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# **The Commoditisation of Culture: Folklore, Playwriting and Copyright in Ghana**

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## **Abstract**

In this thesis I consider the interface between copyright law and cultural practice. I argue that the protection of folklore through copyright obfuscates the status of folklore as a generative resource for derivative works in favour of its status as a carrier of national identity, over which states can exercise property rights. Specifically, I analyse the significance of folklore within the playwriting culture of Ghana and discuss how, within this specific context, the introduction of the 2005 Copyright Act (which requires nationals to seek permission and pay a fee to use folklore), rather than incentivising artists to create derivative works from folklore, significantly disrupts the ability of playwrights to continue to create work that reflects the codified theatrical practice established in Ghana post independence. As such, the Ghana Copyright Act, 2005 threatens to jeopardise the fundamental balance in copyright between protection and access, and so the purpose of copyright as a mechanism for incentivising artists. Through exploring the development of the relationship between folklore and copyright and how protection for folklore interacts at the international, continental and sub-regional levels, this thesis examines both the potential impact of the copyright law in Ghana and the efficacy of protecting folklore through a copyright paradigm at all.

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I would like to thank my supervisors, Professor Ronan Deazley and Asst. Professor Katie Gough, for their guidance, patience and perseverance.

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## **Author's Declaration**

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Printed name: Stephen Collins

## Introduction

The Ghana Copyright Act, 2005, was signed into law in 2010 by the then president John Kufour. Under the Act, the use of Ghanaian folklore for commercial purposes by nationals and non-nationals is subject to gaining permission and paying an undetermined fee to the National Folklore Board under s.64 (1).<sup>1</sup> As Ben Nyadzie, Senior Folklore Officer at the Ghana Copyright Office, stated in an interview given for this research, fees are payable in advance of use regardless of the potential revenue generated.<sup>2</sup>

Folklore retains a significant role across Ghana's cultural industries as a resource from which artists regularly develop new works. Hence, this situation has led to accusations that the law will 'divorce a generation from its own folklore',<sup>3</sup> whereas supporters of the law point to folklore's 'commercial value'<sup>4</sup> and the need to 'develop, preserve and promote'<sup>5</sup> folklore in Ghana. Throughout this thesis I consider the interface between copyright law, folklore and cultural practice. Specifically, I examine creative practice in Ghana's playwriting industry, how the regime of protection for folklore set down in Ghana's 2005 Copyright Act has the potential to significantly disrupt that practice and, consequently, what Ghana's cultural economy stands to lose by the enforcement of the law in its current form.

Folklore constitutes an important and long-standing resource for Ghanaian playwrights and its use has contributed to both the development of Ghana's theatre industry and a distinctive style of theatre. Naturally, the importance of folklore as a

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<sup>1</sup> Ghana Copyright Act 2005, 'A person who intends to use folklore for any purpose other than as permitted under section 19 of this Act, shall apply to the Board for permission in the prescribed form and the person shall pay a fee that the Board may determine' (s.64(1)).

<sup>2</sup> Interview with Ben Nyadzie, Senior Folklore Officer at the Ghana Copyright Office, September 2012. The interviews undertaken for this research constitute a unique body of data. For a list of interviewees, see Appendix A.

<sup>3</sup> Interview with Carlos Sakyi, Chairman of the Ghana Music Rights Organization (GAMRO), September 2012.

<sup>4</sup> Nyadzie, interview, 2012.

<sup>5</sup> 'National Folklore is Sacred', <http://ghanadistricts.com/news/?read=37130>. Posted 26 August 2010. Accessed: 5/9/2012.

resource for artists in Ghana is not restricted to playwriting or to theatre, but spreads across Ghana's cultural industries. Though within Ghana, the copyrighting of folklore, its efficacy and potential impact, remains underexplored, following the introduction of the 2005 Ghana Copyright Act, a small body of literature has developed around how restrictions on the use of folklore may impact upon a range of creative disciplines. John Collins, Professor of Music at the University of Ghana, has written several articles on the laws potential impact on musicians<sup>6</sup> where traditional beats, rhythms and melodies continue to be utilised by Ghana's contemporary musicians.<sup>7</sup> The Ghanaian copyright academic Boatema Boateng explores what she sees as the fundamental incompatibility between the production of traditional *Adinkra* and *Kente* symbols and patterns and their protection through Ghana's copyright law.<sup>8</sup> Also, Gertrude Torkonoo has written a paper critiquing the law in terms of what she regards as its incompatibility with both Human Rights Law and the Ghanaian Constitution.<sup>9</sup> However, as yet, there has been no significant study into the relationship between the law and its potential impact on Ghana's playwrights.<sup>10</sup> The

