally register and use the trademark or cultural symbol in another class of goods to the exclusion of the indigenous community from which the symbol originates and such community would be excluded from using the trademark even though such trademark makes use of the ICEs belonging to an it.<sup>58</sup> An example of can be seen in the manner in which Spur steak ranch, a restaurant in South Africa, has used the ICEs of Native-American Indians without their knowledge or consent.<sup>59</sup> This trademark is registered, though in South Africa, to the exclusion of the Native-American Indians and they have no say

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<sup>51</sup> S 13(3).

<sup>52</sup> Pozzo supra at 52 12; Baker, KD. 2018. Appropriation and Protection Provided by Intellectual Property Law. *North Carolina Central University Science and Intellectual Property Law Review* 11(1), 11 – 30.

<sup>53</sup> *Ibid.*

<sup>54</sup> Venzina supra at 52, 5.

<sup>55</sup> Frankel, S. 2007. Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights. *Trade Mark Law and Theory: A Handbook of Contemporary Research* 1(6), 1 – 39; Kuruk, P. 1999. Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Commercial Rights in Africa and the United States. *American University Law Review* 48(4), 1 – 83.

<sup>56</sup> Frankel supra at 55, 3.

<sup>57</sup> Agreement on Trade-Related Aspects of Intellectual Property, 1995.

<sup>58</sup> Frankel supra at 55, 15; La Vina, AG, Sapiera, M. Traditional Knowledge: Challenge to Intellectual Property Rights. *Philippine Law Journal* 70(2), 140 – 186.

<sup>59</sup> Mulgrew, N. 2015. A Taste for Strife; or, Spur in the South African Imaginary. *Safundi: The Journal of South African and American Studies* 16(3), 334 – 350.

on how their ICEs in this regard can/should be represented. It can be said then that trademark law not only provides limited protection for ICE, but it can perpetuate the infringement of the ownership right of ICEs. Furthermore, rights in a trademark exclusively vest in the sign/mark registered, trademark law does not protect any variation or development of a registered trademark, unless such variations are also registered. By nature then, indigenous communities are excluded from using trademark law to protect their ICEs as it is incompatible with the evolving nature of indigenous knowledge - indigenous communities would constantly have to register further evolving variations of their ICEs, an imaginably tedious and tiresome responsibility.<sup>60</sup> Finally, the other limitation of trademark law in assisting the protection of the ownership right of ICEs is that usually a registration of an indigenous sign/mark is only effective if the sign/mark is famous. Proprietors only show interest to and license a sign/mark that is in demand in the markets for ICEs.<sup>61</sup> This is the nature of trademark law and its interaction with competition in business. Nonetheless, the effect of this is that trademark registration of ICEs becomes exclusively available to famous indigenous signs/marks, leaving those unpopular ones vulnerable to ownership rights being infringed. It is noted that trademarks are for use in trade and that since most communities are not traders, trademark law would not be a viable option for them. However, the point being made here is that the nature of trademark law as a type of intellectual property protection regime, and its purpose being central to its nature, can exclude indigenous communities in the quest to protect indigenous knowledge. Not only is trademark law inadequate to protect ICES but it also directly and indirectly creates an environment where the ownership right of ICES can be infringed by third parties.

## **5.2 Effect of the PPDMIKA**

The PPDMIKA provides for the protection of registered indigenous knowledge meeting the eligibility criteria set out in section 11 of the Act.<sup>62</sup> Indigenous knowledge includes ICEs.<sup>63</sup> The eligibility criteria requires that the indigenous clothing and accessories must have been developed within the indigenous community, passed on from generation to generation and is associated to the cultural and social identity of the indigenous community.<sup>64</sup> The effect of this express protection means that indigenous communities are granted exclusive rights and control

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<sup>60</sup> Frankel *supra* at 55, 18; La Vina *supra* at 56, 170.

<sup>61</sup> La Vina *supra* at 56,165.

<sup>62</sup> S 9.

<sup>63</sup> S 1.

<sup>64</sup> S 11.

of the use of their clothing and accessories.<sup>65</sup> Any person or entity wishing to make commercial use of indigenous clothing and accessories is required to apply and enter into a license agreement with the relevant indigenous community, in accordance with the Act which requires that the indigenous community consent, be properly acknowledged and that the benefits accruing from such commercial use be shared with the indigenous community.<sup>66</sup> This means that fashion houses and fashion designers will no longer be able to “draw inspiration” from indigenous clothing and accessory designs without following the requirements set out above, by law. If they do, they would be committing an offence and liable for a fine if found guilty.<sup>67</sup> Furthermore, indigenous communities no longer need to rely on existing intellectual property laws to protect their communities from the infringement on the ownership right of their clothing and accessories, they need only to register their clothing and accessories to receive protection under the Act. Notwithstanding this, it must be noted that this protection is largely limited to South Africa and does not extend to foreign jurisdictions as discussed in chapter 4 above.

