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Historical Threads: Intellectual Property Protection of Traditional Textile Designs: The Ghanaian Experience and African Perspectives

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Abstract: Defining the relationship between folklore and intellectual property continues to be an ongoing debate. Some challenges in defining this relationship center on the main characteristics of intellectual property, namely, the eligibility criteria and limited protection period that make the current construction of intellectual property incompatible with folklore protection. However, countries like Ghana have been using the intellectual property system as one of its tools to protect folklore. This article focuses on traditional textile design protection in Ghana, establishing the importance and significance of these designs in Ghana's history and culture and why Ghana is determined to protect these designs. After examining Ghana's efforts and the obstacles in its path as it uses the intellectual property law system to protect traditional textile designs, the article argues that there should be regional cooperation and international protection to strengthen individual national efforts.

INTRODUCTION

Folklore protection continues to be a subject of international, regional, national, and scholarly debate. At the basic level, the debate centers on three main issues: (1) whether folklore should be protected; (2) if the answer to the first issue is in the affirmative, then the next question is which aspects of folklore should be protected; and, finally; (3) how it should be protected. These questions have been part of the focus of the World Intellectual Property Organization (WIPO) over the past few decades. The WIPO's initiatives include drafting model laws[1] and model provisions[2] jointly with the United Nations Educational, Scientific, and Cul-

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tural Organization (UNESCO); conducting fact-finding missions[3]; and ongoing attempts to draft an international treaty in this area.[4]

Attempts to legislate in this area are hampered by the diverse and sometimes opposing angles to this issue. One argument advanced in favor of folklore protection is that it is only fair that the global system affords as much consideration and protection to what traditional communities and some developing countries value (i.e., their folklore) as it does to the intellectual property of developed countries.[5] Intellectual property refers to creations of the mind; and the main categories for rights in these creations are copyright, patent, industrial designs, and trademarks. From an intellectual property perspective, however, and stemming largely from the origins of the intellectual property system being rooted in western epistemology, the current construction of intellectual property with its eligibility criteria and limited duration is not wholly compatible with folklore protection.[6] Nevertheless, there is an undeniable similarity between some folklore works and the works protected under the intellectual property law system.[7]

Countries like Ghana and other former colonies whose introduction to the intellectual property system was during the colonial period face numerous obstacles in their quest to protect folklore. This article examines intellectual property and traditional textile protection from an African perspective. Many African countries have traditional textile designs.[8] The choice of Ghana and the kente designs[9] is motivated by the fact that the Ghanaian kente design is one of the most well-known traditional designs from Ghana and the African region. Further, it is high on Ghana's list of the folklore it wants to protect. The article uses the kente designs to illustrate the importance of traditional textile designs as well as explore national and regional perspectives on intellectual property protection of traditional designs. There are few studies that address the issue of traditional designs and intellectual property protection internationally as well as from a Ghanaian and African perspective. Thus, this article will contribute much needed analysis in this area. Although there is a great body of literature analyzing the philosophical justifications for intellectual property[10] and why it is or is not suitable for folklore protection, an in-depth analysis of that field is beyond the scope of this article.

Against this background, the first part of the article examines the nature and significance of traditional textiles. Next, it focuses on the kente traditional designs, followed by an examination of unauthorized traditional design commercialization concerns. Then the article analyzes of intellectual property protection of kente designs in Ghana. Next is a discussion of regional perspectives. Finally, the article examines folklore and human rights.

NATURE AND SIGNIFICANCE OF TRADITIONAL TEXTILE DESIGNS

In this section cloth, fabric, and textiles are used interchangeably. Further, because the designs in question are used in textiles, traditional textiles and traditional textile designs are used interchangeably.

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Characteristics of Traditional Textile Designs

There are several characteristics distinguishing traditional textile designs from other textile designs. One characteristic of traditional textiles is that they are regarded as having been developed by communities, not by an individual. Although it is not always possible to date when they were created, the relevant community has customarily been producing the textiles for a long period of time, usually dating back several centuries, and may still be producing it. Also, the art of making the textile has been preserved and transmitted from one generation to the next. In addition, even within a country, a particular textile design may be associated with a specific indigenous community or with a particular region of a country. Some types of fabrics and designs may be distinct to a particular ethnic group or region of a country. The requisite knowledge about a textile can identify which part of the country it comes from and even the ethnic group that produces it or is in charge of producing it.

These characteristics apply to what is generally referred to as folklore of which traditional art and design forms a part. One legal writer has described folklore as having the following common characteristics:

- It is passed from generation to generation, either orally or through imitation.
- It is generally not attributable to any individual author or set of authors.
- It is being continually used and developed within the indigenous community.[11]

Although there are various definitions of folklore, this article adopts the definition of folklore in the WIPO-UNESCO Model Provisions[12] unless otherwise stated. The WIPO-UNESCO Model Provisions define folklore or "expressions of folklore" as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community."[13] The WIPO has also described folklore as a part of traditional knowledge[14] while defining traditional knowledge as covering "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries, designs; marks; names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[15] Thus folklore could be defined as traditional cultural knowledge a definition, which arguably omits scientific knowledge.

However, the term *folklore* does not have unquestioned universal acceptance, and there are criticisms about the appropriateness of using the term *folklore* to refer to the cultural heritage and expressions of indigenous and traditional communities. Dissatisfaction with the term centers mainly on its association with rural, lower, disadvantaged, illiterate, or uncivilized societies.[16] Further, there are some historical negative overtones attached to folklore based on its association with myths, superstitions, and similar terms. In Australia, for example, there is an aver-

sion to the word *folklore* with a preference for the expressions "traditional knowledge" or "cultural expressions of indigenous peoples."[17] Despite this controversy, this work uses the term *folklore* because that is the term used in the Ghanaian legislation.

Before moving on, the following important points must be made. First, traditional does not necessarily mean old or a lack of novelty,[18] because works are continually transformed. Second, the fact that these works are generally regarded as originating from a community does not mean that the contributions of specific individuals cannot be recognized. As one commentator argues, it is an oversimplification or an example of generalizing to state that traditional knowledge tends to be handed over from one generation to the next and does not have a "clearly identifiable individual inventor."[19] Similarly, although in traditional communities works tend to be created by groups, it is possible for individuals in the community to be singled out for their exceptional talent or recognized as creators.[20] Kamal Puri, for example, concludes on this point that it is feasible for there to be an identifiable author, an author who "can be readily identified for the purposes of protection under the copyright system."[21]

Significance of Traditional Textile Designs

As a part of folklore, traditional textiles have a lot of significance in ethnic communities, a significance that might extend to the country in question. This significance is summarized as follows:

1. They are part of the cultural heritage of the communities. Dr. Erica-Irene Daes, chair of the Working Group on Indigenous Populations, provided a useful definition of heritage:

   > "Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.[22]

   Applying this to the subject of this article, the community has *inherited* the textile or art of textile making from their ancestors which knowledge they will transmit to future generations.
2. They form a part of and could be a marker of identity.[23]
3. They can be a means of communication and instruction in a community.
4. In some communities, the production of the textiles may be a good source of revenue for the community and the country.