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<sup>6</sup> See, for example, John Collins, 'The Folkloric Tax Problem in Ghana', *The World Association for Christian Communication*, (2003). Available at: <http://www.waccglobal.org/language/publications/mediadevelopment/64-2003-1/649-The-folkloric-copyright-tax-problem-in-Ghana.html>, (accessed 5/11/09) See also: Deborah Wassel, 'From Mbube to Wimoweh: African Folk Music in Dual Systems of Law', *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 20 (2009) 289-325.

<sup>7</sup> The influence and use of folklore extends far beyond theatre and informs cultural practice across many of the creative industries in Ghana. The Ghanaian musicologist, Owusu Brempong, notes that Ghanaian Highlife music consistently recycles folklore: 'Folktale is the genre most frequently used in highlife and they are [...] easily identifiable in the song texts.' To underline the point Brempong states that: 'the texts drawn from traditional culture are used in song form, which modifies but continues the narrative tradition' Owusu Brempong, 'Folktale Performance in Highlife Songs: An Empirical Observation', *Journal of Performing Arts* Vol. 4, No. 1, (2009), 14.

<sup>8</sup> Boatema Boateng, *This Copyright Thing Doesn't Work Here* (Minneapolis: University of Minnesota Press, 2008). Boateng's argument is that the application of copyright law to folklore and traditional cloth production effectively appropriates the benefits and control of a system of production and innovation based upon custodianship to the state. Also see Josephine Asmah, 'Historical Threads: Intellectual Property Protection of Traditional Textile Designs: The Ghanaian experience and African Perspectives', *International Journal of Cultural Property*, Vol. 15 (2008) 271-296.

<sup>9</sup> Gertrude Tokornoo, 'Creating Capital from Culture', *Annual Survey of International and Comparative Law*, Vol., XVIII, (2012), Torkonoo's work is particularly interesting in terms of examining the tension that results from vesting the rights in folklore in the president in trust for the people, her central argument is that this disenfranchises traditional communities by placing the right to authorise use and collect and distribute revenue in the state.

<sup>10</sup> It is important to note that though this thesis is primarily concerned with playwriting, by far the most vocal advocates for a change in the law in Ghana are musicians. This is attributable to several factors: there are a much greater number of musicians than theatre makers, they are unionized and their habitual use of folklore in the creation of new music reaches a much wider audience and raises more revenue than theatre. In terms of the cultural industry, musicians, both traditional and contemporary, are regarded as significantly contributing to Ghanaian culture. The decline in theatrical output in recent years, exacerbated by the demise of the highly popular Concert Party, means that theatre makers do not regard themselves as important enough in terms of the cultural economy to be affected by the law. Boateng notes a similar trend with regards to the traditional textile industry (Boateng, *This Copyright Thing Doesn't Work Here*, 109).

position of playwriting within Ghana's creative landscape is slightly different as, unlike music and cloth making, its emergence as a significant part of Ghana's cultural landscape is rooted in the post-independence nation building process of the 1960s and 1970s. Accordingly, the scope of this study is, I believe, unique in Ghanaian theatrical and legal discourse and my aim with this work is to contribute to both fields.