### **5.3 Consequences for the fashion industry**

Fashion designers may no longer source “free” inspiration from indigenous ICEs through fashion and clothing for new trends. The process outlined in section 13(2) and discussed in chapter 3 will have to be followed by every fashion design wishing to make commercial use of indigenous ICEs through fashion and accessories. As concluded in chapter 3, the provisions of the PPDMKA balance the rights of indigenous communities and the third-party users of indigenous knowledge. Therefore, as much there will now be added financial costs to creating an indigenous fashion inspired design, such costs are fair and can be challenged by third-party users where they experience unfairness.

An interesting consideration is whether e-commerce stores distributing clothes and accessories, as service providers of a distributing platform, will be liable for the infringement of individual designers selling from the platform through 3<sup>rd</sup> party liability principle. Section 28 of the PPDMKA creates an offence primary and direct infringement by requiring that such infringer has knowledge that they are committing an infringement.<sup>68</sup> From the direct reading of this section, it means that an online store would not be liable of any infringement of a designer unless it can be proved that they possessed knowledge of the said infringement, which would

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<sup>65</sup> S 13.

<sup>66</sup> *Ibid.*

<sup>67</sup> S 28 [use abbreviation].

<sup>68</sup> Act 6 of 2019.

usually be proved by an indigenous community's addressing an appropriate cease and desist letter to the platform.<sup>69</sup> However, since the infringement of indigenous knowledge constitutes a statutory offence, the general criminal principles concerning joint wrong-doing or participation by aiding or abetting in a crime may be applicable.<sup>70</sup> E-commerce stores would then be held liable for secondary infringement through the application of the mentioned principles. And this may be to the benefit of indigenous communities as it would be easier to monitor infringement of indigenous knowledge on such platforms than to rely on finding individual infringers. This benefit to indigenous communities would be bring distress to the e-commerce fashion industry. They would have to perform their own checks of designers using their platform to ensure that they are not found infringing on indigenous knowledge or ICEs of indigenous communities. And this may possibly come with considerable financial costs.

Additionally, section 13(3) of the PPDMIKA makes provision for individual members of an indigenous community who hold the indigenous knowledge of that community and wish to make commercial use of such knowledge.<sup>71</sup> Fashion designers such as Laduma Ngxokolo and Nosipho Maketo, owners of 'MaXhosa' and 'Earth Nut', respectively fall into this category of users of indigenous knowledge as both claim to belong to the indigenous communities whose ICEs they source inspiration from for their designs.<sup>72</sup> This section states that such individual members must obtain permission from the indigenous communities to use the indigenous knowledge and may only make commercial use of that indigenous knowledge subject to terms and conditions imposed by the trustee of the indigenous community as formalized in an agreement.<sup>73</sup> Interestingly, unlike other third party users of indigenous knowledge, there is no provision for individual members to refer a dispute to the dispute resolution committee if they are aggrieved by the terms and conditions imposed by the indigenous community or its trustee. Essentially this means that indigenous communities are given full discretion by the PPDMIKA in dealing with individual members. Such full discretion without the provision of an accessible, timely and cost-efficient dispute resolution method through the dispute resolution committee as provided to other third-party users of indigenous knowledge, may be disadvantageous to individual members. Indigenous communities may set unreasonably unfavourable and unfair

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<sup>69</sup> Dean, O ed & Dyer, A ed. 2014. *Introduction to Intellectual Property Law*, 38.

<sup>70</sup> Dean, O ed & Dyer, A ed. 2014. *Introduction to Intellectual Property Law*, 432.

<sup>71</sup> Act 6 of 2019.

<sup>72</sup> Maxhosa.Africa (online). 2021. "The Brand: Story" Available at: <https://maxhosa.africa/brand-story>, accessed 09 January 2021; Young, N. 2020. "South African women are forging new fashion frontiers by embracing their heritage" Available at: <https://qz.com/1866270/south-african-women-are-embracing-their-heritage-through-fashion/>, accessed 09 January 2021.

<sup>73</sup> S 13(3) (a) – (b).

terms for such individual members, and they would not have any efficient legal recourse to deal with such unfairness.