5. The preservation of the textile designs are in effect the preservation of culture and global diversity.

Against this background, the next section examines one traditional textile design: the kente.[24] The terms *kente designs, kente*, and *kente* cloth are used interchangeably.

THE KENTE DESIGNS

The kente cloth is an important part of Ghana's cultural heritage. Although the kente's exact origin is unknown, kente designs clearly date back several centuries.[25] The term *kente* has its roots in the term *kenten*, meaning basket. This name was given to the cloth because it resembles the woven designs of a basket. Kente is a handwoven cloth woven on a horizontal treadle loom.[26] The art and knowledge of kente weaving has been practiced for centuries in Ghana and passed from one generation to the next. The cloth is traditionally woven by the Ewe and Asante ethnic groups.[27] The Asante cloth is woven in the villages near Kumasi and around Bonwire and Ntonso; and the Ewe Kente is woven around Kpetoe, Denu, Wheta, and Agbozume in the Volta Region of Ghana. Although these ethnic groups produce similar kente cloth, the differences in the cloths made by these two ethnic groups are in the weaving styles.[28] Kente weaving tends to be a family business.[29]

However, the fact that folklore tends to be communally produced does not negate the possibility of identifying an individual's contribution to the creation. With respect to kente weaving, Betsy Fowler writes about a Ghanaian artist who produces kente designs used to mark events in tribal life.[30] Examples like these are evidence of the fact that, even under the communal umbrella, there is a degree of individual creativity; and in some cases some individuals can be identified for the designs they create.

Kente designs have a lot of symbolism and significance in Ghana. Kente patterns are unique, and each has its own name. In addition, kente cloths have rich vibrant colors. Colors are very symbolic in Ghana; consequently, the colors for the cloths are chosen according to the story or message the cloth is meant to communicate.[31] The complex and intricate designs in kente cloths have deep symbolic meanings. The key thing is that the kente cloth is more than just a cloth:

> Kente cloth came to represent the history, philosophy, ethics, and moral values in African culture. . . . In a total cultural context, kente is more important than just a cloth. It is a visual representation of history, philosophy, ethics, oral literature, moral values, social code of conduct, religious belief, political thought and aesthetic principles.[32]

Under Akan traditional protocol, kente is reserved for important occasions. A ceremonial cloth, the kente was originally reserved for royalty and worn during

important occasions and ceremonial events.[33] With time, its use spread to non-royals. However, its value as a ceremonial cloth has not decreased; it is still reserved for important occasions such as weddings, naming ceremonies, and state functions:

> In many cases the use of Kente has a sacred intent. It may be used as a special gift during such rites and ceremonies as child naming, puberty, graduation, marriage, and soul-washing. It may also be used as a symbol of respect for the departed souls during burial rites and ancestral remembrance ceremonies. Its significance as a symbol of prestige, gaiety and glamour is evident during such community celebrations as festivals and commemoration of historical events, when people proudly wear the best of their Kente Cloths to reflect the spirit of the occasion.[34]

Its importance in Ghanaian society is seen in the fact that in 1960 Ghana presented the United Nations with the largest known Kente cloth on record.[35]

With Ghana having more than 70 diverse ethnic groups, one might question how the folklore produced by two ethnic groups is regarded as the folklore of the country as a whole. In Ghana's response to a WIPO Questionnaire in 2001, Ghana's assistant copyright administrator mentioned that expressions of folklore in Ghana are regarded as the cultural heritage of Ghana and the property of the source community.[36] Thus, folklore is supposed to be a unifying factor and give these diverse groups a common heritage as Ghanaian citizens. China expressed a similar sentiment in a document submitted to WIPO in 2002 where Chinese folklore is referred to as "just like a shining treasure house that symbolizes national unity and bridges China with the world."[37]

While mentioning the significance of kente to Ghana, it is noteworthy that kente use is being adopted in other parts of the world. For example, African Americans in the United States have adopted it to signify their identity and ties to Africa.[38] However, and as is described in the following text, the production and use of kente in other parts of the world is a controversial issue.

UNAUTHORIZED TRADITIONAL DESIGN COMMERCIALIZATION CONCERNS

Indigenous and traditional communities are becoming increasingly concerned about how to preserve their culture from commercial exploitation by outsiders.[39] Several factors have contributed to this situation including new technologies; globalization, a consequence of which is increased contact with foreigners; and the recognition of the potential economic value to be derived from commercializing traditional art. However, unauthorized exploitation can harm the community in various ways. One legal scholar commenting on the unauthorized commercialization of indigenous artworks states that "[g]iven this special place of art in the indigenous community, one can appreciate the additional harm caused by the un-

authorized reproduction of artworks. Use of these images by outsiders violates many of the principles governing the use and creation of art."[40] Because of the exploitation, traditional communities are trying to find ways to protect and preserve their culture.

Ghana is becoming increasingly concerned about the appropriation[41] and unauthorized commercialization of kente. One Ghanaian copyright official stated that this illicit exploitation is conducted especially in the United States and Asia.[42] These imitations tend to be mass produced by factories, whereas the original and authentic Ghanaian kente is locally handmade, more expensive, and of a superior quality. In addition, imitations of kente are readily available in foreign markets such as in the United States. Ghana also has to deal with regional compliance because it appears that other African countries may be producing and marketing kente imitations.[43] If these practices are not arrested, they could result in Ghana losing this aspect of its culture.[44]

The cultural appropriation of the kente cloth could be injurious to Ghanaian culture in several ways. As stated in the previous section, Ghanaians have woven the kente cloth for centuries. The people making unauthorized reproductions of the cloth in Asia and the United States are depriving Ghanaians in Ghana of a means of livelihood. They are tapping into a market to which they are not entitled. There is also the danger of these textiles being exported to Ghana and competing with Ghana's local industry. Economic history shows that unfair competition from imported products has the capacity to kill a local industry. Furthermore, this cloth is prestigious and symbolic in Ghana, worn on special occasions. Worn and used out of its cultural setting, there is the danger that this cloth will be devalued and become commonplace. Moreover, the cloth may be inappropriately used because the wearer does not attach as much meaning to it as does the Ghanaian.[45] One Ghanaian scholar observed that "something that is sacred in one country, should not be used as a table cloth in another."[46]

As Boateng observes on this point:

> The use of kente for items like umbrellas, beach balls, and furnishings is considered to degrade a cloth that is normally reserved for ceremonial use.
>
> It is at this point, where for African Americans kente is "anything you want it to be," that the issue of globalization becomes most pertinent, for the kente in question is usually not the hand-woven product that is only obtainable from Ghanaian craftsmen, but imitations thereof. Within the global economy, sophisticated communications and reproduction technology give an advantage to producers who have the resources to quickly access market information and turn it to their advantage. Thus East Asian and other producers (some within Africa) undercut indigenous producers of kente, adinkra, and other handmade textiles. Their ability to profit from this is partly due to consumers' acceptance of their imitations. The relationships between African Americans and Ghanaians around cloth are thus mediated by these third parties, to the disadvantage of the original producers.[47]

In sum, the examination in this section established Ghanaian concerns about the unauthorized production of kente designs regionally and internationally and about the need to find a solution to this issue.

