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CREATING CAPITAL FROM CULTURE – RE-THINKING THE PROVISIONS ON EXPRESSIONS OF FOLKLORE IN GHANA’S COPYRIGHT LAW¹

GERTRUDE TORKORNOO

INTRODUCTION

Expressions of folklore, or “traditional cultural expressions” (TCEs),² refer to unique artistic products of identifiable indigenous communities. They are works of art that evolve from communal cultural interactions, and are not attributable to any individual authorship. The World Intellectual Property Organization (WIPO) defines TCEs as “economic and cultural assets of indigenous and local communities and their countries.”³

In Ghana, two such forms of art are kente and adinkra.⁴ Historically, kente was a loom woven mosaic fabric made from colorful threads. Special kente cloth designs were created on the order of kings and

1. Copyright Act, 2005, Act 690 (Ghana) [hereinafter Copyright Act].

2. In this paper, ‘expressions of folklore’ and ‘traditional cultural expressions’ are used interchangeably.

3. The World Intellectual Property Organization, WIPO, defines Traditional Knowledge (TK), Genetic Resources (GRs), together with Traditional Cultural Expressions (TCEs or expressions of folklore) as “economic and cultural assets of indigenous and local communities and their countries.” Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore, *available at* <http://www.wipo.int/tk/en/> (last visited Dec. 10, 2010).

4. ‘Kente’ is a derivative of ‘kenten’, the Twi language word for basket. The name depicts both the art of weaving employed to create kente, and the conceptual mosaic framework of every kente design. Twi is a language spoken by many tribes within the middle belt of Ghana. ‘Adinkra’ means ‘to say goodbye’. It is also a Twi word.

nobility to commemorate special events or to laud heroes. Each kente design has a phrasal name which serves the dual purpose of identifying the design and acting as a historical record of the community's significant persons and experiences. The other form of TCE in Ghana, adinkra, is a language expressed in symbols and shapes.⁵ Each shape or symbol makes a statement usually proverbial or affirmative of a value.⁶ Just like kente, adinkra symbols were originally created within cloth. The creation of kente and adinkra art has now evolved and the designs and symbols are used in every form of material including glass, metals, wood, canvas, and leather.

Adinkra and kente dominate products sold in locations of tourism. They are utilized as national icons in music, film and theatre, media and communication, import and export of non-traditional products, education and research, and on public buildings.⁷ They are also used in artistic industries such as textiles, graphics, crafts, and jewelry, as well as in the manufacturing of household goods.

Globally, TCEs are protected by national intellectual property laws. Domestic laws are supported by an international legal regulatory framework administered by WIPO and the United Nations Educational Scientific and Cultural Organization (UNESCO). Ghana protects and regulates its expressions of folklore, especially kente and adinkra, within the Copyright Act of 2005 (Act 690). This Act was passed to replace the 1985 Copyright Law, which was enacted at a time when Ghana was under military rule. The purpose of the law is to bring the provisions on copyright and the Copyright Office into conformity with the 1992 Constitution of the Fourth Republic of Ghana.⁸

Act 690 vests all rights in folklore in perpetuity⁹ in the President of Ghana as trustee for the Ghanaian people. It creates a National Folklore Board to administer, monitor and register expressions of folklore on behalf of the Republic.¹⁰ The law enjoins the reproduction, communication, and adaptation of expressions of folklore by anyone,¹¹ or the sale or

5. For online dictionaries of adinkra symbols, see websites such as West African Wisdom: Adinkra Symbols & Meanings, available at http://www.adinkra.org/htmls/adinkra_index.htm (last visited Dec. 10, 2010).

6. See W. BRUCE WILLIS, THE ADINKRA DICTIONARY: A VISUAL PRIMER ON THE LANGUAGE OF ADINKRA (1998).

7. A major aesthetic feature of the Kotoka International Airport in Accra is a big presentation of a stool, the adinkra symbol that symbolises the welcome given to guests who enter a home.

8. Copyright Act, *supra* note 1, preamble.

9. *Id.* §§ 4(2), 17.

10. *Id.* §§ 59, 63, 64.

11. *Id.* §§ 4(1), 44.

distribution of works of folklore in or outside Ghana without the written permission in writing of the National Folklore Board.¹² It directs the payment of a fee to the same board for the use of any folkloric material.¹³ Breach of these provisions is made subject to criminal penalties.¹⁴

The law has been equated to the “nationalization of rights to folkloric expressions”¹⁵ because it takes authorship rights away from the creators of expressions of folklore and places them in the President, as trustee for the entire nation. It makes no distinction between works created by unknown authors in antiquity and modern derivative works of individual and identifiable groups. The law also ignores the recognized authorship of distinct TCEs by particular tribes and groups within the country.

This paper examines three tensions created by the manner in which Ghana’s TCEs are regulated under the Copyright Act. The first tension is the divergence between the context of private rights and communally created works. While one of the fundamental principles of copyright law is to reward specific and identifiable sources of creativity, Act 690 grants copyright in communally created art. There is also divergence between the usual designated duration of copyright and the antiquated nature of most expressions of folklore, including kente and adinkra expressions.

The second tension arises from the fact that the placement of copyright in Ghana’s TCEs in the President as trustee of the whole nation removes from the authoring communities the right to economic reward and moral rights of attribution. The character of balanced intellectual property (IP) systems is articulated by WIPO as systems that “reward creativity, stimulate innovation and promote economic development while safeguarding the public interest.”¹⁶ Removing rewards from the authors of the protected art forms precludes these globally accepted objectives of IP law.

The third tension arises in the law of human rights. Within international law, it is accepted that the right to benefit from the products of one’s creative authorship is a human right. Article 15(c) of the International Covenant on Economic, Social and Cultural Rights,¹⁷ and Article 27 of

12. *Id.* § 44.

13. *Id.* § 64.

14. Copyright Act, *supra* note 1, § 44.

15. See Kathleen Ludwig, *The Nationalization And Commercialization of Ghanaian Folklore*, 6 Mich. J. of Pub. Aff. (Spring 2009).

16. See WIPO homepage, available at http://www.wipo.int/about-wipo/en/what_is_wipo.html (last visited Dec. 10, 2010).

17. Adopted for signature, ratification and accession by the General Assembly of the United Nations in Resolution 2200A (XXI) of December 16, 1966. It entered into force on January 3, 1976.

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the Universal Declaration of Human Rights (UDHR)¹⁸ provide for this right. Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples¹⁹ recognizes the right of a community of indigenous peoples to control and benefit from their cultural heritage as intellectual property. Furthermore, on the domestic front, Ghana's Constitution guarantees the right to the free participation in ethnic culture.²⁰ The state is also prohibited by the Constitution from taking over any interest in property without the payment of fair and adequate compensation.²¹

The issues addressed in this paper are particularly important because TCEs are a significant source of capital and wealth creation for indigenous communities in both developed and developing economies.²² This provides an impetus for ensuring legal arrangements that bring the greatest economic return to authors.

In addition to economic equity, there are important social and cultural reasons for states to regulate rights and access to TCEs through IP law and remove them from the public domain.²³ Available literature

International Covenant on Economic, Social and Cultural Rights, *available at* <http://www2.ohchr.org/english/law/cescr.htm> (last visited Dec. 10, 2010).

18. Adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. The Universal Declaration of Human Rights, *available at* <http://www.un.org/en/documents/udhr/index.shtml> (last visited December 10, 2010).

19. Adopted by the General Assembly of the United Nations in Resolution 61/295 on 13 September 2007. United Nations Declaration on the Rights of Indigenous Peoples, *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last visited Dec. 10, 2010).

20. GHANA CONST. ART. 26(1) (1992).

21. *Id.* art. 20.

22. Terri Janke records that the Australian income flow from the aboriginal native art market is valued at 300 million dollars every year. Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* 6, a paper delivered at the 2008 Wentworth Lecture of Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra; *available at* http://www.aiatsis.gov.au/research/conf2009/presentations/Day3/MCC3/MC3_CE3.pdf (last visited Feb. 27, 2011). Molly Torsen discusses with pictorial depiction the scope of inspiration provided by TCEs to the creations of major designers working in fashion, cosmetics, jewelry, furniture and fittings, for trademarks, insignias and logos etc. See Molly Torsen, *Intellectual Property and Traditional Cultural Expressions* (2006), *available at* <http://www.sedi.oas.org/Dt/TC/prquito/PRESENTACIONES/3%204%20-%20Molly%20Torsen%20-%20USA%20-%20IP%20and%20TCEs%20-%20IPL.pdf> (last visited March 15, 2011). For discussions on the scope of economic resources derived from traditional cultural expressions produced by indigenous communities from both developing and developed economies, see also MOLLY TORSEN & JANE ANDERSON, *INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES, LEGAL ISSUES AND PRACTICAL OPTIONS FOR MUSEUMS, LIBRARIES AND ARCHIVES* 41 (2010).

23. Carlos Correa defines the public domain in these words: "Public domain in the IPRs field generally includes any information not subject to IPRs or for which IPRs have expired. Thus, to the extent that TK (traditional knowledge) is not covered under any of the IPRs modalities, it would belong to the public domain and be freely exploited. However, this technically correct view ignores the fact that TK may be deemed subject to customary laws that recognize other forms of ownership or possession rights." The Quaker United Nations Office (QUNO), *Traditional Knowledge and Intellectual Property, Issues and Options Surrounding the Protection of Traditional Knowledge* 3,

establishes that over space and time, indigenous communities have been subjected to appropriation of communally created art forms without any returns because of the lack of legal arrangements to exact compensation or prevent wrongful appropriation.²⁴ TCEs in the form of music, stories, art works and dances were used by people outside the communities that created the art as ideas for new creative works through the application of technology such as photography, audio and video recordings, and film production. These new works then became protected by intellectual property law in favor of the visitors²⁵ because they were created by identifiable authors and fixed in tangible media. Contrarily, the communal authors of the original cultural expressions lacked the legal right to claim benefits for the foundational works because of the communal and aged nature of their authorship.²⁶

Even worse, many of these secondary level works were presented in ways alleged to have violated the spiritual and traditional mores of the communities and distorted the cultures they purported to portray.²⁷ Without the capacity to object to the content and structure of the secondary works, or entitlements to and influence over their adaptation and translation, authoring communities lose the capacity to control the evolution and communication of the deep, sensitive and spiritual meanings of their relevant cultural expressions. In such circumstances,

(Nov. 2001), available at <http://www.quno.org/geneva/pdf/economic/Discussion/Traditional-Knowledge-IP-English.pdf> (last visited Dec. 8, 2011).

24. A first example is the 19th – 20th century recordings of the music of the Ojibwa of northern Minnesota by ethnomusicologist Frances Densmore, who gained fame in the Bureau of American Ethnology for that work housed in the Library of Congress. No corresponding IP rights went to the Ojibwa peoples who created the music. A second example is the famous photographic collections of Hopi spiritual rites taken by missionary Reverend H. R. Voth of the Mennonite mission in the early 20th century. While Voth was acknowledged as the author of the photographs, no benefit accrued to the Hopi who provided the setting for the pictures. See MICHAEL BROWN, WHO OWNS NATIVE CULTURE? ch. 1 (2003). A third example is from the musical works of Michel Sanchez and Eriq Mouquet, which fused digital samples of the music of Ghana, Solomon Islands and other African tribal communities obtained from a cultural heritage archive where ethnomusicologists had recorded music and deposited their recordings. The two musicians used these recordings to create the successful ‘Deep Forest’ musical albums, but gave no attribution or returns to the original musicians. See TORSEN & ANDERSON, *supra* note 22, at 19.