The analysis in this thesis is from a cultural practice perspective, but through it I consider larger questions concerning the efficacy of protecting folklore through copyright. The inter-disciplinary nature of this thesis, by moving across various registers of academic discourse, illuminates the often-opposing logics that underpin the tension in using copyright as a means of protecting folklore and so restricting its unregulated use. To illustrate this in terms of Ghana's theatre industry: prior to 1957, only four Ghanaian plays had been published in some form.<sup>11</sup> However, by 1960, the Arts Council of Ghana had been established; the National Theatre Movement had outlined the trajectory for establishing a national theatre building; the Ghana Drama Studio had been built and its resident theatre company, the Experimental Theatre Players, were working under the guidance of their director and writer Efua Sutherland.<sup>12</sup> Plays had been published and received multiple performances and more were being developed through training programmes at the School of Performing Arts at the University of Ghana, which catered to increasing numbers of students interested in theatre training.<sup>13</sup>

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<sup>11</sup> J.B Danquah's *The Third Woman* (London: Society for Christian Literature 1943); and F. Kwesi Fiawoo's, *The Fifth Landing Stage* (Accra: Sedco Publishing Ltd, 1983) were published at the time. Mabel Dove's *A Woman in Jade*, (in *Selected Writings of a Pioneer West African Feminist* (Nottingham: Trent Editions, 2004)), was serialized in *The Times of West Africa* in 1934. Kobina Sekyi's *The Blinkards: A Comedy and The Anglo-Fanti: A Short Story* (Accra: Readwide Publishers, 1997), was lost and rediscovered in the 1970s, though James Gibbs suggests that page proofs for Chatto and Windus were prepared (James Gibbs 'Seeking the Founding Father: the story of Kobina Sekyi's *The Blinkards* (1916) (unpub, 2010) 11).

<sup>12</sup> Efua Sutherland was very influential in the development of Ghanaian theatre and particularly in codifying the use of Ghanaian folklore. For a detailed examination of Sutherland's work see Chapter 2.

<sup>13</sup> See James Gibbs, *Ghanaian Theatre: A Bibliography of Primary and Secondary Sources*, 2012, available at: [http://www.jahn-bibliothek.ifeas.uni-mainz.de/Dateien/Ghanabib\\_2012.pdf](http://www.jahn-bibliothek.ifeas.uni-mainz.de/Dateien/Ghanabib_2012.pdf). Accessed 20/10/13. Gibbs' *Bibliography* notes theatrical activity (publications, performances, articles, interviews etc.) by year. It clearly shows an exponential growth in activity following independence in 1957.

This growth in activity and investment was based on the coming together of Sutherland's desire to develop an identifiable form of Ghanaian theatre and Ghana's first president, Kwame Nkrumah's need to construct and disseminate signifiers of a new unitary national identity. It was the synchronicity of these aims that positioned Ghana's pre-colonial folkloric culture as artistically and politically significant. Thus, as the state encouraged and facilitated the use of Ghanaian folklore by artists following independence and again in the 1980s and 1990s, the imposition of an obligation to pay a fee for that use appears incongruous.

Through analysing how government policy historically facilitated cultural practice in Ghana, and latterly how the copyright law has produced the potential to disrupt that cultural practice, this research explores a delicate balance between copyright as a mechanism for incentivising artistic creation and a means by which that creation is potentially prohibited. I argue that by obfuscating the status of folklore as a generative resource in favour of its status as a carrier of national identity with economic potential, the current terms of protection for folklore in Ghana are fundamentally unbalanced.

The disjuncture in the ways in which the utility and value of folklore in Ghana is conceptualised on both sides of the debate is striking and evident across several levels with little acknowledgement of the complexity of the situation.<sup>14</sup> For example, following a research paper I delivered at the School of Performing Arts at the University of Ghana in 2014, the first response from the audience was an assertion that '99% of the people sitting in this room would agree with me that the current Ghanaian copyright law [...] is a very bad law in the sense that things that were created by your forebears as a legacy left for you, you as an artist cannot use without permission from the state'.<sup>15</sup> Further, Dzifa Gomashie, Deputy Minister for Tourism, Culture and Creative Arts, suggested that within contemporary Ghanaian society,

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<sup>14</sup> In response to Question II.5 of WIPO's 2002 'Questionnaire on National Experiences with Protection of Expressions of Folklore': 'In the practical application of your national laws and regulations, has identification of the folklore to be protected presented any difficulties?', the Ghanaian response was a simple 'No'. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_2/wipo\\_grtkf\\_ic\\_2\\_7.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_7.pdf). Accessed: 10/5/14.