INTELLECTUAL PROPERTY PROTECTION

As mentioned earlier, although there is an undeniable similarity between the subject matter of folklore and intellectual property works, there are difficulties in attempting to incorporate folklore into the existing intellectual property law categories. These difficulties stem from two main facts: (1) that the intellectual property law system, being a western construct, was not designed for folklore protection; and (2) currently, folklore does not fit neatly into the eligibility criteria for intellectual property protection. In fact, some scholars have questioned the wisdom of traditional communities using the intellectual property law system to protect folklore because in doing so, they might have to define or redefine themselves through an alien lens. Nevertheless, there are two main reasons for the intellectual property law system attraction: (1) the similarity between intellectual property works and folklore, as mentioned earlier in this section, and (2) the fact that the intellectual property law system is reasonably well established. Thus, from the point of view of a society trying to protect its cultural heritage, it is more advisable to use the current intellectual property law system as a protection tool while waiting for an international agreement in this area, as opposed to taking no action.

The section continues by examining Ghana's use of the intellectual property law system to protect its traditional textile designs, as a case study of the African situation.

International Intellectual Property Landscape

Ghana's international intellectual property relations can be grouped into two periods: pre-independence and the post-independence era. Like many former British colonies,[48] Ghana's introduction to the intellectual property system came from Britain. For example, Ghana's first copyright legislation was a British statute, the Imperial Copyright Act of 1911,[49] which came into force in 1912 and was applicable to the whole of the British Empire. Thus, as is the case with other former African colonies, the introduction of the intellectual property law system into Ghana did not take into consideration the differences between Ghanaian society, culture, communal nature, and values on the one hand and that of Britain on the other.[50]

Likewise, some international treaties to which Britain was a party were applied to Ghana. For example, Britain adhered to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) 1886 for itself and its

colonies and possessions. However, since independence, Ghana has signed and ratified some of the international intellectual property agreements in its right.

Ghana's international obligations have grown since independence. First, from August 22, 1962, it became bound by the Universal Copyright Convention (UCC) 1952 and its protocols 1 and 2. Second, Ghana ratified the Berne Convention in 1991. Thus, until 1991 when Ghana ratified the Berne Convention, the UCC played a dominant role in Ghana's international copyright obligations. This is clear from the fact that Ghana's first two post-independence copyright legislation, the Copyright Act, 1961 (Act 85), and the Copyright Law, 1985 (P.N.D.C. Law 110), are silent on the Berne Convention but mention Ghana's obligation to protect works of UCC parties.[51] In 1976 it became a member in its own right of the Paris Convention for the Protection of Industrial Property.[52]

Ghana's international obligations have expanded even further since the 1990s. Ghana became a World Trade Organization (WTO) member on January 1, 1995, and was bound to implement the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[53] from January 1, 2000.[54] Ghana signed the WIPO Copyright Treaty (WCT) on May 23, 1997, and is reported as having played a leading role in its conclusion.[55] Ghana ratified the WCT on August 18, 2006, and the WCT entered into force in Ghana on November 18, 2006.[56] Ghana has also signed the Convention on Biological Diversity (CBD), is a party to it, and has ratified it.[57] The Patent Cooperation Treaty (PCT)[58] entered into force in Ghana in February 1997, and Ghana became a signatory of the Patent Law Treaty (PLT)[59] on June 2, 2000.

Domestic Intellectual Property Regime

During the past decade, Ghana has embarked on an ambitious plan to expand its intellectual property law regime partly in an attempt to meet its TRIPS obligations. During the past decade, Ghana has drafted bills for parliament's consideration in several areas. The bills either revise existing intellectual property legislation, in areas including copyright[60] and patents, or aim to introduce legislation in areas hitherto not provided for, such as geographical indications and layout (topographies) of integrated circuits. Some new laws that have been passed include the Copyright Act, 2005 (Act 690),[61] and the Trademarks Act, 2004 (Act 664).[62]

Kente and Traditional Designs Protection

Copyright plays a prominent role in Ghana's intellectual property system; since independence Ghana has passed more copyright than other intellectual property legislation. However, folklore protection in *formal* legislation began not with the intellectual property system but with textile legislation in the 1960s and 1970s such as the Textile Designs (Registration) Decree, 1973 (N.R.C.D. 213),[63] which for-

bade the registration of textile designs "if the design is substantially made up of well-known indigenous traditional motifs" (section 2(2)(d)). The Industrial Designs Act of 2003 (Act 660) repealed and replaced this decree. The Copyright Law, P.N.D.C. Law 110 of 1985,[64] with its folklore protection provisions, marked the beginning of a relationship between folklore and Ghana's intellectual property system. The introduction of folklore protection into Ghana's intellectual property system can be regarded as an indication that Ghana was beginning to think about which of its resources and cultural heritage were important and worthy of protection. P.N.D.C. Law 110 was repealed with the passage of the Copyright Act, 2005 (Act 690).[65]

Copyright Protection Under Act 690

Ghana's copyright legislation, Act 690, specifically protects folklore. Other African countries protect folklore under *formal* legislation such as Ivory Coast in 1978, Nigeria in 1992,[66] and Togo in 1991. These efforts are not surprising in view of international initiatives and model laws exploring the relationship between folklore and intellectual property such as the Tunis Model Law[67] and the WIPO-UNESCO Model Provisions.[68] As WIPO has observed, although these two international initiatives are not binding, they have influenced the development of national laws on folklore protection.[69] Another reason from the Ghanaian perspective is the similarity between intellectual property law and control of folklore under customary law principles.[70] Intellectual property protection does not mean that customary law principles have been eclipsed; rather, intellectual property law protection should be regarded as an addition to or a strengthening of the customary law principles.[71]

An analysis of Ghana's Copyright Act reveals that the act has a dual role because it protects the following:

- The traditional copyright works such as literary works, artistic works, musical works, sound recordings, audiovisual works, choreographic works, derivative works, and computer software or programmes (Act 690, s. 1. (1))
- Folklore

Although the traditional works must comply with eligibility criteria such as originality, reduction to material form, conditions on the author's nationality, and other publication guidelines,[72] these eligibility criteria do not apply to folklore.[73]

With the traditional works, authors have economic and moral rights in their works. Works of individuals are protected during the author's life and for 70 years after the author's death. The term of protection is 70 years from the time the work was made or first published for other works such as those of a body corporate.[74] Moral rights exist in perpetuity, however. Act 690 also provides for permitted used of works.

It is an infringement for a person to deal with a copyright protected work in a manner that adversely affects the author's economic or moral rights. The civil sanctions for copyright infringement include injunctions and damages for the infringement while the criminal sanctions include fines and prison terms. Parties also have the option of negotiating a settlement of a dispute (Act 690, s. 48).

Act 690: Folklore Copyright Provisions

Under Act 690 (s. 76) folklore

> means the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore.