25. Contemporary examples of such situations can be found in the presentation by Molly Torsen, *supra* note 22.

26. Madhavi Sunder raises objection to the stance that treats the cultures of indigenous societies or ‘poor people’s knowledge’ as raw material of innovation—ancient, static, and *natural*—rather than as intellectual property—modern, dynamic, *scientific and cultural invention*. Madhavi Sunder, *The Invention of Traditional Knowledge* 5-7 (2006). See also JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1997).

27. Michael Brown describes such complaints from the Hopi regarding the pictures taken by Voth for which he had copyright, and by the Zia Pueblo regarding images of their sun symbol used as a trademark and the federal state symbol of New Mexico. BROWN, *supra* note 24, at chs. 1 & 3.

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the cultural heritages which bind people together risk the danger of losing their true meaning and value.²⁸

Finally, notwithstanding more than forty years of working towards an international framework, the issue of a globally accepted regime for regulating TCEs in intellectual property law remains unresolved to date.²⁹ No globally significant agreement on intellectual property rights, including the Berne Convention, explicitly recognizes expressions of folklore as a subject matter of regulation within intellectual property law.

Scholars agree that the problem lies in the convergences and divergences between necessary incidents of IP law such as mode of authorship of protected works, tangibility, fixation and duration of rights, and the general character of TCEs.³⁰ As two commentators express the issue, “the very nature of traditional cultural expressions means that they occupy an ambiguous IP status.”³¹

Currently, the 1994 Agreement on Trade Related Intellectual Property Rights (TRIPS)³² has merged regulation of all forms of international trade with intellectual property rights³³ for members of the World Trade Organization (WTO). It has harmonized IP law standards³⁴ and made it

28. Much of the outrage by aboriginal artists or Native American Indians has been in finding their spiritual art used on ‘unfitting’ items. See protests by the Zia Pueblo on the use of their sacred sun sign in the New Mexico flag, and as trademarks. *Id.* at ch. 3.

29. A position noted in the seventh paragraph of the Preamble to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.

30. See Valsala G. Kutty, *National Experiences With The Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines* ch. 111, WIPO/GRTKF/STUDY/1 (Nov. 25, 2002); Stephen Palethorpe & Stefaan Verhurst, *Report on the International Protection of Expressions of Folklore Under Intellectual Property Law* 6, parts 11 & 111, (Oct. 2000).

31. TORSÉN & ANDERSON, *supra* note 22, at 5.

32. TRIPS is the Agreement on Trade Related Aspects Of Intellectual Property Rights, including trade in counterfeit goods. During the Uruguay Round of the General Agreement on Trade Tariffs (GATT), state members negotiated TRIPS as a distinct treaty. It sets out uniform minimum standards in the application of obligations and rights derived from various international intellectual property law treaties during trade. These are: the Berne Convention for the Protection of Literary and Artistic Works, including the Paris Act of the Berne Convention dated July 24, 1971; the Paris Convention for the Protection of Industrial Designs, including the Stockholm Act of the Paris Convention dated July 14, 1967; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 26, 1961; and the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted in Washington on May 26, 1989. TRIPS came into force with the establishment of the World Trade Organization on the first day of 1995.

33. JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 3 (2001) (describing TRIPS as “the first international intellectual property agreement . . . governing the multilateral trading system, thus marrying trade law and jurisprudence with intellectual property law . . .”).

34. GLOBAL INTELLECTUAL PROPERTY RIGHTS, KNOWLEDGE, ACCESS AND DEVELOPMENT 1 (Draho Peter & Mayne Ruth eds. 2002) (“[I]ntellectual property rights have gone global. States around the globe are converging upon the same set of intellectual property standards in areas of law

necessary for states to carefully assess whether domestic IP laws adequately protect citizens in international trade as well as align with the minimum standards in the treaty. Because of TRIPS' firm indication that the treaty only deals with "private rights," the legal anomalies under discussion should raise significant concern for reaching a resolution acceptable to the general community of states. It also necessitates the discussion of how TCEs can be properly promoted, protected and rewarded in global trade through intellectual property law.

This question is extremely important for a nation such as Ghana because of the dominance of products and services using expressions of folklore. And in a region such as West Africa, where indigenous communities straddle countries, ensuring clarity on rights to TCEs is relevant in the very process of regional integration.

The first part of this paper addresses the divergence of Act 690's provisions on expression of folklore and the norms of copyright law and human rights law. The second part of the paper traces the international evolution of the legal anomalies reflected in Ghana's copyright law provisions on expressions of folklore. Commencing with Article 15(4) of the 1971 Act of the Berne Convention for the Protection of Literary and Artistic Works,³⁵ and ending with the 2010 Swakopmund Protocol of the African Regional Intellectual Property Organisation (ARIPO), this paper examines the international law framework which has evolved largely under the auspices of WIPO, UNESCO and regional international organizations such as the ARIPO.

The paper looks at trends in this international legal arrangement. Until recently, the dominant trend was to compromise norms in the law of copyright such as private rights, duration of copyright, tangibility, and fixation of copyrighted works by creating special regimes of law around only TCEs. These special regimes are then placed within copyright legislation. However, current trends recognize that copyright law is not the only appropriate arena for regulating expressions of folklore authored by communities. This is because expressions of folklore span every aspect of human resource. They comprise copyrightable tangible and intangible expressions. They include expressions that may be used for branding and leading to trademark rights. Rights may arise due to

such as copyright, patents, trademarks and industrial designs, as well as upon the remedies available for the enforcement of these rights").

35. This provision in the Berne Convention gave states the mandate to vest works of unknown authors in a national authority subject to a declaration made to the World Intellectual Property Organization (WIPO). Expressions of folklore are deemed to be works of unknown authors which fit into copyright legislations through this provision in the Berne Convention.

geographically restricted productions that may be protected with geographical indications. Patentable formulae and processes developed in folk medicine, agriculture, and even during the creation of artwork should also lead to rights in patent law, while secret rituals and records may be protectable as trade secrets. It is also recognized that the evolution of new TCEs in contemporary society is often the work of smaller identifiable groups, including individuals, and this fact must be recognized for a national IP system to be credible.³⁶

The more recent trend is to regulate TCEs by enacting *sui generis* legislation for TCEs. Such statutes incorporate all forms of IP regulation within the single piece of legislation.³⁷ At the treaty level, the *sui generis* regime set out in the Swakopmund Protocol³⁸ of the ARIPO recognizes rights in every arena of IP law.³⁹ It also creates an interface between customary law as a foundation for cultural rights in TCEs and IP law.⁴⁰ WIPO's parallel response is the *Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore* by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). These draft provisions incorporate policy objectives and principles recognising TCEs

36. Two Australian cases establish this recognition of the evolution of authorship of expressions of folklore from communal collaboration to individual efforts. In *Yumbulul v. the Reserve Bank of Australia*, while acknowledging the original source of the folkloric art in issue—the Morning Star Pole used by several aboriginal communities—and the need to respect the cultural rights of the communities, the court distinguished between the artists' individual rights to his personal sculpture of the Morning Star Pole and obligations arising from the licensing agreement he had entered into regarding the use of a picture of this sculpture, and the rights of the community that had taught him the rituals regarding the Pole. The court remarked on the fact that Australian copyright law made no room for recognition of such cultural rights. See a review of the decision in *Yumbulul v. Reserve Bank of Australia and Others*, 21 I.P.R. 481 (1991). Again, in *Bulun Bulun & Milpururru v. R & T Textiles*, the court based its analysis of intellectual property rights regarding an unlicensed reproduction of artwork in textiles on copyright law. While refusing to find joint ownership rights based on rules of equity between the artist and the community authors of the inspiring art, the court recognised a fiduciary obligation by the individual artist to the community for the spiritual lore from which the art was developed. See Aboriginal Education Board of Studies, New South Wales website, available at <http://ab-ed.boardofstudies.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/case-studies-of-copying-and-appropriation/case-study-5-johnbulun-bulun-and-m-v-randt-textiles/>.

37. See Special Intellectual Property Regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge, Panama Law no. 20 (June 2000); Indigenous Peoples Rights Act of the Philippines' (2007).

38. Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010), available at <http://www.cbd.int/doc/measures/abs/msr-abs-aripo-en.pdf> (last visited Dec. 10, 2010) [hereinafter Swakopmund Protocol].

39. Section 19(2)(a) details protections found in copyright law for copyrightable expressions. Section 19(2)(b) grants traditional protections in trademark law to the use of 'words, signs, names and symbols.' Section 19(3)(c) confers traditional legal protection in geographical indications, and 19(4) confers protection from 'unauthorised disclosure' of secrets.

40. Discussed in Part Three of this paper.

as cultural intellectual creative assets of communities which form the basis for communities making claims in all areas of IP law—not only copyright law.⁴¹

These treaty-level instruments make the distinction between protecting the interest of communal originators of folkloric expressions through a public entity, and private claims in IP law by individual authors who have used TCEs for derivative works. In so doing, the necessary balance is struck between protection of expressions of folklore as a community asset, and granting private IP rights to stimulate and reward individual creativity. The current trend removes the focus on regulating TCEs through just copyright law, and makes room for a more sophisticated structure of claims to TCEs through trademark, patent and trade secret laws.⁴²

The third and final part of this article suggests new models for dealing with TCEs in Ghana. It recommends the creation of a *sui generis* regime which protects and promotes the cultural heritage of ethnic groups. The IP claims of individuals using TCEs for original works would be protected through the appropriate legislation in IP law. In doing so, the necessary balance is struck between protection of expressions of folklore as a community asset, and granting private IP rights to stimulate and reward individual creativity.

I. LEGAL NORMS AND THE PROVISIONS ON EXPRESSIONS OF FOLKLORE IN ACT 690

The first use of the word “folklore” is attributed to William Thoms in 1846 as an expression he coined to replace the words “popular antiquities” and “popular literature.”⁴³ There are wide divergences regarding the definition in scope, content and character of folklore.⁴⁴ This

41. See Intellectual Property and Traditional Cultural Expressions/Folklore, available at http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf (last visited March 31, 2011).

42. See INDIGENOUS INTELLECTUAL PROPERTY RIGHTS, LEGAL OBSTACLES AND INNOVATIVE SOLUTIONS (Mary Riley ed., AltaMira Press 2004). These series of articles discuss regulations, institutions and issues in the protection of TCEs through all forms of IP law in the United States of America, Canada, Honduras, Suriname, India, Nigeria, Peru, Guatemala, and New Zealand. In “Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Museums, Libraries and Archives,” Molly Torsen and Jane Andersen also discuss issues in regulation of rights to TCEs in Australia, New Zealand, Canada, the United States, and the United Kingdom, using all forms of IP law. TORSÉN & ANDERSEN, *supra* note 22.

43. Kutty, *supra* note 30, at 7.

44. *Id.* (citing the Standard Dictionary of Folklore as providing twenty-five definitions of folklore). See also Palerthorpe & Verhurst, *supra* note 30, at 6.