<sup>15</sup> Response to research paper 'Who Owns Ananse?', delivered at the School of Performing Arts, University of Ghana, February 2014.

folklore continues to constitute ‘the vehicle through which our forebears nurtured and groomed the young [...], and we in the present learn about the past from the verbal/words, music/instruments/dance/ stories/ artefacts etc. Folklore is the bridge between the past and the future’.<sup>16</sup> Thus, from Gomashie’s perspective, the use and reuse of folklore retains a significant importance in Ghana and the existence of the law is no impediment to that use. However, in 2014, Nyadzie stated that the intention behind the provisions for the protection of folklore in the 2005 Act was to standardise copyright law in Ghana by requiring artists to clear the rights for all works that they wish to utilise, folkloric or not. By encouraging artists to ‘be honest’,<sup>17</sup> he suggests that the current copyright law is simply ‘promoting originality’.<sup>18</sup>

Throughout this thesis, I argue that playwrights have played a major role in the continued maintenance and transmission of folklore in Ghana. In 2001, WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC),<sup>19</sup> distinguished folklore from other creative works ‘because of its dual purpose as both a source of cultural heritage and as an economic asset’.<sup>20</sup> However, there is a third notable purpose that forms the focus of this thesis: the role of folklore as a resource for creative artists in the creation of derivative works. I argue that the terms of protection for folklore included in the 2005 Copyright Act, rather than incentivising artists to continue to create derivative works from folklore in line with established cultural practice, will, instead, significantly disrupt the ability of playwrights to continue to create work that reflects the values and aesthetics of Ghana’s post independence theatre industry. Accordingly, the questions that this thesis will address are: why, if the state once encouraged the use of folklore, does it now appear to restrict it? To what extent has folklore retained its significance in Ghanaian theatre? Do the current terms of

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<sup>16</sup> Interview with Dzifa Gomashie, Deputy Minister for Tourism, Culture and the Creative Arts, February 2014.

<sup>17</sup> Interview with Ben Nyadzie, February 2014.

<sup>18</sup> Nyadzie, interview, 2014.

<sup>19</sup> The World Intellectual Property Organization (WIPO) was adopted as the new name for the Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle (United International Bureau for Protection of Intellectual Property (BIRPI) in 1967. Throughout this thesis, for the sake of clarity, I refer to both incarnations as WIPO.

<sup>20</sup> Michael Jon Anderson, ‘Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge’, *Case Western Reserve Journal of Law, Technology and the Internet*, Vol. 1, No. 2 (Spring 2010) 156.

protection for folklore have the potential to disincentivise artistic endeavour? And, beyond Ghana, what does the current situation of the protection of folklore in Ghana and its potential impact upon playwrights suggest about the suitability of fitting folklore within a copyright paradigm? In order to begin to address these questions, it is necessary first to define the area of study, the terms used throughout this thesis and the parameters of the argument.

## Ghana<sup>21</sup>

The issue of the protection of folklore is a global one. Much of the impetus for the development for legal protection for folklore has come from Latin America, the Pacific states and the sub-continent.<sup>22</sup> Moreover, a great deal of work done by WIPO, particularly since 2001, has considered the question in global terms. In this thesis, however, I restrict my focus to the West African sub-region and specifically Ghana. I do this for two reasons, firstly because Ghana's copyright law represents an extreme example in terms of the restrictions it places on the utilisation of folklore. Secondly, my choice is based on my long association and familiarity with the theatre industry in the country.

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<sup>21</sup> Europe's long interaction with communities along the length of the Guinea Coast, which stretches from Senegal in the West to Cameroon in the East, began with the Portuguese in 1472. The Portuguese Prince, Henry the Navigator, sent an expedition to find a sea route that bypassed the Arab dominated trans-Saharan gold trade. His explorers landed at a place they named El Mina, the mine. In 1482 they built the first fortified trading post at Elmina, which still stands today. In 1660 the British started trading interests in Ghana through the Company of Royal Adventurers, which was established by James Stewart, Duke of York. This was succeeded by the African Company of Merchants, which was abolished by the Crown in 1821 as the slave trade was suppressed and all privately held lands were taken over by the British government. The Gold Coast became an official Protectorate of Britain in 1874 after the Dutch and Danish signed over their interests and land. Still at this time the Gold Coast colony was a small strip of coastal land in which the fort cities of Accra, Cape Coast and Sekondi controlled trade from the interior to the rest of the world. The British paid ground rent to the local chiefs and the Gold Coast lawyer, Joseph Casely-Hayford, describes the British as 'honoured guests, who must be entertained and honoured; and, as long as he know his place and did not assume airs or bully the people, he was welcome to have his share of the good things of the land'. Initially, the British forts 'had no territory or territorial rights attached to them', but progressive British Governors informally extended the parameters of their jurisdiction. Following a series of wars with the Ashanti to the North, the Ashanti Region and Northern Regions were annexed by Britain in 1901. The only subsequent territorial change was the inclusion of British Togoland in 1956. See: Joseph Casely-Hayford, *Gold Coast Native Institutions*, (London: Sweet and Maxwell, 1903), 135-138.