The protection of folklore under copyright in Ghana originated with the former copyright legislation, the Copyright Law, 1985 (P.N.D.C. Law 110). Although these two pieces of legislation had similar definitions of folklore, the main difference between the two definitions is that under Act 690 kente and adinkra designs are specifically mentioned in the legislation as works of Ghanaian folklore.[75]

Folklore protection under Act 690 has the following main features. The act protects folklore against reproduction, "communication to the public by performance, broadcasting, distribution by cable or other means" and against "adaptation, translation and other transformation" (Act 690, s.4.(1)), whereas folklore rights are vested in the president "on behalf of and in trust for the people of the Republic" (Act 690, s.4.(2)). The perpetual duration the act grants to works of Ghanaian folklore (Act 690, s.17) means that such works will never be part of the public domain.[76] Act 690 establishes a National Folklore Board (Act 690, s. 59) whose duties are to maintain a register of Ghana's folklore and to "promote activities for the dissemination of expressions of folklore within the Republic and abroad."[77] People who want to use folklore for uses that fall outside the permitted uses in section 19 must obtain the National Folklore Board's prior consent and pay a fee (Act 690, s. 64(1)).[78] Such fees are to be paid into a fund, which is to be established by the minister with the accountant general's approval and managed by the National Folklore Board for the purposes of preserving and promoting folklore and promoting indigenous arts (Act 690, s. 64(3)(a) and (b)). Offences under the Copyright Act concern the sale or distribution of imported works of Ghanaian folklore without the written permission of the National Folklore Board (Act 690, s. 44).[79] At present, Ghana's copyright legislation does not protect foreign folklore.

Evaluation

Although Ghana and other countries protect folklore in *formal* legislation, many factors militate against their success in protecting their folklore. There is tension in seeking overseas compliance of customary laws[80] as well as in trying to ensure

compliance overseas for copyright legislation that protects folklore. As Kamal Puri has analyzed in relation to intellectual property protection of Aboriginal cultural heritage in Australia, it is not always easy to reconcile Aboriginal customary law with its group ownership with the Anglo-Saxon legal system with its personal rights and an individual artist's intellectual property.[81]

In addition to the aforementioned challenges, another contributory factor is the perception that folklore is part of the public domain.[82] From a strict Western perspective, folklore forms a part of the public domain. However, in other parts of the world, like Ghana, folklore does not form a part of the public domain. There is this struggle between what belongs to the commons and what does not, and this plays out in the folklore area as well.

Writing on the use of kente and adinkra designs, Boateng gave some insight into the commercialization and use of Ghanaian folklore in the United States. She describes a conversation she had with a U.S. vendor in Champaign, Illinois, who was surprised that adinkra symbols have legislative protection in Ghana. The vendor said when the vendor inquired about the copyright implications of using adinkra symbols in her business card in the early 1990s, U.S. officials informed the vendor that this was an item of folklore that was a part of the public domain. This was despite the fact that Ghana's copyright law with its provisions on folklore protection had been in existence for five to six years.[83] Another scholar mentions the lack of recourse for a Ghanaian artist when J.C. Penney reproduced some of his traditional designs on bedsheets and sold them to the American public.[84]

With copyright in folklore being vested in the Republic of Ghana and with the establishment of a National Folklore Board to administer proceeds from folklore use, it remains to be seen how the proceeds will be administered and whether folklore producers will benefit from the proceeds.[85] A few solutions that have been identified in other countries include provisions in licences, agreements, and concessions between the owners of the folklore and the potential users.[86] Writing on the Ghanaian situation in 2004, before the passage of Act 690, Boateng stated that there is a need for the government, with the copyright holder of folklore to be accountable and ensure that producers of folklore benefit from its mass exploitation. She commented further that in the view of some kente and adinkra producers in Ghana, the state is not trustworthy enough as the copyright holder and "the custodian of their interests."[87] Although it is too early to evaluate the effect of Act 690 on this issue because the act does not state the formula that will be used in administering the proceeds, this is an area that the government must address in the coming years. This is because international instruments such as the CBD emphasize the importance of benefit-sharing agreements.[88]

In sum, this section establishes how the perception of folklore in some countries as public domain items can enable the infringement of another country's laws. It also shows the difficulty that countries like Ghana encounter when trying to protect their folklore in places where folklore is generally not protected. This is strengthened by the absence of an international agreement and international

enforcement in this area. In conclusion and in fairness to this piece of legislation, it is impossible for national legislation alone to resolve this challenge conclusively. The very nature of the challenge dictates a regional and international solution.

REGIONAL PERSPECTIVES

Folklore protection is an important issue in Africa because of the significance of folklore in Africa. As mentioned earlier, some African countries are using intellectual property legislation to protect folklore. Shyllon asserts, "Folklore provisions in post-colonial legislation in the African states must be seen as an attempt to cater for the peculiar needs of these countries whose civilization and tradition are oral."[89]

One lesson that can be learned from the Ghanaian experience is that alone, provisions in national legislation on folklore protection are insufficient to ensure compliance overseas. The question then remains of what steps countries like Ghana should take to move forward in folklore protection? Is the answer in a regional or international arrangement; and if so, in which order?

One law scholar has proposed that a regional solution might have greater success than a "more encompassing global treaty" for folklore protection in Africa.[90] His proposal is based on a consideration of the differences between African countries on the one hand and developed nations on the other.[91]

In the African context, there is certainly some merit in the establishment of a regional arrangement on folklore. It has already been mentioned that several African countries protect folklore under intellectual property. A regional arrangement on folklore is advisable because it would strengthen these efforts. The case for the regional argument is stronger when it comes to folklore policy making because it gives greater weight to national efforts. There are already several regional organizations in Africa under whose umbrella this issue could be tackled. These include the Economic Community of West African States (ECOWAS)[92] and in the intellectual property areas the African Regional Intellectual Property Organization (ARIPO),[93] formed among English-speaking Africa, and the African Intellectual Property Organization (OAPI),[94] formed among French-speaking Africa. There is also the African Union (AU), formerly the Organization of African Unity.

However, these intellectual property groupings do not establish a common and uniform folklore policy for the region. On March 2, 1977, the OAPI was created by the adoption of a convention signed in Bangui.[95] The Bangui Agreement was revised on February 24, 1999,[96] to comply with TRIPS. The OAPI has extensive provisions on folklore protection in its Annex VII.[97] However, ARIPO does not address folklore.[98] Since its establishment by the Lusaka Agreement in Zambia on December 9, 1976, ARIPO has adopted two protocols: the Protocol on Patent and Industrial Designs within the Framework of the African Regional Industrial Prop-

erty Organization (Harare Protocol)[99] and the Banjul Protocol on Marks.[100] Moreover, and as the name implies, ARIPO's focus is on cooperation among English-Speaking Africa in industrial property matters. Thus, there is a gap in this area in relation to policy and cooperation in folklore issues.

Another initiative is the African Union Model law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources[101] (African Union Model Law), a draft agreement on biological resources. Although the African Union Model Law was drafted in response to the CBD[102] and article 27.3(b) of the TRIPS Agreement,[103] it is an example that could be followed with respect to regional folklore policies.