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contention has slowed the process of arriving at an agreement on international regulation of folkloric expressions.⁴⁵

The accumulation of creative works which make up expressions of folklore include folk literature such as proverbs, riddles, myths, legends and fables. Folk music utilizes traditionally made instruments. Folk art is found in murals, sculptures, jewelry, and carvings. Folk medicine includes processes of extraction and procedures of administration of medicines from oral traditions. Folk industries span pottery making, textile weaving, hair braiding and sculpture, cosmetology, traditional forms of agriculture, and many more.⁴⁶

Three concepts are central to an understanding of folklore as a genre of knowledge: 1) folklore creatively emanates from the cultural aspects of human life; 2) it is authored by communities; and 3) it is transmitted trans-generationally.⁴⁷ These elements are present in the definition of folklore in Section 76 of Act 690:

[t]he 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 is not known, and any similar work designated under this Act to be works of folklore.

Act 690 singles out for mention adinkra and kente designs in its definition of expressions of folklore.⁴⁸ The reason is not difficult to appreciate. Apart from their exquisite beauty, adinkra and kente are two of the most visible, commercialized and versatile art forms emanating from Ghana.⁴⁹ Kente is a cultural asset given by Ghana to the world. Globally, its most significant and popular use has been for graduation gowns and tassels for educational institutes.⁵⁰ Adinkra is a language expressed in art form, which would have only aesthetic value for the

45. Adebambo Adewopo, *Protection and Administration of Folklore in Nigeria*, 3 SCRIPT-ED 4 (March 2006).

46. Kutty, *supra* note 30, at 7–10.

47. *Id.* at 7; Palerthorpe & Verhurst, *supra* note 30, at 6.

48. Copyright Act, *supra* note 1, § 76.

49. In the introduction of “The Copyright Thing Doesn’t Work Here, Adinkra and Kente Cloth and Intellectual Property in Ghana,” Boatema Boateng provides a quick skim of the Asante and Ghanaian historical contexts of the development of the kente and adinkra art forms from the 11th century and their place in Ghanaian cultural identity. The book deals extensively with national cultural and legal developments around these two forms of art and their use and relevance globally. BOATEMA BOATENG, *THE COPYRIGHT THING DOESN’T WORK HERE, ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* (2011).

50. See, e.g., Midwest Global Group, Inc. website, <http://kente.midwesttradegroup.com/>.

unlearned.⁵¹ It is fast expanding into an expression of African identity.⁵² With the global growth in use of tribal and ethnic art forms for fashion and design, it is easy to see the place kente and adinkra can have in this commercially expanding space.⁵³

A. IPLAW ISSUES RAISED BY ACT 690

Private Rights/Communal Rights

In Ghana's multi-ethnic society, the identification of the members of any community for the purpose of determining the author(s) of a particular folkloric expression would prove to be an extremely difficult task. Community membership is determined by tribal rules and may be through matri- or patri-lineage. However, lineage trails are easily obfuscated by ethnic intermarriages and the conflicting rules on lineage from any two groups. Furthermore, community membership is often expanded by the presence of long-term resident migrants. Exacerbating the difficulty of determining the exact authors of an expression of folklore is that folkloric expressions are changed subtly over long periods of time, thus obscuring the exact moment of authorship.

As a response to this chasm between communal authorship of expressions of folklore and the need to identify authors of copyrighted works, Act 690 makes the president the trustee of folkloric expressions.⁵⁴ The Berne Convention provides the framework for the legislative position of identifying an authority to hold the rights for works of unknown authorship. Per Article 15(4)(a), states may enact legislation to designate a competent authority to represent authors of "unpublished works where the identity of the author is unknown."

It is relevant to note that the Berne Convention anticipates that such unpublished works would be created by particular authors. Article 15(4)(a) provides:

51. For online dictionaries of adinkra symbols, see websites such as West African Wisdom: Adinkra Symbols & Meanings, available at http://www.adinkra.org/htmls/adinkra_index.htm (last visited Dec. 10, 2010).

52. The adinkra symbol 'Sankofa,' which is depicted by a bird with its neck turned towards the tail and means 'it is wise to return to refer to the past for its good things' was used as the theme of an African debut fashion show in Nigeria by Korto Momolou, a Liberian born Canadian, who participated in the famous fashion reality show Project Runway and is fast gaining fame as a fashion icon.

53. Torsen, *supra* note 22 gives a vivid power point presentation of the scope of some extremely lucrative native arts pieces from all continents.

54. Copyright Act, *supra* note 1, § 4.

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In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent *the author* and shall be entitled to protect and enforce his rights in the countries of the Union.

The first incongruity with accepted tenets of copyright law that Act 690 generates is to grant copyright in communally created expressions such as folklore. This anomaly is heightened by placing the copyright in an individual—the president.⁵⁵

These provisions remove access to folklore as “economic and cultural assets”⁵⁶ for the indigenous and local communities which author them. Tension is created by the paradox that although by law, these arts are not in the public domain for use as a public commons, it is still recognized that they constitute a common “cultural heritage” which is preserved and developed through social interactions. Under Sections 4 and 64 of Act 690, no Ghanaian may obtain rights to adaptations, translations or transformations of any existing kente and adinkra designs unless they have paid for these rights. And yet the definition of folklore recognizes that the arts are “created, developed and preserved”⁵⁷ by Ghanaian communities. The law seems blind to the fact that the cultural use, preservation and development of these folkloric arts would naturally lead to their adaptation, translation and transformation. Thus, by directing that adaptation, translation and transformation must first be paid for; the law is overtly contradictory.

It can only be presumed that the intention of the law has no application in the domestic daily use of these arts and it must not be literally interpreted. A purposive interpretation that may be given these provisions would be that the law intends to prevent anyone, Ghanaians included, from utilizing these arts industrially or obtaining private intellectual property rights in any adaptation, translation and transformation of these arts without first paying for the right to do so.

An unacceptable national consequence of the imbalance created by the vesting of rights to TCEs such as adinkra and kente in the President is seen when the domestic law is mirrored against international use of

55. *Id.*

56. *See* definition of TCEs and Expressions of folklore by WIPO, *supra* note 3.

57. Copyright Act, *supra* note 1, § 76.

certain Ghanaian TCEs. The famous Kwaku⁵⁸ Anansi character is an interesting phenomenon in Ghanaian folklore. Anansi stories evolve from community fireside⁵⁹ storytelling. The wilder the variant of Anansi's wisdom and escapades brought by each participant seated around the fire, the more exciting the gathering becomes. Anansi, as a character of fables, has obtained global stature through the diaspora of African communities, most likely from stories that provided comfort during the hard days of slave travel. With this evolution, persons outside Ghanaian political boundaries have obtained copyrights in works using the folklore. Examples are *Anansi and the Box of Stories: A West African Folktale* by Stephen Krensky;⁶⁰ *Spider and the Sky God: An Akan Legend* by Deborah M. Newton Chocolate,⁶¹ *Anancy and the Sky God*,⁶² and *Caribbean Favourite Tale Anansi* by Brian Gleeson.⁶³ Also, *The Magic of Anansi*⁶⁴ is directed by Jamie Mason and produced by Tamara Lynch for the National Film Board of Canada.

While persons outside Ghana can produce books, films and theatre using Anansi stories, Ghanaian citizens would be deemed to have infringed Sections 4, 64, and 76 of Act 690 if they produced works involving Anansi stories. They can only do so with the permission of the National Folklore Board and after payment of fees. If the current law is to act as a tool for development, it is important that it is reviewed and amended, because as is, the law disincentives development.

Duration of Copyrights

The harms discussed above are further aggravated by the law placing copyright in the President in perpetuity.⁶⁵ Copyrights are conferred for defined periods.⁶⁶ Just like every arena of law, IP law is backed by policy objectives. All intellectual property laws are structured to encourage the

58. Kwaku is the name given to all males born on Wednesdays within the Akan group of tribes. The Akans have 'day names' for both male and female, giving each person a name without effort by parents or caregivers. 'Ananse' is the Akan word for 'spider.' Kwaku Anansi is therefore the spider man.

59. This is the regular gathering of families and friends around huge fires at night.

60. STEPHEN KRENSKY, *ANANSI AND THE BOX OF STORIES: A WEST AFRICAN FOLKTALE* (2007).

61. DEBORAH M. NEWTON CHOCOLATE, *SPIDER AND THE SKY GOD: AN AKAN LEGEND* (2005).

62. BRIAN GLEESON, *ANANCY AND THE SKY GOD* (1997).

63. BRIAN GLEESON, *CARIBBEAN FAVOURITE TALE ANANSI* (1992).

64. *The Magic of Anansi*, a short film directed by Jamie Mason and produced by Tamara Lynch, available at <http://www3.nfb.ca/animation/objanim/en/films/film.php?sort=cc&id=50422> (last visited Mar. 31, 2011).

65. Copyright Act, *supra* note 1, § 17.

66. Under Article 7(6) of the Berne Convention, copyrights are for the lifetime of the author and 50 years after their death, a period of time that may be extended through national legislation.

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exposure of new creative expression and useful information into the intellectual commons, after the originator has been rewarded with monopoly rights for a period of time. Even in trademark law, where a mark is prima facie protected without time limit, rights are conferred within territorial enclaves. Failure to protect it from third party users would also lapse the right to exclusive use.

This eventual 'granting of access' purpose of IP law is upturned by the 'perpetual vesting' of expressions of folklore in the President of Ghana by Section 17 of Act 690. The provision is technically supported by international law through the wording of Article 7(6) of the Berne Convention. Article 7(6) allows States to fix copyright protection for a period longer than in the Convention. However it must be remembered that Article 18(1) provides that the Berne Convention applies to "*all works which, at the moment of the [Convention's] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.*" Thus at the time these provisions were first enacted in determining what works are in the 'public domain' requires territorial interpretation and application.

Several international instruments support the perpetual protection of cultural heritage from appropriation and distortion. These include the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)⁶⁷ and the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972).⁶⁸ The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995),⁶⁹ and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)⁷⁰ also provide an international legal framework.

67. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 13(d) (1970), available at <http://dosfan.lib.uic.edu/usia/EUSIA/education/culprop/unesco01.html> (last visited Mar. 1, 2011).

68. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, arts. 2, 4 (1972), available at <http://whc.unesco.org/archive/convention-en.pdf> (last visited Mar. 1, 2011).

69. Convention on Stolen or Illegally Exported Cultural Objects, art. 3 (1995), available at <http://www.ifar.org/upload/PDFLink470fad94529d6UNIDROIT%20Convention%20on%20Stolen%20or%20Illegally%20Exported%20Cultural%20Objects.pdf> (last visited Mar. 1, 2011) (providing the right to claim a return of stolen cultural heritage within three years following knowledge of the theft and seventy-five years following the act of theft or such longer period that national law may allow).

70. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, arts. 2(1), 3 (2003), available at http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Mar. 1, 2011). Article 2(1) recognizes that such cultural manifestations are in a constant state of recreation by 'communities and groups in response to their environment, their interaction with nature and their history,' but nevertheless demand safeguarding

It is notable that even in jurisdictions that purport to strictly apply IP rules, exceptions have been made to this basic rule of duration in the cultural arena. Under United Kingdom copyright law,⁷¹ royalty rights from use of the famous work “Peter Pan” subsist in perpetuity for the benefit of the Great Ormond Street Hospital for Children.⁷² Molly Torsen and Jane Anderson report of a proposal put forward in 2003 in Australia to grant perpetual protection for the artwork of the renowned indigenous artist Albert Namatjira.⁷³ These examples show that the central principle of limited duration, essential to the copyright balance, may “*be twisted to accommodate certain specific situations.*”⁷⁴

Notwithstanding the support for perpetual protection of TCEs found in the national law and international instruments described above,⁷⁵ the point made by this paper is that such legislative provisions create a legal conundrum irreconcilable in general IP law tenets. There is clearly the need to respond to the concerns and interests⁷⁶ behind the general regulation of TCEs in a more sophisticated manner. This is especially so because Ghana’s interests and concerns cannot only be centered in the prevention of appropriation by more technologically advanced users of folkloric expressions. They ought to include the use of TCEs for domestic wealth creation and development of national identity. They also ought to include the enhancing of national security and integrity through non-interference with fundamental human rights and the rights of ethnic groups.

of a right as an incident of human rights law. This is the thrust of the argument in intellectual property scholarship. See BROWN, *supra* note 24; Kutty, *supra* note 30; Palethorpe & Verhurst, *supra* note 30; and BOATENG, *supra* note 49 (works which point out that such change makes TCEs identified in broad form, ineligible for protection in intellectual property law because of the specificity required to make a creative work protectable in intellectual property law).

71. Copyright, Designs and Patents Act, No. 816 C.21 (1988) (United Kingdom) § 301, sched. 6. See also Copyright, Designs and Patents Act 1988 (Commencement No. 1) Order 1989, available at http://www.wipo.int/clea/docs_new/pdf/en/gb/gb046en.pdf (last visited May 20, 2011).

72. Copyright, Designs and Patents Act, No. 816 C.21 (1988) (United Kingdom) § 301, available at <http://www.legislation.gov.uk/ukpga/1988/48/section/301> (last visited May 20, 2011).

73. TORSSEN & ANDERSON *supra* note 22, at 37.

74. *Id.*

75. Including the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (last visited Mar. 1, 2011).

76. Palethorpe and Verhurst describe the concerns and interests in regulating expressions of folklore as “numerous, complex, often overlapping or in conflict, and at times dependent on their country of origin.” They span “[the preservation of] Cultural Heritage – the dominant rationale behind the identification, conservation, preservation, and dissemination of folklore; Cultural Improvement of the nation and its contribution to the ‘advancement of global culture;’ Protection of Minorities [expressed in] self-determination, recognition of customary law and socio-economic development; Development – [the] potential role of the protection of folklore in the socio-economic development of developing countries, [and] Fundamental and Human Rights – the right to culture, cultural autonomy and preservation, and freedom of expression.” Palethorpe & Verhurst, *supra* note 30, at 16-18.

IP Law and Ideas, Concepts and Language

A fundamental principle of copyright law is that no one can obtain rights in concepts and ideas. This is echoed in Section 2 of Act 690.⁷⁷ Kente and adinkra constitute specific literature in graphic art form. The literature in kente is obtained from the names and phrases given to the designs. The literature in adinkra is interpreted from the shapes of carefully arranged symbols.

This paper argues that the text of ancient kente and adinkra art, set within the traditional loom woven fabric and screen printed fabric, constitutes the expression of folklore created, preserved and developed by ethnic communities of Ghana. This is what should be covered by Section 76 of Act 690. Beyond the known and identified texts, adinkra and kente are concepts – the forming of phrases from symbols or patterns. Any group of people can develop such language, if they define the understandings they choose to attach to their various patterns and symbols. Thus to lay claim to the folkloric art form called adinkra or kente, without defining the boundaries of expressions claimed, offends another fundamental tenet of intellectual property law. It is tantamount to copyrighting language. Interestingly, to date, the National Folklore Board has not completed the record of folklore under its trust.⁷⁸ Significantly, the material in its current directory covers only adinkra symbols, and not kente patterns.

The economic reality of contemporary Ghana is that although the use of adinkra remains within the known texts, there are many patterns passed off as kente which do not reflect any known expression. Kente thus has evolved beyond the original context of creating a text with fabric to represent the concept of brightly colored patterns arranged linearly. A second evolution of kente and adinkra is the shift from fabric on to every form of material and into every genre of art. Such development in the use of the two artistic literatures did not emanate from the traditional communities that created the art forms. They arose out of industrial uses of the art in the mass production of fabrics in cotton, linen, silk and polyester, or creation of paper designs and designs for mugs, pottery, glass and ceramics.

77. Copyright Act, *supra* note 1, § 2 (“Copyright shall not extend to ideas, concepts, procedures, methods or other things of a similar nature”).

78. Interview with Mr. Lemaire (Jan. 7, 2011) (transcript on file with author).

B. HUMAN RIGHTS, CONSTITUTIONAL LAW AND CRIMINAL LAW
ISSUES RAISED BY ACT 690

Intellectual Property Rights as Human Rights

The general protection of TCEs with intellectual property law is supported by human rights law.⁷⁹ Article 15(c) of the International Covenant of Economic, Social and Cultural Rights,⁸⁰ and Article 27 of the Universal Declaration of Human Rights, (UDHR)⁸¹ articulate the right to benefit from the products of one's creative authorship as a human right. Article 31 of the UN Declaration on the Rights of Indigenous Peoples⁸² recognizes the right of a community of indigenous peoples to the control and benefits from their cultural heritage as intellectual property. Ghana constitutionally guarantees the customary law right to free participation in ethnic culture.⁸³

Article 20 of the Constitution strictly prohibits the taking over of any property or interest in property of any form by the state except after prompt payment of fair and adequate compensation. Section 4 of Act 690 is therefore in conflict with Article 20 of the 1992 Constitution. It is also in conflict with the inalienable human right of every person to benefit from the result of their scientific, literary or artistic work articulated in Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights.

Discrimination

The third arena in which the provisions of Act 690 under discussion result in constitutional breach is in the area of discrimination.⁸⁴ Visitors to Ghana will enjoy its TCEs from many sources. In the identification and appropriation of only the kente and adinkra art forms in the name of the president,⁸⁵ Act 690 discriminates against the community creators of these identified arts. Further, in the requirement for them to pay to utilize their art forms, they are discriminated against. Article 17(2)-(3) of Ghana's Constitution direct that

79. See UNESCO Legal Developments, General Comment No. 17 (2005), available at http://portal.unesco.org/culture/en/ev.php-URL_ID=30545&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Mar. 3, 2010).

80. International Covenant on Economic, Social and Cultural Rights, *supra* note 17.

81. Universal Declaration of Human Rights, *supra* note 18.

82. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 19.

83. GHANA CONST. ART. 26(1) (1992).

84. *Id.* art. 17.

85. Copyright Act, *supra* note 1, § 76.

(2) A person shall not be discriminated against on grounds of gender, race, color, **ethnic origin**, religion, creed or social or economic status.

(3) For the purposes of this article, **"discriminate" means to give different treatment** to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, color, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages.

The Musician's Association of Ghana and especially Professor John Collins, Department of Music, University of Ghana has described the demand for payment of the fee as a form of property tax.⁸⁶

Criminal Law

Section 44 of Act 690 is also irreconcilable with the principle of legality in criminal law "*nullum crimen, nulla poena sine lege*" (no crime or punishment without prior written law). Section 44(2) of Act 690 attaches criminal sanctions to the translation and adaptation of 'works of folklore' without any identification of what is meant by "works of folklore" save for the specific cases of kente and adinkra designs. This lack of clarity on what is meant by 'works of folklore' pre-empts the validity of Section 44(2) in the light of Article 19(11) of the Constitution which provides that "no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law."

Obfuscation of Issues of Human Rights, Property Rights, and IP Rights and Regulation of TCEs

Officers⁸⁷ of the National Folklore Board present the position that in interpreting Sections 4⁸⁸ and 64⁸⁹ of Act 690, the Board makes a distinction between the maintenance, development and promotion of

86. For a list of articles written by John Collins on this and other subjects, particularly *The 'Folkloric Copyright Tax' Problem in Ghana*, see Scientific African, John Collins webpage, available at <http://www.scientific-african.org/scholars/jcollins>.

87. Interview with Mr. A. H. Lemaire, Director, and Mr. Darimoah, Officer of the National Folklore Board (January 7 2011) (transcript on file with author).

88. Section 4 vests all expressions of folklore in the President and prohibits reproduction, communication, translation, transformation and adaptation of expressions of folklore. Copyright Act, *supra* note 1, § 4.

89. Which requires payment to the National Folklore Board before use can be made of any expressions of folklore. *Id.* § 64.

expressions of folklore and commercial use of folkloric expressions. However, the concept of ‘maintenance, development and promotion’ of expressions of folklore is not articulated in Act 690 and the law makes no distinction between the ‘reproduction, communication and adaptation,’ enjoined under Section 4, and maintenance, development and promotion of expressions of folklore.

The argument of officers of the Board is that it is the use of existing kente and adinkra expressions by commercial entities in industrial products that is enjoined by Section 4 of Act 690. Manufacturing and service-providing corporate bodies who utilize adinkra and kente are the ones to be regarded as ‘reproducing and communicating’ the art and are the entities targeted to obtain permission and pay fees for using the adinkra and kente expressions. They go on to say that when traditional artists create new folkloric works—especially adinkra and kente—from known expressions and within their traditional setting in communities, this is considered to be the maintenance, development and promotion of the culture and art. No permission or cost is incurred in producing such new manifestations of kente and adinkra. This position was confirmed for me through interviews with J. A. Larkai and Bernard Bosumprah⁹⁰, both of whom have worked in the position of Copyright Administrator, the body under which the National Folklore Board is administratively placed. The position of Mr. J. A. Larkai is that because Ghana’s folkloric expressions are the cultural heritage of the entire nation, anyone who wishes to exploit it has to contribute to a fund for maintaining the art and this is what is provided for in Section 64 of Act 690. As he put it, “*the authors of our folkloric expressions are unknown, and the art belongs to all of us. If you want to exploit it commercially, then you must make a contribution to a fund for maintenance of the heritage.*”

He adds that the maintenance function of indigenous artists entitled them to exemption from such fees. Officers of the National Folklore Board seem to have taken the view that the human right to the use of one’s culture is protectable when TCEs are used in traditional settings. Businesses, even if Ghanaian or owned by Ghanaians, lose that right through the cloak of corporate personality.⁹¹

90. Interview with J. A. Larkai and Bernard Bosumprah (Feb. 7, 2011) (transcript on file with author).

91. These companies are too numerous to be all named in this paper. The use of adinkra and kente by corporate Ghana is also diverse in range. The Cocoa Processing Company uses the ‘sikafutro’ (wealth) symbol as part of trade dress. Printex and Akosombo Textile Companies use adinkra and kente in the fabrics they produce. The Savings and Credit Bank uses the ‘nkotsemesefo pua’ (the ‘discretion’ symbol for the maidservants of queens) as a mark. Vodafone Ghana, a telecom

Certain concerns must be addressed as an offshoot of such a position. First, because of the silence of the entire Act 690 on any circumstances which allow exemption from fee payment for the use of TCEs, and especially because indigenous artists also make commercial use of the art, the exemption presented by officers of the National Folklore Board is not supported by the law. Kente is not created for fun. Short of productions for royal courts, TCEs are crafted for sale and to support livelihood. In their regular sale of TCEs for their livelihood, especially kente and adinkra products in wood, pottery and fabric, crafts people are constantly reproducing and communicating the art. Exempting them from payment of the fees required in Section 64 just because of their small scale traditional work setting constitutes discrimination against the rest of Ghanaians who use the crafts in an industrial context.