Nonetheless it is commendable that the PPDMIKA expressly differentiates between individual members of indigenous communities wishing to commercialize indigenous knowledge they also hold being part of the community and other third-party users wishing to do the same but not members of the indigenous community whose indigenous knowledge they wish to commercialize. This differentiation is cognizant of the goals and purposes of this Act which is to empower indigenous communities, which includes individual members. From the reading of the section compared to section 13(2), even though individual members cannot approach the dispute resolution committee where they are aggrieved by the terms and conditions set by the indigenous communities, it seems that lesser is expected of them than of other third-party users. For example, individual members are not expected to apply for license through NIKSO in the prescribed manner, enter into a license agreement with the indigenous community and share benefits arising from the commercial use of indigenous knowledge. It may be that the terms and conditions imposed by the indigenous community are benefit-sharing, which would be fair, but the legislator's choice to exclude the term of sharing commercial benefits for the individual members can be interpreted that such is not encouraged or is between the individual member and their indigenous community. This is good news for designers such as Laduma Ngxokolo and Nosipho Maketo and good news for South Africans in general as individual members of indigenous communities will be encouraged to make commercial use of their indigenous knowledge. Finally, the differentiation adds to the genuineness of the PPDMIKA in seeking to address the plight of indigenous communities and understanding the reality of indigenous communities.

#### **5.4 Foreseeable Issues**

The laws of Copyright and Designs require some degree of originality; even where the standard of originality is 'low' requiring only the evidence of skill and labour exerted in the creation of an article.<sup>74</sup> These types of intellectual property relate closest to the type of protection required for ICEs and if such ICEs are to be protected under the same umbrella of intellectual property with these, it follows that ICEs will also be required to present a level or degree of "originality". Without pursuing an unwarranted discussion on originality and attempting to set the standard

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<sup>74</sup> World Intellectual Property Organization (online). "What is Intellectual Property" Available at: <https://www.wipo.int/about-ip/en/>, accessed 15 January 2021; *Klep Values (Pty) Ltd v Saunders Value Company Ltd* [1987] 4 All SA 147.

of originality for ICEs, it can be said that indigenous cultural expression must present something new to society, not a copy of something already existing but be authentic. Intellectual property seeks to grant creators moral and economic rights on their creations as an incentive for their contribution to society.<sup>75</sup> The PPDMIKA also requires that ICEs must have been **developed within the indigenous community**<sup>76</sup> and passed down from generation to generation to be liable for protection under the Act.<sup>77</sup>

Anthropologists say that an authentic cultural product is one that remains untouched by foreign influences and enduringly signifies/captures the fundamental values of that culture.<sup>78</sup> This closely relates to the requirement of the PPDMIKA that ICES must have been developed within the indigenous community and passed down from one generation to the next.<sup>79</sup> Considering this, the history of the Sotho community's "indigenous" blankets and "seshoeshoe" prints becomes problematic. The Sotho blankets became part of the attire of the Sotho indigenous community after a British trader gifted the blanket to the Sotho King Moshoeshoe. Furthermore, the "seshoeshoe" print that has become the indigenous dress for Sotho women was not particularly developed by the Sotho community but imported from Europe.<sup>80</sup>

Does the indigenous Sotho blanket and "seshoeshoe" print dress then qualify for protection under the PPDMIKA? Once more, it must be noted that the Sotho community is not the only indigenous community in South Africa whose indigenous clothing and accessories have been influenced by outsiders of the community.<sup>81</sup> The point is this: when considering the reality and history of South Africa, indigenous communities' contact with European powers had a substantial impact on the livelihoods of indigenous communities, down to their clothing and accessories.<sup>82</sup> In a quest to better assimilate to the modern world, "more suitable" adaptations

<sup>75</sup> World Intellectual Property Organization (online). 2004. "WIPO Intellectual Property Handbook" Available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_489.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf), accessed 15 January 2021.

<sup>76</sup> own emphasis.

<sup>77</sup> S 11.

<sup>78</sup> Coombe, RJ. 1993. The properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy. *Canadian Journal of Law and Jurisprudence* 6(2), 249 – 286; Danielsen, D & Engle, K. 1995. *After Identity, A reader in law and culture*. Routledge: London.

<sup>79</sup> S 11.

<sup>80</sup> Llyod, Y. 2017. "Deep roots of the Basotho Blanket" Available at: <https://za.pinterest.com/pin/392798398752543421/>, accessed 15 January 2021; Pheto-Moeti, MB. 2005. "An assessment of Seshoeshoe Dress as cultural Identity for Basotho Women of Lesotho" Thesis, University of the Free State. Available at: <http://scholar.ufs.ac.za:8080/bitstream/handle/11660/1555/Pheto-MoetiMB.pdf?sequence=1&isAllowed>, accessed 29 December 2020.