One scholar analyzing African initiatives and the African Union Model Law comments that the "development of national laws based on the model law has been slow even though the idea of the sui generis option has been accepted."[104] He continues that this is partly caused by the problem of adapting it to national policy objectives and observes that most Africans are not aware of the existence of this law, nor of international agreements such as the CBD or the TRIPS Agreement. Furthermore, he suggests the following:

> National governments and the international community should learn to be more participative, strategically patient and democratic in their decision-making processes. They should ensure that those most likely to be affected by these legislative imperatives not only understand the issues involved, but actually get a fair hearing and participate in the whole process. There is a need for more widespread discussion of the Model Law at national, subregional and regional levels on the continent to more realistically elicit the reaction, support or otherwise of Africa.[105]

Although model laws are nonbinding, the attempt to legislate on a regional basis is commendable; and this initiative is probably expandable into the folklore realm. Likewise, the success of regional policies on folklore protection in Africa will also require education and consultations at the various levels of African society.

Basically, and in view of the differences between the meaning of folklore in the African context and in other parts of the world where folklore might be regarded as part of the public domain, it is advisable that folklore protection form a part of African regional policy. This suggestion is made against the background that African countries have already recognized the importance of cooperation through organizations like ARIPO. However, the most important reason for this suggestion is that it will give national African folklore initiatives a force that the individual countries cannot achieve on their own.

There are three possible ways of addressing this:

1. This could be done under the umbrella of the existing regional intellectual property organizations.
2. A new regional organization could be formed being an amalgamation of the existing intellectual property organizations.

3. A new organization could be formed for African folklore, such as the African folklore organization.

Of these three possible alternatives, the second and third points are a better solution than the first one. It is better that the issue is dealt with by the whole region as opposed to it being settled according to language groupings. Ghana, for example, although an English speaking country, has French-speaking countries as its neighbors.

As one legal scholar commenting on the African situation from an intellectual property and trade angle has observed:

> The ARIPO and the OAPI establish two different systems that do not project the realities of a unified African objective. Perhaps a more effective African intellectual property regime may be pursued through a process of reviewing the existing sub-regional trade initiatives within the African region in order to make the system more workable or indeed introducing intellectual property within the existing sub-regional trading initiative, such as the Economic Community of West African States (ECOWAS).[106]

In addition to the previous recommendations listed, this process might be facilitated if African countries keep a registry of their folklore. For example, Ghana has already instituted this measure, and other non-African countries such as India and China also have registers of their folklore. Some writers have commented that traditional peoples may not want to disclose folklore that is sacred. A determination of whether sacred folklore should or should not be included in the registry is not within the scope of this article. That is for the country in question to decide. However, folklore that can be disclosed should be disclosed as a starting point. With time, the registry could translate into a regional one if future events necessitate such a measure.

During its ninth session (April 24–28, 2006), WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) identified some of the recurring issues in discussions on the protection of traditional knowledge as including the nature of traditional knowledge, the description and definition of traditional knowledge, and the identify of the owners and other beneficiaries.[107] This shows that there are still many questions to be answered before an international agreement can proceed. Thus, having a regional agreement or some policy on these areas would certainly aid international efforts. This does not mean that international efforts should not proceed without a regional agreement, however.

FOLKLORE AND HUMAN RIGHTS

Folklore protection through the human rights framework is regarded as one viable option and arguably better than the use of the intellectual property system.[108]

To what extent is the protection of folklore a human rights issue? Some international documents such as the Universal Declaration of Human Rights of 1948 (UDHR)[109] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[110] recognize rights in intellectual property.[111] "Today, the right to the protection of interests in intellectual creations is recognized explicitly as a human right in the UDHR, the ICESCR, and many other international or regional instruments."[112] The CBD underlines the importance of protecting and preserving traditional knowledge. Although there is some research on this area,[113] a human rights framework for folklore protection has not been studied in depth; and there is a need for more research in this area. The main question is this: Do countries have a human rights obligation to protect folklore? Although an in-depth analysis of this question is not within the scope of this paper, this section focuses on article 15(1)(b) and (c) of the ICESCR.[114]

Article 15(1) of the ICESCR recognizes cultural rights and intellectual property rights. One author argues that it recognizes cultural human rights.[115] Nwuache asserts that article 15(1)(b) and 15(1)(c) "constitute the right to intellectual property."[116] Haugen argues that although from the wording of article 15(1)(c) this article was meant to apply to individual authors, developments in intellectual property show that it might also apply to minorities.[117] Yu argues that although the drafters of articles 27 of the UDHR and 15(1)(c) of the ICESCR as well as the general comment number 17 on article 15(1)(c)[118] may not have had traditional communities in mind, this does not mean that an interpretation of these articles cannot be extended to include collective rights.[119]

In sum, one can therefore conclude that provisions in international documents such as article 15(1) of the ICESCR can cover intellectual creations of communities as well. Based on this analysis, I argue that the protection of folklore, in this case traditional cultural designs, it also a human rights issue.[120] Considering effective folklore protection as a human rights issue strengthens the case for folklore protection. How countries deal with this issue will vary,[121] because there are no international regulations on the protection of traditional cultural expressions. However, with the ongoing work of WIPO and other organizations might soon result in an international solution.

CONCLUSION

This article analyzes the protection of traditional textile designs under the intellectual property law system. In focusing on the kente traditional designs in Ghana, the article establishes the importance of these designs to Ghanaian society as well as some of the obstacles in the path of protecting traditional designs. The future of folklore and intellectual property protection in African countries like Ghana will be strengthened by increased regional cooperation. In particular, there is a need for regional policy in this area as opposed to current intellectual property

groupings along language lines, groups that reflect Africa's past colonial history and may not work well in the present circumstance. African countries and local communities will have to resolve the issue of equitable benefit sharing of the proceeds from folklore use. This is not an easy task in view of the lack of uniformity among indigenous and traditional communities as well as differences in their relationships with their respective governments. Thus to deal with equitable benefit sharing, the governments must work with the different groups to come to a workable solution within their unique situations.

The article also argues that effective folklore protection requires an international solution. The WIPO and other organizations have already taken various steps in the past few decades to define the relationship between folklore and intellectual property and to draft a treaty in this area. These efforts suggest that an international solution will soon be found.

ENDNOTES

1. The Tunis Model on Copyright for Developing Countries of 1976. The Tunis Model Law on Copyright for Developing Countries is reprinted in WIPO (1976) 12 Copyright: Monthly Review 165. The Tunis Model Law on Copyright for Developing Countries of 1976 protected folklore indefinitely. See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Tenth Session Geneva, November 30 to December 8, 2006, "Options for Giving Effect to the International Dimension of the Committee's Work," Document prepared by the Secretariat, WIPO/GRTKF/IC/10/6, October 2, 2006. Available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_6.doc (accessed August 13, 2007) at 5.

2. Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, 1982 (WIPO-UNESCO Model Provisions). Available at WIPO http://sct.wipo.int/tk/en/laws/pdf/unesco_wipo.pdf (accessed August 17, 2007). This is reprinted in (1982) 16 (4) Copyright Bulletin 62. For a definition of the meaning of expressions of folklore, see "Traditional Cultural Expressions (or Expressions of Folklore)" in WIPO Glossary of Terms. Available at http://www.wipo.int/tk/en/glossary/ (accessed August 18, 2007).

3. The WIPO conducted several fact-finding missions in 1998 and 1999 to explore the relationship between folklore and intellectual property.

4. Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions of 1984. The Draft Treaty is of use for historical reference only because no country adopted it. For a brief discussion of this Draft Treaty, see Kuruk, "Protecting Folklore Under," 817. Attempts to draft an international treaty are being continued by WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. This committee was established in 2000.

5. On this point, see for example, Drahos, "Towards an International Framework," 8–9, commenting on developing-country arguments on folklore in relation to TRIPS and developed countries.

6. On this point, see for example, Massey and Stephens, "Intellectual Property Rights," 54.

7. See Kuruk, "Protecting Folklore Under."

8. For more information on African textile designs, see for example, Sieber, *African Textiles and Decorative Arts*; Kuruk, "Protecting Folklore Under."

9. A discussion on the kente designs appears later in this article.

10. See for example, Hughes, "The Philosophy of Intellectual Property"; Hettinger, "Justifying Intellectual Property"; Drahos, *A Philosophy of Intellectual Property*; Fisher, "Theories of Intellectual Property"; Trosow, "The Illusive Search."

11. Farley, "Protecting Folklore of Indigenous Peoples," 9.

12. Supra note 2. The WIPO Secretariat also uses this definition, see "Traditional Cultural Expressions (or Expressions of Folklore)" in WIPO Glossary of Terms, supra note 2.

13. WIPO-UNESCO Model Provisions, section 2.

14. *Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore*, available at WIPO, http://www.wipo.int/about-ip/en/stuides/publications/genetic_resources.htm/ (accessed August 14, 2007).

15. *Traditional Knowledge and Cultural Expressions*, WIPO, available at http://www.wipo.int/globalissues/cultural/background/index.html (accessed August 14, 2007) at 2. This was the definition WIPO used in its fact-finding missions in 1998 to 1999.

16. See Kuruk, "Protecting Folklore Under."

17. See Michael Blakeney's comments in "Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources" (2002).

18. Barsh, "Indigenous Knowledge and Biodiversity," 74–75.

19. Downes, "How Intellectual Property Could Be a Tool," 258.

20. Downes, "How Intellectual Property Could Be a Tool, 258–59.

21. Puri, "Preservation and Conservation," 16.

22. Erica Irene-Daes, "Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples," U.N. Subcommission on Prevention of Discrimination and protection of Minorities, U.N. Doc. E/CN.e/Sub.2/1993/28, July 28, 1993, para. 24 (quoted in Roht-Arriaza, "Of Seeds and Shamans," 260).

23. As Kamal Puri states, "For indigenous peoples of the Pacific, culture is the lifeline for their survival and prosperity. Without cultural identity, their social, emotional and political matrix in likely to crumble into pieces. Its continued practice is vital for social and political harmony among indigenous peoples" ("Preservation and Conservation," 6).

24. For pictures of the kente designs, see Sieber, *African Textiles and Decorative Arts*, 198; Boateng, "African Textiles and the Politics," 222; "Akan Kente Cloths," Marshall University, available at http://www.marshall.edu/akanart/cloth_kente.html (accessed August 21, 2007).

25. One reference states that it dates back to the twelfth century; see http://www.africawithin.com/tour/ghana/kente.htm (accessed August 21, 2007). Another source mentions that "the history of kente weaving extends back more than 400 years." Ghana Embassy in Japan, "Ghana National Cloth-Kente," available at http://www.ghanaembassy.or.jp/general/native.html (accessed August 21, 2007).

26. The looms are used to weave four-inch strips of the cloth, which are then woven together to form larger garments.

27. Ghana has more than 70 different ethnic groups and languages. However, they tend to be divided into five major ethnic groupings: Guan, Ewe, Ga-Adangbe, Mole-Dagbani, and Akan. These groups have subdivisions with common cultural, historical, linguistic, and other ties. However, there is still a lot of diversity between the various ethnic groups. The Ashanti (sometime written as Asante) belong to the Akan group.

28. There are for example differences in the weft designs of the cloths. See "Akan Kente Cloths," Marshall University, available at http://www.marshall.edu/akanart/cloth_kente.html (accessed August 21, 2007) at 3. See also "Patterns and Symbols in Kente and Korhogo cloths," available at http://www.africancrafts.com/davilojo/kandk/kandk.htm (accessed August 21, 2007).

29. Men usually weave it, but women can play a role in sewing the strips together.

30. Fowler, "Preventing Counterfeit Craft Designs," 126–27.

31. On this point, see Salm and Falola, *Culture and Customs of Ghana*. "The many colors of *kente* cloth represent various human traits and connote status (gold), vitality (yellow), renewal (green), and spiritual purity (blue)," 118.

32. See "Kente," available at http://www.ghana.com/republic/kente/ (accessed March 24, 2003) at 1. See also "Ghana National Cloth-Kente," Ghana Embassy in Japan, available at http://www.ghanaembassy.or.jp/general/native.html (accessed August 21, 2007).

33. See, for example, Salm and Falola, *Culture and Customs of Ghana*, 117.

34. See http://webusers.anet-chi.com/~midwest/history.html (accessed March 24, 2003). See also "Ghana National Cloth-Kente," Ghana Embassy in Japan, available at http://www.ghanaembassy.or.jp/general/native.html (accessed August 21, 2007).

35. It measures 12 × 20 feet and is called *tikoro nko agyina*—one head does not constitute a council. See "Akan Kente Cloths," Marshall University, available at http://www.marshall.edu.akanart/cloth_kente.html (accessed August 21, 2007).

36. WIPO, "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana," (WIPO, Questionnaire Ghana) 8, available at http://www.wipo.int/tk/en/consultations/questionnaires/ic-2–7/ghana.pdf (accessed June 7, 2007). The assistant copyright administrator also mentioned, "Individual artists whose works are based upon folklore also have copyright protection in respect of those works." There is little information available on how this works in practice.

37. WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2002) "Current Status on the Protection and Legislation of National Folklore in China, Document submitted by the Delegation of China" WIPO/GRTKF/IC/3/14, (Annex), 1.

38. See Salm and Falola, *Culture and Customs of Ghana*, 123; Boateng, "African Textiles and the Politics."

39. Puri, "Protection of Expressions," 7.

40. Farley, "Protecting Folklore," 10.

41. For an in-depth discussion of appropriation and cultural appropriation, see Ziff and Rao, *Borrowed Power*; Scafidi, *Who Owns Culture?*

42. See WIPO, Questionnaire Ghana at 10, supra note 36.

43. See Boateng, "African Textiles and the Politics," 221–22.

44. "Also, cultural sovereignty is infringed when cloth designs that Ghanaians regard as part of their cultural heritage are appropriated and exploited without any respect for Ghana's prior claim as the country of origin of these designs" (Boateng, "African Textiles and the Politics," 224).