This is the sort of dichotomy that courts have to deal with when legislation does not clarify what is clearly human rights arising from cultural circumstances,⁹² and commercial rights arising from the use of culture. In the Australian case of *Terry Yumbulul v. Reserve Bank of Australia*,⁹³ Yumbulul had been taught the sacred meanings of the morning star pole, a totem of his clan. He later licensed the Aboriginal Artists Agency to use a representation of his sculpture of the pole. When his design appeared on a 10 dollar bill, he sued the issuing bank. The court's elucidation of the transaction was that Yumbulul had duly entered into a contract for which his rights and obligations should be construed within the law of contract. The interest of his Galpu clan was in Yumbulul's "*cultural obligation to his clan to ensure that a pole was not used or reproduced in any way which offended against their perceptions of its significance.*"⁹⁴ This could not be recognized by law because such considerations were not present in Australian copyright legislation.

In the Ghanaian context, propounding the free use of existing adinkra and kente expressions by indigenous artists while demanding payment for their use by other commercial users creates lack of clarity and integrity in the practical interpretation of the law. This is especially so

company, uses a collection of adinkra symbols as a trade dress for some of its products. HFC Bank uses the 'ebankese' (fortress) symbol as a trademark. The CAL Bank uses 'Nsaa' (symbol for excellence) and Databank using the 'akofena' symbol of battle readiness as a trademark.

92. Rights that have been clearly articulated in international instruments such as Article 15(c) of the ICESR and Article 31 of the UN Declaration on the Rights of Indigenous Peoples. *See supra*, notes 68-71. Ghana has incorporated these international principles in Articles 17 and 20 of the national Constitution and so all domestic legislation must conform with these principles.

93. *Terry Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481. For more on the judgment of French J., see DORIS ESTELLE LONG & ANTHONY D'AMATO, A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY 1028 (2000).

94. *Yumbulul*, 21 I.P.R. 481 at 483.

because there is no distinction in Act 690 on the circumstances for such differing treatment. Because of the lack of clarity on any such distinction, the inevitable social outcome of the arrangements in the law is defiance in the general adaptation, translation and transformation of these art forms without reference to the National Folklore Board.

The second concern raised by this view on non-payment for the use of TCEs by indigenous artists arises within the language of Article 31 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which states that:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and **traditional cultural expressions**, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their **intellectual property** over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁹⁵

The first use of the operative words, “maintain, control, protect and develop,” deals with the human right to have unfettered access to traditional cultural expressions created by communities. The position that fees must not be paid for the ‘maintenance and development of TCEs by indigenous artists would therefore seem to be founded on international law principles. However, the second use of the operative words in the same article deals with the right to have intellectual property in traditional cultural expressions. Thus, even if Article 31 forms the basis of the discriminatory stance of the National Folklore Board in favor of indigenous artists working ‘in situ,’⁹⁶ it should also form the basis to grant IP rights to indigenous artists for any new creative adaptations, translations, or transformations of the folklore. Notably, Act 690 fails to do this.

Kente and adinkra have been adapted and translated within media in ways unimaginable to the original authors. A most devastating impact of Act 690 is the lack of incentive for Ghanaians to lay claim to creative innovations they bring to the development of these beautiful TCEs. The

95. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 19, art. 31 (emphasis added).

96. On the site of the authoring communities.

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need to encourage, rather than discourage control and intellectual property rights over new and evolving renditions of these folkloric expressions for wealth creation cannot be overemphasized.

It is important to follow the trajectory of international legal regulation of expressions of folklore before formulating suggestions for solving the conundrum that the provisions on folklore in Act 690 represent.

II. INITIATIVES IN INTERNATIONAL INTELLECTUAL PROPERTY INSTRUMENTS TO PROTECT EXPRESSIONS OF FOLKLORE

The Berne Convention

The 1971 Paris Act of the Berne Convention For the Protection of Literary and Artistic Works is recognized by scholars as the starting point of the international legal regulation of folklore.⁹⁷ This recognition explains the prevalent focus on achieving the social and economic objectives of protecting TCEs within the legal framework of copyright law. Article 15(4) of the 1971 Paris Act provides for national legislations to designate a competent authority to represent unknown and unidentified authors of literary and artistic works and to notify the Director General of WIPO via a complete written declaration concerning the designated authority.

There are difficulties in applying the copyright protection provisions of the Berne Convention to expressions of folklore. First, rights are conferred only on original works, and originality is the focus of protection.⁹⁸ Inconsistent with receiving protection under this requirement, most TCEs are minor variations of a slowly evolving creative expression. This process makes it difficult to identify the moments of innovation for these expressions. Secondly, only two types of authorship are recognized under the Berne Convention. Individual authorship is articulated in the provisions by the pronoun 'his' whenever the sole author is being referred to,⁹⁹ and the second type is joint authorship. No protection is available for the diffused group of authors. Thirdly, rights are conferred for the fixed period of the lifetime of the author plus fifty years¹⁰⁰ thereafter, unless member states choose to

97. See Kutty, *supra* note 30; Palethorpe & Verhurst, *supra* note 30.

98. Berne Convention for the Protection of Literary and Artistic Works, art. 2(3) (1886), available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html [hereinafter Berne Convention].

99. *Id.* art. 2(6).

100. See *id.* art. 7.

extend the period of protection. These terms directly oppose the communally aged and traditionally held forms of folkloric works.

On the other hand, protection conferred on jointly authored works remains in effect until the death of the last surviving author.¹⁰¹ This is a situation suited to the generational and communal manner of creation of folkloric works. Fixation is also not a requirement of Berne for copyright protection.¹⁰² Article 2¹⁰³ allows protection for works, whatever may be their mode or form of expression. The Convention leaves it as a matter of legislation in the countries of the Union to prescribe whether works shall not be protected unless they have been fixed in some material form. These elements in the Convention have made room for State signatories of the Berne Convention to incorporate within their copyright laws¹⁰⁴ provisions on folklore, without violating the letter and spirit of Berne.

Tunis Model Law on Copyright for Developing Countries

In March 1976, the Tunis Model Law on Copyright for Developing Countries was adopted by the Committee of Governmental experts convened by the Tunisian Government with the assistance of the Secretariats of UNESCO and the International Bureau of WIPO. It was drafted to assist states in framing or revising domestic legislation to comply with the 1971 Paris Act of the Berne Convention and the Universal Copyright Convention. It is described as having two basic features:¹⁰⁵ first, to be compatible with both the 1971 Paris Act of the Berne Convention and the Universal Copyright Convention; and second, to cater to both the Anglo-Saxon and the Roman legal approach of whichever developing country that intends to use them. Section 1 expands the ‘Protected Works’ found in the Berne Convention,¹⁰⁶ to include tapestry¹⁰⁷ and ‘works of drawing.’ The meaning of ‘works of applied art’ is also expanded by adding that the art may be ‘handicraft or produced on an industrial scale.’ Section 1(3) and Section 6 provide a

101. *Id.* art. 7bis.

102. *Id.* art. 2.

103. *Id.* arts. 2(1), 2(2).

104. For a current list of countries with such provisions in their copyright law and the legislative texts of countries regulating traditional cultural expressions, see Legislative Texts on the Protection of Traditional Cultural Expressions, available at <http://www.wipo.int/tk/en/laws/folklore.html> (last visited February 27, 2011).

105. Commentary drafted by the Secretariat of UNESCO and the International Bureau of WIPO, Section 4.

106. Berne Convention, *supra* note 98, art. 2.

107. Tunis Model Law on Copyright for Developing Countries, § 1(14) (1976), available at http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf (“in view of the special importance of this type of artistic creation in certain developing countries”) [hereinafter Tunis Model Law].

regime of protection 'where a work is that of national folklore.' Section 6 has three thrusts:

1. to place economic and moral rights in works of national folklore in the hands of a 'competent authority.'
2. to make manufacturing, importation and distribution of copies of works of national folklore, including their translations, adaptations, arrangements or other transformations' without prior authorization, an infringement of the copyright of the competent authority; and
3. to make such works protectable in perpetuity.¹⁰⁸

Only use by public entities for non-commercial purposes may be without prior authorization. The Model Law creates a provision for the payment of royalties from use of works that have fallen into the public domain, as well as from use of works of national folklore.¹⁰⁹ Section 5(bis) categorically elides fixation as a requirement of protection for only folklore.

Significantly, the Tunis Model Law defines folklore as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage."¹¹⁰ This definition imposes a territorial lock upon the joint authors of works of folklore.

1982 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions

The next major international instrument regarding the protection of folkloric works is the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (hereinafter Model Provisions), which was

108. Commentary 39 explains the objective of this provision as the prevention of any improper exploitation and the adequate protection of the cultural heritage known as folklore, which constitutes not only a potential for economic expansion, but also a cultural legacy intimately bound up with the individual character of each people.

109. Tunis Model Law, *supra* note 107, § 17.

110. *Id.* § 18.

developed by WIPO in collaboration with UNESCO.¹¹¹ It signaled the beginning of sui generis regulation¹¹² around expressions of folklore, because of its silence about any existing international IP regime. However, it is easy to identify the strong link between these provisions and regulations in copyright law. Under this international instrument, “expressions of folklore” are defined as:

[p]roductions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) tangible expressions, such as:
 - (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewellery, basket weaving, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - (c) architectural forms].”¹¹³

Section 4 of the Model Provisions specifies the traditional ‘fair use’ exceptions for the need to seek prior authorization for utilization of expressions of folklore. This exception includes use for educational purposes, illustration, incidental purposes such as reporting on current events, or where the work of folklore is physically and permanently situated in a public place. The Model Provisions were adopted by the Executive Committee of the Berne Convention and the Intergovernmental Copyright Committee of the Universal Copyright Convention for use by developing countries.

111. Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=184668 (last visited May 26, 2011) [hereinafter Model Provisions].

112. See WIPO Publication, WIPO/IPTK/MCT/02/INF.5, 6.

113. Model Provisions, *supra* note 111, § 2.

WIPO/UNESCO Initiatives After 1982

In 1989, the UNESCO General Conference¹¹⁴ adopted a *Recommendation on the Safeguarding of Traditional Culture and Folklore* [hereinafter Recommendation] to Governments. The Recommendation provided the following broad examples of expressions of folklore: “language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.” The focus on copyright law is obvious from this definition. At this juncture, it had become evident that expressions of folklore went beyond copyrightable works. Therefore, this shortcoming in copyright law created the necessity to harness the record of the full scope of what states considered to be their folklore in order to provide effective safeguarding measures. The recommendations provided guidelines for identification, conservation, preservation, dissemination, and protection of expressions of folklore through international cooperation. As a starting point, it requested states to engage in

[a]ppropriate survey research on national, regional and international levels with the aim to:

- a. develop a national inventory of institutions concerned with folklore with a view to its inclusion in regional and global registers of folklore, institutions;
- b. create identification and recording systems (collection, cataloguing, transcription) or develop those that already exist by way of handbooks, collecting guides, model catalogues, etc., in view of the need to co-ordinate the classification systems used by different institutions;
- c. stimulate the creation of a standard typology of folklore by way of:
 - i. a general outline of folklore for global use;
 - ii. a comprehensive register of folklore; and
 - iii. regional classification of folklore, especially field-work pilot projects.