<sup>22</sup> Historically, India has been very active in attempting to secure copyright protection for folklore, notably during the Stockholm Revision Conference. See Svante Bergstrom (Rapporteur), *Records of the Intellectual Property Conference of Stockholm*, June 11 to July 14, 1967 Volume II. Available at: <http://global.oup.com/booksites/content/9780198259466/15550029>. Accessed 5/4/14.

I first travelled to Ghana in 2000 and since then have returned many times as a researcher and theatre practitioner. Through these two strands I developed an awareness of the relevance and continued importance of Ghanaian folklore in Ghana's post independence playwriting. This research project stretches beyond this PhD to an MPhil in which I examined the recent diminution of Ghana's theatre industry. What began as an enquiry into the lack of contemporary playwrights in a country with such a rich and recent theatre history, has developed into an examination of the role of folklore in cultural practice, and the role of the state in directing that practice.

## Play texts

In this thesis I do not focus on the generational repetition of Ghanaian folkloric practice within traditional communities, though this is a very important area, but rather on the utilisation, repetition and codification of folkloric elements in Ghana's theatre industry.<sup>23</sup> As such, my objects of study are Ghanaian play texts. In Ghana other forms of dramatic expression exist that I will mention briefly here in order to define the place of play texts within the wider cultural output.

In Ghana today there exists a rich heritage of annual festivals and specific communal rituals that date from pre-colonialism. James Gibbs describes these as 'annual community gatherings [which] incorporate specific elements of drama'.<sup>24</sup> These

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<sup>23</sup> I do not examine the tension between the community's right to practice and develop their traditional culture or the potential impact of mapping copyright on to these expressions. Johanna Gibson's 2005 book *Community Resources* provides an excellent in-depth examination of this issue from the perspective of traditional knowledge. This issue is very relevant in Ghana (as expressed by Nii Amarkai, King Maker of the Ga Nation who I interviewed in 2012 for this research) and has its roots in the post independence power struggles between Nkrumah and Ghana's traditional rulers. (See: Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Aldershot: Ashgate Publishing Co., 2005). Additionally, I do not examine at length customary law, though it is certainly arguable that, as suggested by Paul Kuruk, customary law has a role to play in the protection of folklore, particularly in Ghana, which officially practices a dual system of law. There is a body of literature that examines the potential of customary law in developing or augmenting protection for folklore at the national level. In terms of Ghana, see: Paul Kuruk, 'African customary law and the protection of folklore', 4-32 and Joseph B. Akamba and Isidore Kwadwo Tufour, 'The Future of Customary Law in Ghana', in *The Future of African Customary Law* eds., Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (Cambridge: Cambridge University Press, 2012) 202-224.

<sup>24</sup> James Gibbs "Ghana" *A History of Theatre in Africa* ed. Martin Banham (Cambridge: Cambridge University Press, 2004) 159.



gatherings, such as festivals, funerals and weddings, contain unique performance elements and fulfil specific cultural functions, which throughout the colonial era stood distinct from British culture. Further to this, the populist Concert Party form, in which small troupes perform skits, topical sketches and songs, flourished throughout the twentieth century in Ghana. Within the scope of Ghanaian cultural studies there is a growing body of research that focuses on the concert party. In her book, *Ghana's Concert Party Theatre*, Catherine Cole states that the concert party started 'as British imperial cultural propaganda honoring Empire Day [May 24th]',<sup>25</sup> and was 'popular, modern, commercial [and] travelling'.<sup>26</sup> From the 1920s 'African actors trekked the length and breadth of the British colony [the Gold Coast] performing comic variety shows'.<sup>27</sup> The Concert Party borrowed heavily from popular western forms, American humour, music and drama brought by African American sailors, and silent films showing stars such as Charlie Chaplin and Al Jolson. Though the history and development of the Concert Party often overlaps with that of playwriting, it inhabits a distinct space from that of literary theatre in Ghanaian culture.<sup>28</sup>