45. Betsy Quick, writing on the use of kente for everyday objects, states that "there was in effect a line drawn in the sand; either kente was viewed as sacred, as special or it was viewed as anything you want it to be. Often Ghanaians took the former stance; African Americans the latter" (quoted in Boateng, "African Textiles and the Politics," 221).

46. Discussion with Dr. Kezia D. Awadzi PhD, University of Florida at Gainesville in July 2007.

47. Boateng, "African Textiles and the Politics," 221.

48. A British colony from 1874, Ghana became independent on March 6, 1957.

49. Imperial Copyright Act, 1–2 Geo. V, c 46.

50. On this issue in relation to African colonies generally, see Adewopo, "The Global Intellectual Property System," 750–51.

51. See for example, the schedules in these two pieces of legislation which list the parties to the Universal Copyright Convention.

52. The full text of the current version of this convention is available at WIPO, http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (accessed August 13, 2007).

53. The full text of the TRIPS Agreement is available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (accessed August 13, 2007).

54. Ghana was unable to meet this deadline. Ghana's minister of justice, Nana Akuffo-Addo, lamented that "due to the complexity of the issues at stake and our own limited capacity and expertise in the matters of intellectual property law, we have been unable to comply with the deadline" (Safo, "Trade Related Intellectual").

55. Mould-Iddrisu, "Development and Current Status," 3–4.

56. WIPO, Treaties Database.

57. See http://www.cbd.int/convention/parties/list.shtml (accessed June 7, 2007).

58. The full text is available at http://www.wipo.int/pct/en/texts/articles/atoc.htm (accessed August 18, 2007).

59. The full text is available at http://www.wipo.int/treaties/en/ip/plt/ (accessed August 18, 2007).

60. By 1997 the Copyright Office had drafted the Copyright Bill. In drafting the Copyright Bill, the Copyright Office referred to several sources including WIPO's Model Copyright Laws and copyright laws from countries like Nigeria, Sweden, the United States, the United Kingdom, Malawi, and Malaysia. They also consulted with experts from WIPO's Copyright Legislation Division and the Drafting Section of Ghana's Attorney General's Department (Bosumprah, "The New Copyright Bill").

61. Ghana Copyright Act, 2005 (Act 690) available at WIPO, http://www.wipo.int/tk/en/laws/pdf/ghana_copyright.pdf/. For a discussion of copyright in Ghana prior to the Copyright Act, 2005 (Act 690) see Amegatcher, *Ghanaian Law of Copyright*.

62. The first trademark legislation was in 1965, The Trade Marks Act, 1965 (Act 270) and it was based on the British law.

63. Textile Designs (Registration) Decree, 1973 (N.R.C.D., available at WIPO, http://www.wipo.int/clea/docs_new/pdf/en/gh/gh004en.pdf [accessed March 20, 2008]). Section 23 of this legislation defined a textile design as "any pattern or ornamental feature applied to a textile article by printing weaving, or other similar process."

64. Ghana Copyright Law, 1985 (P.N.D.C. Law 110). This was unlike Ghana's 1960 copyright legislation which basically copied the U.K. legislation and did not protect folklore.

65. Copyright Act, 2005 (Act 690). The relevant sections of this act are sections 4, 17, 19, 44, 54, 64, and the Interpretation section.

66. For a discussion of the Nigerian situation, see Adewopo, "Protection and Administration of Folklore in Nigeria." On the African situation, see generally Shyllon, "Conservation, Preservation." On the Tunisian example, see Zografos "The Legal Protection."

67. Tunis Model Law, see supra note 1.

68. WIPO-UNESCO Model Provisions, see supra note 2.

69. WIPO, "Options for Giving Effect to the International Dimension of the Committee's Work," see supra note 1.

70. Kuruk, for example, comments on similarities between intellectual property rights and customary law rules in some African communities (Kuruk, "African Customary Law," 8). Ghana's former copyright administrator, Betty Mould-Iddrisu, has described the control the chief of the Ashanti had over the use of designs as a type of *copyright*, which originated from the importance of their traditional cloths (see Kuruk, "Protecting Folklore Under," 785, note 108).

71. See Kuruk, "African Customary Law," 20.

72. It should also satisfy the following conditions: be created by a Ghanaian citizen or by someone ordinarily resident in Ghana; be published in Ghana, but if published outside Ghana it should be published in Ghana within 30 days of its publication; or be a work Ghana has an international treaty obligation to protect (Act 690, s. 1. (2)).

73. The eligibility criteria for a work to qualify for copyright protection are one of the hurdles confronting the protection of traditional cultural heritage. The Ghanaian Copyright Act appears to bypass this hurdle. For a discussion on the obstacles the eligibility criteria pose to the protection of Aboriginal culture, see Puri, "Preservation and Conservation," 14–17.

74. The term of protection under P.N.D.C. Law 110 was the life of the author plus 50 years and in the case of other works, 50 years after the work was published.

75. In fact, this is the first time that examples of works of Ghanaian folklore are specifically mentioned in Ghana's copyright legislation. Commenting on P.N.D.C. Law 110, Boateng writes the following:

> Indeed the revision to the law has been partly attributed to the fact that imitations of local handmade *adinkra* and *kente* textiles were being mass-produced by East Asian textile factories without the payment of royalties to Ghana for the use of cloth designs that the country considered to be part of its culture. ("African Textiles and the Politics," 212)

76. Act 690, section 38 defines works which are in the public domain.

77. Act 690 at section 63 (f). The functions of the National Folklore Board may be regarded as a bit controversial.

78. The Copyright Law, 1985, achieved some success in protecting Ghanaian folklore when in 1990 musician Paul Simon signed an agreement with the Copyright Office and paid the Copyright Office for using a Ghanaian musical folklore. In 1990 the Ghana Copyright Office granted Paul Simon permission to use "Yaa Amponsah," a Ghanaian musical tune for his work "Spirit of Voices," which was included in the album, *Rhythm of the Saints*. See Amegatcher, *Ghanaian Law of Copyright*, 22; Amegatcher "Protection of Folklore," 35–36.

79. Commenting on a similar provision in P.N.D.C. Law 110, Ghana's former acting copyright administrator stated that this provision was meant to protect Ghanaians from foreigners wishing to exploit Ghanaian folklore (Amegatcher, *Ghanaian Law of Copyright*, 109).

80. See Kuruk, "Protecting Folklore Under."

81. Puri, "Preservation and Conservation," 14.

82. From an intellectual property perspective, public domain works are those that either predate the intellectual property law system, that fall outside the scope of protectable intellectual property subject matter, or whose term of protection has expired. See also Shyllon stating how folklore is public domain material from the European copyright perspective and thus "it is free for anyone to use and/or distort, a concept that is not conducive to its protection" (Shyllon, "Conservation, Preservation," 37).