The record creating focus of the Recommendation informed the direction of the UNESCO/WIPO agenda on folklore from this point on.

114. Meeting of The General Conference of the United Nations Educational, Scientific and Cultural Organization in Paris from October 17 to November 16, 1989 at its twenty-fifth session, available at http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited May 26, 201).

Following the World Forum on the Protection of Folklore held in Phuket, Thailand in April 1997, WIPO embarked on nine global fact-finding missions between 1998 to 1999.¹¹⁵ The quest was to find an appropriate legal framework for regulation of folkloric expressions, which would ensure that its users achieve the objectives of a balanced IP system. Four regional consultations for developing countries on protection of folklore were convened by UNESCO and WIPO between March (Africa), April (Asia Pacific), May (Arab Region) and June 1999 (Latin, Americas and Caribbean).¹¹⁶ Each of the four regional consultations adopted Resolutions or Recommendations. These included proposals addressed to WIPO and UNESCO and to national governments to act and achieve the key objectives of protecting while promoting the utilization of folkloric expressions. These acts should include:

- (i) the provision of legal and technical assistance on how to take steps to protect the use of folklore by communities who author them,
- (ii) specialized training in identification, documentation (including documentation standards), conservation and dissemination of folklore for national agencies and authoring communities; and
- (iii) the development of an effective international regime for the protection of expressions of folklore.
- (iv) The development of systems that will promote private rights as well as community rights in the development of folkloric works.

The 1999 WIPO International Bureau Roundtable on Intellectual Property and Traditional Knowledge, held on November 1st and 2nd in 1999¹¹⁷ continued the new era of moving the discussions away from siting regulation in the restrictive arena of copyright, and extending it to embrace all areas of IP law. The second focus was to achieve the private rights based objectives of IP law. These WIPO roundtable discussions have continued since 2001 through the work of the Intergovernmental

115. WIPO's nine fact finding missions on traditional knowledge, innovations and creativity took place in twenty-seven countries: four developed, nineteen developing and four least developed dispersed in North America, Central America, South America, West Africa, Southern and Eastern Africa, Caribbean Countries, Arab Countries, South Asia, and the South Pacific, thus covering gathering information globally. Richard Owens, *Protection of Traditional Knowledge: A Global Intellectual Property Issue*, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_rt_99/wipo_ipk_rt_99_2.ppt.

116. *Id.*

117. Record of meeting available in WIPO/IPTK/RT/99/7. See also Roundtable On Intellectual Property And Traditional Knowledge (1999), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_rt_99/wipo_ipk_rt_99_7.pdf (last visited May 26, 2011).

Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (IGC).¹¹⁸

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (IGC)

The IGC has worked towards formulating a framework that addresses concerns shared by both developing countries and indigenous communities in developed countries¹¹⁹ (ICDCs). Both of these groups had criticism of the earlier WIPO framework.¹²⁰ The first concern is that the existing IP framework offers inadequate positive protection for TCEs. The second is that it actually facilitated the misappropriation of folklore and traditional knowledge.

As a result of the roundtable discussions, the IGC has produced a documentary with directions to guide the resolution of issues on traditional knowledge and folklore and the process of arriving at a satisfactory internationally accepted regime of regulations. The current May 2010 Revised Provisions For the Protection of Traditional Cultural Expressions/Expressions of Folklore, Policy Objectives and Core Principles¹²¹ sets out such a regulatory regime. It incorporates policy objectives, general guiding principles and specific substantive principles for recognizing TCEs as cultural intellectual creative assets of communities. It also provides the basis for cultural and communal authors to make claims in all areas of IP law.¹²²

118. For information on the work of the IGC, see Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore, available at <http://www.wipo.int/tk/en/> (last visited May 26, 2011).

119. See *The Gap Between Indigenous Peoples' Demands And Wipo's Framework On Traditional Knowledge*, A Publication of The Centre for International Environmental Law (Sept. 2008), available at http://www.ciel.org/Publications/WIPO_Gap_Sept07.pdf.

120. See Martin Khor, *Indigenous People Criticize WIPO Approach*, Third World Network (Oct. 1999), available at <http://www.twinside.org.sg/title/wipo2-cn.htm> (on criticism of the earlier WIPO framework).

121. See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2010), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_16/wipo_grtkf_ic_16_4_prov.pdf (last visited Mar. 15, 2011).

122. See Intellectual Property and Traditional Cultural Expressions/Folklore, available at http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf (last visited March 31, 2011); WIPO/GRTKF/IC/8/5; WIPO/GRTKF/IC/9/5; WIPO/GRTKF/IC/10/5; and WIPO/GRTKF/IC/11/5(c) for previous documentation on the road to the Draft Principles and the Options for Giving Effect to the International Dimension of the Committee's Work; see also WIPO/GRTKF/IC/6/6; WIPO/GRTKF/IC/8/6; WIPO/GRTKF/IC/9/6; and WIPO/GRTKF/IC/10/6.

Originally produced in 2004, the current text represents the outcome of several reviews¹²³ and amendments since 2004.

African Regional Initiatives

The IGC's Revised Provisions were followed by the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*¹²⁴ of the African Regional Intellectual Property Organisation in August 2010.¹²⁵ In keeping with its fragmented colonial history, French speaking African nations formed the sixteen member *Organisation Africaine d la Propriete Intellectuelle* (OAPI) through the Bangui Agreement of 1977, headquartered in Yaounde, Cameroon.¹²⁶ English-speaking African countries formed the *African Regional Intellectual Property Organization* (ARIPO). It administers the Harare Protocol (on patents and registered trademarks) and Banjul Protocol (on marks).

The Swakopmund Protocol presents acceding countries with a sui generis framework for regulating traditional knowledge and expressions of folklore through copyrights for relevant works, trademark rights, geographic indications, and trade secret rights.¹²⁷ The provisions of this Protocol¹²⁸ include in Part 111:

- a. The placement of ownership rights to expressions of folklore in the authoring communities instead of a national authority.¹²⁹
The protocol identifies the possibility of more than one

123. Including the 2006 Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore, Policy Objectives and Core Principles set out in WIPO/GRTKF/IC/9/4.

124. Adopted by the Diplomatic Conference of ARIPO at Swakopmund in Namibia on August 29, 2010, available at <http://www.cbd.int/doc/measures/abs/msr-abs-aripo-en.pdf> (last visited Mar. 26, 2011).

125. See *id.*

126. For information on the organization, see Organisation Africaine d la Propriete Intellectuelle website, <http://www.oapi.int/> (last visited Mar. 15, 2011).

127. See Swakopmund Protocol, *supra* note 38. Section 19.2(a) details protections found in copyright law for copyrightable expressions, and Section 19.2(b) grants traditional protections in trademark law to the use of "words, signs, names and symbols." Section 19.3(c) confers traditional legal protection in geographical indications, and 19.4 confers protection from 'unauthorised disclosure' of secrets.

128. The Protocol deals extensively with bio-piracy and other forms of appropriation of cultural heritage under the heading 'traditional knowledge,' which is not within the scope of this paper.

129. The Nigerian Copyright Law has gone a step beyond Ghana. Section 28(3) of the Nigerian Copyright Act states that "in all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, and in conformity with fair practice, by mentioning the community or place from where the expression utilized has been derived." This provision essentially provides for recognition that the work derives from a collective or community context.

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community being identified as authors of a particular expression of folklore.¹³⁰

- b. Placing enforcement of rights in the hands of the authoring community. The national authority's role is to ensure the availability of infrastructure for that enforcement.¹³¹
- c. The bundle of rights held by communities includes benefit sharing and equitable remuneration, which is still to be fixed by the national authority in consultation with communities.¹³²
- d. The bundle of protection given includes attribution to the authoring community, protection from disparaging use and acquisition of private intellectual property rights in expressions of folklore without prior informed consent of the authoring community.¹³³
- e. Its focus continues to be protection from appropriation,¹³⁴ permitted use in 'traditional context,' and 'non-commercial use.'¹³⁵ It therefore leaves the question of private rights development as a market question between the communities that own the resource and persons they may license to use it.

The Protocol creates provisions through which communities may license or assign their works for remuneration, provided such contracts are in writing.¹³⁶ It has the crippling provision that such documents must be approved by a national authority. It creates a duration period of twenty-five years on knowledge and derivative works held by individuals.¹³⁷ This is perhaps the farthest-reaching applicable provision in bringing rights conferrable on folkloric works in line with traditional IP law.

Developments in Rights to Culture

In tandem with WIPO's work, UNESCO has also developed a series of international legal instruments for regulating products of culture as

130. Swakopmund Protocol, *supra* note 38, §§ 17.4, 18.

131. *Id.* § 19.2.

132. *Id.* § 18.4.

133. *Id.* § 19.

134. Its purposes are expressed to be 'to protect traditional knowledge holders against any infringement of their rights as recognized by this Protocol, and to protect expressions of folklore against misappropriation, misuse and unlawful exploitation. *Id.* § 1.1.

135. *Id.* §§ 17, 18, 19.

136. Swakopmund Protocol, *supra* note 38, § 8.

137. *Id.* § 13.

intellectual creations which require protection from exploitation. The first was the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, followed by the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage. Next was the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, followed by the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The last treaty was the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.¹³⁸ Between the foregoing and the 2007 UN Declaration of Rights of Indigenous Peoples, a strong infrastructural framework has been created to regulate culture as a resource, enabling a platform on which to build private rights in intellectual property in cultural products.

III. CREATING CAPITAL FROM CULTURE

The originators of adinkra would be amazed at its current uses. The historical record is that it evolved as artistic literature stamped in funeral cloths to communicate farewells to departed loved ones.¹³⁹ Nothing about adinkra today is related to funerals. Now, adinkra is used to express values, mission, and goals.¹⁴⁰ In the ‘gifts’ and hospitality businesses, it communicates heartfelt messages while expressing beauty. Kente is fast losing its language, and becoming used in designs that represent no particular messages. Although the art forms have evolved, the opportunity has been lost for the production of capital from the creative forces that have driven this evolution.¹⁴¹ There is rampant copying of every form of expression. Further, creation of new manifestations is often done without any reference to the National Folklore Board, as required by Act 690, thus encouraging within Ghana a visible culture of disregard for law without any record of sanctions.¹⁴²

138. See *supra* notes 67-70, 75 for references on these instruments.

139. WILLIS, *supra* note 6, at 5. Adinkra means “to say goodbye.”

140. The ‘ebankese’ or ‘fortress’ of the HFC Bank depicts the bank’s specialist service of mortgages as well as security of investments. The ‘fihankra’ or ‘fidelity’ of Fidelity Bank expresses its core value – fidelity. Paintings of ‘Gye Nyame’ or the ‘omnipotence of God’ on churches show the primary message of churches.

141. In an interview held on January 8, 2011 with Mr. Kumi of the office of Copyright Administration and his assistant, it was stated that with the exception of one artist who used adinkra symbols in a card game, there have been no registrations of new and unique uses of adinkra symbols and kente designs. And yet the market abounds with kente and adinkra being used in unique forms in fashion, industrial designs, paintings, etc.