<sup>81</sup> Rovine, VL. 2009. Colonialism's Clothing: Africa, France, and the Deployment of Fashion. *MIT Press* 25(3), 44 – 61; Aris, G. 2007. The Power and Politics of Dress in Africa. *Undergraduate Humanities Forum* 2006-7, 1 – 18.

<sup>82</sup> Rovine supra at 58, 47; Aris supra at 58, 2.

of indigenous clothing and accessories have almost replaced the authentic clothing and accessories; for example, the men of the Zulu indigenous community now wear leopard print shirts in place of the chest and back cover made from leopard skin.<sup>83</sup> Therefore, it is recommended that the legislature drafting law for the implementation of the PPDMIKA clarifies the meaning of the ‘requirements for protection’ under section 11<sup>84</sup> and clearly delineates what ICEs will and will not be protected by the Act.

In summation, this chapter has discussed the reality indigenous communities’ ICEs through fashion and accessories in South Africa, as well the historical evolution of such ICEs. The relevant infringements on the ownership rights held by indigenous communities were highlighted, followed by a discussion of the effect of the PPDMIKA on such infringements. It was shown that the PPDMIKA will bring positive change for indigenous communities in the landscape of ICEs through fashion and accessories, and that the fashion industry will now be required to be mindful when seeking inspiration from ICEs of indigenous communities for their designs as well as to pay its dues when sourcing inspiration from such ICEs. Finally, the issue of authenticity relating to the evolution of the ICEs through fashion and accessories of indigenous communities was discussed and recommendations made accordingly.

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<sup>83</sup> Eshowe (online). “Traditional Zulu Clothing” Available at: <https://eshowe.com/traditional-zulu-clothing/>, accessed 20 January 2021.

<sup>84</sup> S 11.

## 5.5 Conclusion

The protection of indigenous knowledge and ICEs is long overdue. This dissertation has highlighted some infringement on the ownership right of ICEs in the creative industries today, robbing indigenous communities from having a say on the uses of their cultural heritage and the enriching financial benefits that have accrued to others from their cultural heritage. More importantly, it was discovered that the infringement on the ownership right of ICEs in the creative industries almost always results in ignorant and offensive uses of ICEs. The result of this is the degradation and destruction of heritage which forms the identity of indigenous communities and integral part of their livelihood.

There are currently no international agreements mandating the protection of indigenous knowledge and ICES in the world. However, the WIPO IGC tasked with the drafting of such a statute sits in regular sessions for the drafting of an international agreement on indigenous knowledge and has made some progress in this regard, though it has taken many years. Meanwhile, motivated by the urgent need to protect indigenous knowledge, many countries have taken steps to implement laws granting indigenous communities ownership rights to their knowledge and subsequently, the rights to control the use, modifications, and dissemination of their indigenous knowledge. South Africa has joined the trail blazing countries in this area of intellectual property law and promulgated not one but two statutes governing the use of indigenous knowledge. One is the IPLAA which seeks to amend existing intellectual property statutes to include indigenous knowledge and the other is a *sui generis* statute exclusively protecting indigenous knowledge, the PPDMIKA.

Unlike the IPLAA, the PPDMIKA reconciles the seemingly incompatible needs of indigenous communities in protecting their indigenous knowledge with the area of intellectual property law. It offers full ownership rights of indigenous knowledge to the indigenous communities it belongs to and expressly provides that indigenous knowledge is property in terms of the Constitution of South Africa. Further, *inter alia*, it defines indigenous knowledge and related terms and makes provisions on the requirements for protection. This dissertation has closely investigated these provisions with regards to indigenous expressions through music, the visual arts and fashion; critically discussed their effects in the South African context, highlighted some foreseeable issues with the implementation of the statute and making recommendations where necessary. Indigenous communities have been marginalized for years in society, treated as if they have made no meaningful contribution. The time has come for the recognition of

their colourful and rich contribution to the world. Most importantly, the time has come for indigenous communities to take full ownership what rightfully belongs to them – the cultural heritage of their ancestors.

## APPENDIX 1



Four-legged vessel of the Zulu people – known to be one of the most significant/ 'master' sculptures attributed to the Zulu. Currently held in the British Museum.

**Source:**

(<https://www.metmuseum.org/art/collection/search/321330>)



The Baboon Master of the Tsonga people –  
Currently held in the Cleveland Museum, United  
States of America.

**Source:**

<https://www.clevelandart.org/exhibitions/art-daily-life-portable-objects-southeast-africa>



The leather glass beads of the Nguni people,  
currently held in the Cleveland Museum, United  
States of America.

**Source:**

<https://www.clevelandart.org/exhibitions/art-daily-life-portable-objects-southeast-africa>

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