83. Boateng, "African Textiles and the Politics," 220, 224.

84. Fowler, "Preventing Counterfeit Craft Designs."

85. Massey and Stephens, writing on the Canadian situation, give examples of developments in the museum and other fields whereby a percentage of proceeds from the sale of traditional designs go to the source communities. The Canadian Museum of Civilization established a fund into which a percentage of the proceeds from such sales were to be paid and the use of these proceeds negotiated with the traditional communities (Massey and Stephens, "Intellectual Property Rights," 57).

86. See for example, Aguilar, "Access to Genetic Resources." Costa Rica's Biodiversity Act, for example, protects a sui generis community intellectual right. Commenting on Costa Rica's Biodiversity Act, the author states:

> This law recognizes the right of local communities and indigenous peoples to oppose access to their resources and related knowledge, for cultural, spiritual, social, economic or other reasons. The basic requirements for access also include the conditions of technology transfer and equitable sharing of benefits, if any, agreed in the licences, agreements and concessions, as well as the type of protection of related knowledge required by the representatives of the place where access is to materialize.

Aguilar, "Access to Genetic Resources," 180. However, the author argues that despite the fact that the law's aim is to protect traditional knowledge, the language of the law is weak.

87. Boateng, "African Textiles and the Politics," 225.

88. The Convention on Biological Diversity, available at http://www.cbd.int/convention/convention.shtml (accessed April 2, 2008) at article 8(j). Article 15 of the Convention on Biological Diversity, on access to genetic resources, also mentions benefit sharing.

89. Shyllon, "Conservation, Preservation," 41.

90. Kuruk, "Protecting Folklore Under," 841.

91. Kuruk, "Protecting Folklore Under," 776, 841.

92. See ECOWAS, available at http://www.ecowas.int/ (accessed August 14, 2007). ECOWAS was formed in 1975 and has 15 members: Benin, Burkina Faso, Cape Verde, La Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

93. For more information about ARIPO's history and objectives, see ARIPO, available at http://www.aripo.org/articles.php?lng=en&pg=12/ (accessed August 14, 2007); "ARIPO was mainly established to pool the resources of its member countries in industrial property matters together in order to avoid duplication of financial and human resources." Currently, ARIPO has 16 members and 14 potential members. See ARIPO-membership, available at http://www.aripo.org/articles.php?lng=en&pg=14 (accessed August 14, 2007).

94. This is also known as the Organisation Africaine de la Propriété Intellectuelle. For more information and the history of this organization, see Organisation Africaine de la Propriété Intellectuelle/African Intellectual Property Organization, available at http://www.oapi.int/en/OAPI/historique.htm/ (accessed August 14, 2007).

95. The OAPI has 16 member states: Benin, Burkina Faso, Cameroon, Central Africa, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad, and Togo. The Bangui Agreement revised the previous Libreville Agreement, and it legislates on patent rights in its member states. See Organisation Africaine de la Propriété Intellectuelle/African Intellectual Property Organization, available at http://www.oapi.int/en/OAPI/historique.htm/ (accessed August 14, 2007).

96. African Intellectual Property Organization, Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (Bangui [Central African Republic], February 24, 1999), WIPO, available at http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf (accessed August 17, 2007).

97. Annex VII of the Bangui Agreement is on Literary and Artistic Property. This Annex contains extensive provisions on folklore protection.

98. See http://www.aripo.org/ (accessed August 14, 2007). For some perspectives on these African groupings, see Kuruk, "Protecting Folklore Under"; Adewopo, "The Global Intellectual Property System"; Ekpere, "The African Union Model Law."

99. It was adopted in 1982 and entered into force in 1984. It was also amended in 1999. See About ARIPO-Legal Framework, ARIPO, available at http://www.aripo.org/articles.php?lng=en&pg=61 (accessed August 14, 2007). "The Protocol empowers the ARIPO Office to receive and process patent and industrial design applications on behalf of states party to the Protocol."

100.

> The Banjul Protocol on Marks, which was adopted by the Administrative Council in 1993, establishes a trademark filing system along the lines of the Harare Protocol. Under the Banjul Protocol an applicant may file a single application either at one of the contracting states or directly with the ARIPO Office and designate states in the application where he wishes his mark to be protected. . . . Since 1997 the Protocol has been extensively revised in order to make it compatible with the TRIPS Agreement and the Trademark Law Treaty as well as make it more user-friendly.

About ARIPO-Legal Framework, available at http://www.aripo.org/articles.php?lng=en&pg=61 (accessed August 14, 2007).

101. For more on this, see "Traditional Knowledge-TK initiatives," ARIPO, available at http://www.aripo.org/articles.php?lng=en&pg=79 (accessed August 14, 2007). It was adopted in 1998. "This Model Legislation innovates by expressly empowering a tradition community to control its genetic and biological resources via the adoption of the prior-consent principle and benefit-sharing regime. Farmers' rights and privileges, community intellectual rights, and breeders' rights have been provided."

102. See "Traditional Knowledge-TK initiatives," ARIPO, available at http://www.aripo.org/articles.php?lng=en&pg=79 (accessed August 14, 2007).

103. Ekpere, "The African Union Model Law," 234.

104. Ekpere, "The African Union Model Law," 235.

105. Ekpere, "The African Union Model Law," 236.

106. Adewopo, "The Global Intellectual Property System," 769.

107. WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2006), *The Protection of Traditional Knowledge: Revised Objectives and Principles*, WIPO/GRTKF/IC/9/5, at 5. Available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_5.pdf (accessed June 7, 2007). The annex of this document contains the Revised Provisions for the Protection of Traditional Knowledge-Policy Objectives and Core Principles.

108. Nwuache, "The Protection of Expressions."

109. Universal Declaration of Human Rights of 1948, Office of the High Commissioner for Human Rights, available at http://www.unhchr.ch/udhr/lang/eng.htm (accessed April 2, 2008). Article 27 provides the following:

> 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.

110. International Covenant on Economic, Social and Cultural Rights, United Nations Office of the High Commissioner for Human Rights, available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm (accessed March 20, 2008).

111. Yu, "International Rights Approaches"; Helfer, "International Rights Approaches."

112. Yu, "Challenges to the Development."

113. Haugen, "Traditional Knowledge and Human Rights"; Nwauche, "The Protection of Expressions."

114. Article 15 of the ICESCR states the following:

> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

115. Haugen, "Traditional Knowledge and Human Rights," 673.

116. Nwauche, "The Protection of Expressions," 232.

117. Haugen, "Traditional Knowledge and Human Rights," 674.

118. For further analysis of General Comment No. 17, see Haugen, "General Comment No. 17."

119. Yu, "Challenges to the Development," 16–18.

120. Haugen, "Traditional Knowledge and Human Rights," for example, concludes that "adequate protection of traditional knowledge is an obligation under international human rights law" [footnote omitted] (Haugen, "Traditional Knowledge and Human Rights," 675). In arriving at this conclusion, he also analyzes the provisions of Article 27 of the International Covenant on Civil and Political Rights.

121. Nwauche, "The Protection of Expressions," 233.

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