142. In the interview held on January 7, 2011, Mr. Darimoah spoke about having to constantly demand payment of fees from industries using adinkra and kente expressions without any reference

The resolution of the complaints of this paper would be to approach amendment of Act 690 with certain objectives and for three levels of beneficiaries. The first beneficiary is the State, which would be strategically steering the creation of healthy and competitive markets driven by intellectual creativity. The second beneficiary is ethnic communities that have developed the pre-existing folkloric expressions and that should benefit from them as capital assets. The third beneficiary is the individuals who are able to develop related rights from pre-existing expressions and create new works for private capital.

The first objective is the objective of the UNESCO Conventions in protecting cultural expressions from appropriation and distortion. The second is the objective of IP law in rewarding creativity and innovation. The third is the public policy objective of making creative works available as a creative commons.

Market Creation

My strongest incentive for writing this paper is the place and value placed on native arts in world markets today. The first example is that of Tommy Watson, an Australian Aboriginal artist whose work was documented in a report written for WIPO by Torsen and Anderson. The report states, "Watson's 2006 painting *Waltitjatt* sold for \$197,160 at a recent auction sale in Sydney. Watson travels between Irrunytia, a small community of 150 people, and Alice Springs, a regional center. Watson reportedly receives approximately \$1000 per painting from a local art gallery." Such is the unwarranted poverty that hapless indigenous artists with no knowledge of the real market value of their works can live in, while their works would fetch princely figures in international forums.

Torsen and Anderson also report other examples of significant sums paid for native arts. These include a world auction record sum of €818,400 sold for an Australian Torres Strait Islander drum at Christie's Paris in 2006. A Blackfoot Beaded Hide Man's wearing shirt was sold at Sotheby's New York for \$800,000. In October 2006, Sotheby's made a world record total of \$7 million for the sale of American Indian art. This record sale included a new world record for the price of a Native object—a Tsimshian face mask sold for \$1.8 million.¹⁴³ The scope of income deriving from cultural products on global markets leaves no doubt that crafts people are creating resources with significant earning

to the National Folklore Board. Interview with Mr. A. H. Lemaire, Director, and Mr. Darimoah, Officer of the National Folklore Board (January 7 2011) (transcript on file with author).

143. TORSSEN & ANDERSON, *supra* note 22, at 41.

potential. But it is a potential that hardly ever reaches their pockets. To lock them out of this global market due to a failure to tackle the legal infrastructure is unacceptable. The lockout from markets arises from restricting the work of authors to ‘in situ’ maintenance and development of craft and the ‘nationalization’ of their intellectual property.

In Ghana, the domestic commercial use of native arts is extensive. All industries in Ghana are replete with products using folkloric expressions, requiring the need to provide real and actual incentives in private property rights to broaden the market through product proliferation and to make intellectual creativity a source of capital creation. In placing government between the creative use of TCEs and authoring communities, the incentive to produce new works is significantly reduced, and neither communities nor individuals are encouraged to showcase the skills required to develop a broader spectrum of the arts. Further, capital is leaked by failure to recognize the creators of new manifestations of TCEs.

The commercialization of native arts in Alaska has been linked to the fast growth of tourism.¹⁴⁴ With respect to Ghana, Adinkra and Kente comprise the gifts with which any tourist is likely to leave. Hollowell reports that in the state of Alaska, most tourists choose to spend their money on native cultural experiences and attractions, which makes the sale of native arts big business. The Silver Hand is a trademark that authenticates crafts made by Alaskan natives, providing “consumers with a ‘guarantee of authenticity’ ...meaning that the article was ‘made in Alaska, handcrafted and finished by an Alaska Native artist or craftsman... The seal consists of a black oval containing a hand in silver and the words ‘Authentic Native Handicraft from Alaska.’”¹⁴⁵ The seal is issued by a state-sponsored registry on application and proof of being a native of Alaska. The use of the collective mark has survived decades on the market and has experienced geometric growth in artisans who have registered to use the emblem. It is “considered one of the best Native arts authentication programs in the United States.”¹⁴⁶

It must be noted that the authentication program is not without challenge. For example,

144. See Julie Hollowell, *Intellectual Property Protection and the Market for Alaska Native Arts and Crafts*, in *INDIGENOUS INTELLECTUAL PROPERTY RIGHTS, LEGAL OBSTACLES AND INNOVATIVE SOLUTIONS* (Mary Riley ed., 2004).

145. Alaska Admin. Code, tit. 3 § 58.020 (1993), available at <http://commerce.alaska.gov/oed/mia/58020.htm> (last visited Mar. 15, 2011).

146. Hollowell, *supra* note 144, at 75.

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The Alaska Department of Commerce and Economic Development estimates that 75-80 percent of what gets displayed and sold as Native work is not actually made by Alaska natives at all and that shops are filled with imitation and imported Native-style art with labels that skirt legal definitions of misrepresentation and consumer fraud.¹⁴⁷

The exploitation of folkloric expressions through imitations thus reduces the capacity of ICDCs to obtain wealth from their cultural assets.

A similar initiative is the 'Label of Authenticity' certified trademark developed by The National Indigenous Arts Advocacy Association (NIAAA) of Australia,¹⁴⁸ which seeks to distinguish art and cultural products or services originating from an Aboriginal or Torres Strait Islander person from fake products. These initiatives show the direct benefits to local communities in protecting folkloric works with traditional IPRs and creating strong markets for them.

But Section 4 of the Agreement on Trade Related Intellectual Property Rights 1994 (TRIPS) provides for special border measures which are able to halt the flooding of domestic markets of countries such as Ghana with such limitations on folkloric works. Indeed, Act 690 provides for such measures and this should suffice to provide a framework for gate-keeping. Success reports on the market activities of ICDCs¹⁴⁹ show that these models of gaining IPRs from folkloric work achieve the objective of stimulating innovation and rewarding creativity inspired by the cultural heritage that folklore gives a community.

Capital Creation

In *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere Else*,¹⁵⁰ Hernando de Soto provides empirical data and cogent arguments to show that it is not the lack of resources or talents that make the poor poor, but the inaccessibility for these people to create capital out

147. *Id.* at 58. See also Alaska State Council on the Arts website, <http://www.eed.state.ak.us/aksca/native.htm> (last visited May 23, 2012).

148. See *Symbols, Motifs and Ownership: Marketing and Copyright Issues*, available at <http://www.powerhousemuseum.com/hsc/paperbark/symbols.htm> (last visited May 23, 2012).

149. *Id.* (reporting a positive example of the use of copyright law by Jimmy Pike, an Aboriginal and Torres Strait Islander whose artwork is used by Rowe Fabrics, Sydney for fabrics through a licensing agreement).

150. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

of assets.¹⁵¹ He shows how poor countries hold rich resources in defective forms, “where ownership rights are not adequately documented, and so cannot be turned into capital, or traded outside of narrow local circles where people know and trust each other; used as collateral for a loan or as a share against investment.”¹⁵² De Soto’s view deserves serious consideration, as it is backed by strong empirical evidence.

The experiences from ICDCs on the commercial exploitation of folklore show that a multi-pronged approach to the application of traditional IP law for wealth creation from these resources can be effective.¹⁵³ This is more so when supported by administrative structures.¹⁵⁴ Administrative support is more strongly needed when the communities that produce these works do not have the capacity to conduct arms-length commercial transactions to obtain appropriate remuneration for their works. They may also lack the capacity to pursue infringers in courts of law, or even worse, they may not have the adequate records of provenance to defend moral rights to the works.

In an active effort to define cultural heritage, which is likely replicated around the country, and make it regulated by law, the role of administrative bodies is most significant. The creation of databases and other records is a function well established in developed countries, enabling the capital creation culture necessary for proper administration of any resource as well as designating private rights for wealth creation. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is considered the world’s premier institution for information and research about the cultures and lifestyles of Aboriginal and Torres Strait Islander peoples and is governed by an Indigenous Council.¹⁵⁵ The Institute is reported as holding a priceless collection of films, photographs, video and audio recordings and the world’s largest collections of printed and other resource materials for Australian indigenous studies. This Institute has pioneered unique policies for access and management of their Australian indigenous collections. They present an experience and an example well worth observing for guideposts.

151. He presents that the value of savings among poor countries is (as at time of writing), forty times all the foreign aid received through the world since 1945, reaching in Haiti, as high as one hundred and fifty times greater than all foreign investment received since independence from France in 1804. *Id.* at 5.

152. *Id.* at 6.

153. Records show this is the experience in Australia, Canada and Alaska in the U.S. See TORSEN & ANDERSON, *supra* note 22; and Hollowell, *supra* note 144.

154. See Hollowell, *supra* note 144.

155. See Australian Institute of Aboriginal and Torres Strait Islander Studies website, <http://www.aiatsis.gov.au> (last visited May 23, 2012).

The Traditional Music Archive (TRAMA) example is also worth working with and examining for guideline purposes. WIPO provides information on this project.¹⁵⁶ The Traditional Music Archive (TRAMA) is a research and documentation center in Sudan that collects, documents, preserves, and disseminates traditional music and folklore of tribal groups. It enters into an informed and consenting agreement with tribal representatives before any performance is recorded. In its archive, approximately 4,000 recordings are being considered for digitization for preservation and dissemination purposes. TRAMA also sells recordings and shares the financial benefits with the groups. Although it provides an example in the collection of data in music, the concept may be extended to different forms of expressions such as drama, storytelling, graphic arts, biotechnology, and other forms of folkloric expressions.

Although Ghanaians are very clear on the ethnic sources of their TCEs,¹⁵⁷ setting up a national database on cultural heritages will initially require the involvement of communities in determining what their cultural heritages actually entail. This system will also provide clarity to support legislative regulation of folkloric expressions in intellectual property law. A register of all widely known kente designs with attribution of authorship to the communities known to be the creators and users of the designs will make available information for several purposes. It will give directions to potential customers about the range of designs available, help to establish the scope of the kente dictionary, as well as the locations for their purchase. This process will assist in determining copyright claims—not only on infringement, but on distortion of meaning—thus preserving the authenticity of the arts.

The United Nations University (Institute of Advanced Studies) provides a detailed framework for such projects in *The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis*, wherein it provides indicators from an array of jurisdictions.¹⁵⁸ The National Folkloric Board (NFB) will best serve in the limited function of being a registry for folkloric works, and a consulting and assistance center to communities who claim authorship of particular

156. See The Sudanese Traditional Music Archive, available at http://www.wipo.int/export/sites/www/tk/en/culturalheritage/casestudies/sudanese_archives.pdf (last visited May 15, 2011).

157. A consistent national activity is to display the cultures of different ethnic groups at commemorative social, sports, political and religious events, competitions, educational programs and even local community events.

158. See UNU-IAS Report: The Role of Registers and Databases in the Protection of Traditional Knowledge, A Comparative Analysis, available at http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf (last visited Feb. 28, 2011).

folkloric works. The NFB is already serving this role.¹⁵⁹ In addition to continuing an ongoing project to capture all adinkra designs in a database,¹⁶⁰ the National Folklore Board has expressed the intention of focusing on being a quality control coordinator in assisting crafts people to achieve acceptable standards in the works they produce for tourism and export markets. They are organizing seminars and workshops for this quality control function. In this consulting role, they may also provide directions on how communities and art and craft collectives may register trademarks, collective marks, and certification marks for promoting their works. They can also assist authoring communities to register their claims to folkloric works as anticipated under the Swakopmund Protocol.

In Australia, there have been calls for the establishment of an administrative body in the mold that it is suggested the National Folklore Board play. The suggested role includes facilitating consent and payment of royalties to communities of authors, to develop standards of appropriate use, to guard cultural integrity, and to enforce rights, including moral rights. In *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke presents that

[W]hile it is important to have rights, it is also important to establish mechanisms by which to assert them. To administer rights and protect them, it is necessary to set up indigenous cultural infrastructure – administrative processes and persons in authority who can act, negotiate and hold collectively rights to culture. [...] A National Indigenous Cultural Authority can provide leadership and administer rights either directly or by establishing a rights clearance framework for indigenous cultural and IP rights. [...] It [also] has a role to assist users [to] make contact and identify relevant indigenous owners.¹⁶¹

The National Folklore Board can create its own authenticity mark—like the Standards Board of Ghana, which should establish the authenticity of cultural products bearing that mark.¹⁶² It is important however that any such function does not stand in the way of developing a culture of promoting private and individual rights.

159. Interview with Mr. Lemaire (Jan. 7, 2011) (transcript on file with author).

160. A copy of the state of collections shown to me by Mr. Darimoah of the National Folklore Board on January 7, 2011.

161. Terri Janke, *supra* note 22.

162. The same suggestion is made for the National Indigenous Cultural Authority by Terri Janke. *Id.*

In *M*, Payunka, Marika & Others v. Indofurn Pty Ltd* (the “Carpets case), carpets designed in Vietnam and sold with tags that labeled them as ‘Aboriginal carpets’ were imported from Vietnam to Australia. Several carpets were direct copies of original artworks, while others carried designs that had been significantly simplified and therefore were not direct copies. The Aboriginal artists argued that all of the carpets constituted copyright infringement. In arguing that the simplified carpets did not constitute original or derivative works, an additional argument was made that this copying was an infringement because it distorted the cultural meanings within the works. The court accepted this reasoning and included in its decision making, considerations of harms to the community’s moral rights in the infringement. Although the finding of infringement was not based on customary law protocols argued before the court but under Australian copyright law, the case represents an excellent example of how the law can adequately function to protect not only economic rights but also moral rights of authors, including rights of communities. In the current draft of Act 690, the opportunity is lost by Ghana in not clearly articulating what Ghana’s cultural heritages are.

New and Private Rights

Both the office of the NFA officers and the Copyright Administrator assure that artists are being encouraged to produce and register new adinkra and kente designs. The language of Act 690 befuddles the practicality of this initiative and suggests that the incentive objective of intellectual property law is totally lost in this stance. To illustrate this, this article visits Sections 4 and 44 of Act 690.

Section 4—Folklore protected

- (1) An expression of folklore is protected under this Act against (a) reproduction, (b) communication to the public by performance, broadcasting, distribution by cable or other means, and (c) adaptation, translation and other transformation.
- (2) The rights of folklore are vested in the President on behalf of and in trust for the people of the Republic.

Section 44—Offences related to folklore

- (1) A person shall not sell, offer or expose for sale or distribution in the Republic copies of (a) works of folklore made in or outside the Republic, or (b) translations, adaptations,

arrangements of folklore made outside the Republic without the permission in writing of the National Folklore Board.¹⁶³

Clearly, the law enjoins the adaptation, translation, and other transformation of any pre-existing expression of folklore, and the entire body of folklore is vested out of the public commons. Thus, when an individual creates an adaptation or transformation of an existing adinkra or kente design, or a new one, there is no room for rights in that original work—they automatically go to the president for use by anyone. Section 44 may not make it unlawful to create new expressions of folklore within Ghana, but one cannot sell or distribute such new creative works, as a result of Section 4. In effect, Ghanaians are invited without restraint to create new folkloric expressions, for no economic or moral rights. It is this result that makes the ‘invitation’ to artists to register new designs in kente and adinkra impractical. Pointedly, neither the office of the Copyright Administrator, which has jurisdiction to register folkloric expressions in music, adinkra and kente, nor the National Folklore Board, the watchdog of users of folkloric expressions, could show that they had had any success in obtaining new designs from artists.¹⁶⁴

The most critical amendment should be the recognition of the right of individuals and collectives to develop and obtain related rights for adaptations, translations, and transformation of original folkloric works and rights for new works. Transactions in related rights may be guided by customary law (as land law is currently structured), the law of contracts, and intellectual property law. Thus, if the individual or collective that develops related works are natives of the relevant community that authored the TCE, then they only need the consent and payment of set customary tokens to their own community registries, in the manner that land use is granted to natives of a traditional area. If an individual, collective or corporate person is not a native of the community with rights to the original folklore expression from which the derivative work was created, then the use of the derivative work may be based on licensing agreements to that individual, corporate person or collective.

An important step will be the establishment of a regime for geographic indications for those art forms which emanate from more than one area of the country and whose character forms a fundamental aspect of community identity, such as kente. In this arena, where there is

163. Copyright Act, *supra* note 1, §§ 4, 44.

164. Interviews held with Mr. LeMaire of the National Folklore Board and Mr. Kumi of the Office of the Copyright Administrator (Jan.7, 2011) (transcripts on file with author).

consensus about the contours of particular designs and their meanings, but controversy about where they originated from, the National Folklore Board can act as intermediary trustee, assisting with user licenses. Indeed, the structure of this form of administration already exists in land law, where the unconstitutionality of vesting of stool and family lands in the State is established.¹⁶⁵ The Lands Commission acts as intermediary to receive and distribute royalties for disputed boundaries.¹⁶⁶

The expected positive result of this necessary measure is the invigoration of creativity among artists—perhaps through locational collectives on behalf of their societies. It is expected that new folkloric works or the establishment of known designs and patterns in higher qualities and clearer character will occur. New artists working with licenses would be encouraged to produce adaptation and derivative works based on pre-existing creations, for which they should obtain related rights.

It is pertinent to acknowledge difficulties recorded about the experiences of indigenous societies following the creation of records on their cultural products.¹⁶⁷ Other concerns are that

[T]he collection, recording and dissemination of and research on indigenous peoples' cultures raise multiple concerns about the possibility of breaches of confidentiality between ethnographers and informants (although professional codes of ethics proscribe these); . . . the possibility of the misrepresentation of indigenous and traditional cultures . . . the lack of access to documentary materials by the people about whom the research was conducted . . . and concern that much documentation of indigenous and traditional cultures is made, owned and commercialized by non-indigenous and non-traditional persons.¹⁶⁸

In the Ghanaian situation, ensuring that these records are created internally and not by consultants appointed by international agencies will help preserve the authenticity of the records. These suggestions may well provoke the response that inviting ethnic societies to outline their heritages will lead the country into a spate of conflicting claims and rent-seeking behavior as prevailed in customary land administration for years. The response is that confronting unpleasant controversy in the short term in order to lay a foundation for long term benefits should bring

165. See GHANA CONST. ART. 20 (1992).

166. *Id.* art. 21.

167. See BROWN, *supra* note 24, ch. 1.

168. TORSÉN & ANDERSON, *supra* note 22, at 28.

competitive advantages. The import of current initiatives of OAPI in “reaching out to members of the public in each of its 16 member states to raise awareness about the economic, social and cultural benefits of effective intellectual property (IP) protection”¹⁶⁹ is worth considering.

The accounts of initiatives to protect arts and crafts by indigenous artists in Alaska, Australia, and Canada¹⁷⁰ present excellent models of the efforts implemented by ICDCs. These initiatives are designed to create IP rights in folklore that ensure economic and moral rights in works of culture. They also aim to protect the original lore from distortion, while granting incentives to create wealth in crafts for and by indigenous peoples. These initiatives utilize all the existing range of IP rights—copyright, trademark, geographical indications, and unfair competition law including initiatives outside of intellectual property law to protect and promote the development of folklore. Indeed, the language of Sections 17 to 19 of the Swakopmund Protocol incorporates principles for regulation in all these areas of traditional IP law.

The incorporation of customary law norms in law regulating rights in folkloric expressions will respond to the human right demands of Article 15 (2) of International Covenant on Economic, Social and Cultural Rights, as well as Article 31 of UNDRIP discussed *supra*. It recognizes the foundation of culture as the customs of its authors. The Swakopmund Protocol captures this understanding in providing for the application of customary law norms and protocols in the resolution of issues relating to ownership; benefit sharing and use of expressions of folklore.¹⁷¹ Importantly, the application of customary law norms makes room for natives of ethnic communities to participate in the benefit of pre-existing folkloric works without the cost payable by non-members of the community.

CONCLUSION

Because of the disparity in technology and current capacity gap of developing countries to keep up with utilization methods of more developed nations, Ghana need not totally dismantle protection around its folkloric works.

169. Paulin Edou Edou, *Raising IP Awareness in West Africa*, WIPO Mag. Feb. 2011, available at http://www.oapi.wipo.net/wipo_magazine/en/2011/01/article_0007.html (last visited Feb. 25, 2011).

170. Hollowell, *supra* note 144.

171. Swakopmund Protocol, *supra* note 38, § 22.

Instead, first the law must direct the careful documentation, recording and archiving of what constitutes each area of Ghanaian folkloric expressions that ought to be protected against inappropriate exploitation. Such a first step responds to the directions of the UNESCO conventions on culture, the Swakopmund Protocol, and the 1982 Model Law. It leads to the creation of proper legal infrastructure for regulating cultural heritage as a resource.

Second, the legal infrastructure should establish functions and roles for supporting national authorities. Such functions and roles should be purely administrative and consulting and not rent-seeking.¹⁷² This will assist those developing adaptations, translations, and transformations of folkloric expression to determine what would lead to new IP rights. Third, any law on TCEs should reflect a clear policy direction that strikes a balance between recognizing the rights of communities in their TCEs and individual rights in sufficiently original works using TCEs.

Amendments should be made to Act 690 to achieve the following goals:

1. Making cultural works accessible for capital and wealth creation for Ghana's ethnic communities and individual innovators by removing the perpetual rights of the Republic, through the President, in all expressions of folklore.
2. Giving new functions to the National Folklore Board and making them a national coordinating and facilitating agency to assist authoring communities in identification, conservation, preservation, dissemination and protection of expressions of folklore
3. Place IP rights and entitlements in the innovators of any TCEs works by passing a *sui generis* law on culture recognizing entitlements, rights and obligations of authoring communities.
4. Align Ghana law on folkloric expressions with human rights law, constitutional law, and traditional intellectual property law norms.

172. See, for instance, the manner in which the Trademark Trial and Appeal Board Manual of Procedure (TBMP) makes available resources that present case law, statutory changes, and changes to the Trademark Rules of Practice and Federal Rules where applicable—so that registrants of trademarks can advise themselves as to the principles applicable for determining register ability (among other issues); Trademark Trial and Appeal Board Manual of Procedure, *available at* http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp (last visited May 15, 2011).

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CREATING CAPITAL FROM CULTURE

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When supported by an active promotion of cultural products and internal tourism, the impetus for capital creation should bear fruits of wealth.