The key feature that distinguishes playwriting from the Concert Party (and what made it so appealing to Nkrumah) is the potential permanence of the play text, as opposed to the ephemeral nature of the performance. Whereas the Concert Party was designed to be immediate and transitory, playwriting can provide a permanent, published product capable of being disseminated to a national and global audience. For Nkrumah, as explored in Chapter 3, published play texts were both a product of a robust culture and a symbol of it.

As such, my decision to focus on play texts is attributable to three reasons. Firstly, as documents, they afford the opportunity to trace the utilisation of folklore through generations of playwrights and establish both when this utilisation began and the significance of its repetition in the development of theatre in Ghana. Secondly, due

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<sup>25</sup> Catherine Cole, *Ghana's Concert Party Theatre* (Bloomington: Indiana University Press, 2001) 3

<sup>26</sup> Karin Barber, John Collins and Alain Ricard, *West African Popular Theatre* (Oxford: James Currey, 1997) 2.

<sup>27</sup> Cole, *Ghana's Concert Party Theatre*, 1.

<sup>28</sup> Performers often switched codes and the concert party troupe, the Workers Brigade Party, played an intrinsic part in the codification of Ghanaian theatre under the directorship of Felix Morrisseau-Leroy and guidance of Efua Sutherland. See: Cole, *Ghana's Concert Party Theatre*.

to the infrastructure required to publish and disseminate play texts, their existence and popularity during certain period in Ghana's history is suggestive of political support and offers an insight into the nuanced and often over-lapping interplay between theatre and politics in Ghana.

To explain this slightly further: there is a particular political economy to published play texts in Ghana. Robert July, an American academic, notes that as well as developing theatre performances in Ghana, Sutherland was 'determined to develop playwriting, to create a body of dramatic literature written by Africans'.<sup>29</sup> This determination was the result of a trip Sutherland had undertaken in 1958 to Tashkent in the USSR, as part of the Ghana delegation to the 1958 Afro-Asian Writers' Conference. She later recalled:

what moved me was to see a huge exhibition of books from all the other countries that were represented, and see the African area [...] the few shelves [...] I said to myself then that I would help fill those shelves.<sup>30</sup>

It was largely because of Sutherland's experience in Tashkent that when her Ghana Drama Studio opened in 1960, it did so as both 'a centre for vigorous experimentation in drama [and] developing writers'.<sup>31</sup>

Finally, the focus on the play text (whether published or not) is significant in copyright terms as the author automatically benefits from an internationally accepted system of privileges that protect their moral and economic rights. The tension that this highlights in terms of Ghanaian theatre is that so much of what is regarded as the property of individual authors and the basis of Ghana's modern theatre industry is drawn from a collectively maintained folkloric root which, until 1985, was afforded no protection under Ghanaian law, but now is. The complexity brought about as a result of this change is examined throughout this thesis.

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<sup>29</sup> Robert July, *An African Voice: the role of the humanities in African independence* (Durham: Duke University Press, 1987) 75.

<sup>30</sup> Robert July, "'Here, Then, is Efua': Sutherland and the Drama Studio," *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 161.

<sup>31</sup> Ola Rotimi, 'The Attainment of Discovery: Efua Sutherland and the Evolution of Modern African Drama', *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 18.

## Folklore

Throughout this thesis I refer to the term “folklore”. Though “folklore” is a commonly used term, what constitutes folklore and how it is encoded into legal documents is a complex, controversial and unresolved area. Here, it is worth highlighting some of the many complexities that surround the use of this term in legal and cultural discourse.

The term “folk-lore” was originally coined by W. J. Thoms in 1846<sup>32</sup> as a replacement for ‘Popular Antiquities or Popular Literature’,<sup>33</sup> and literally means ‘the learning of the people’.<sup>34</sup> Alain Gobin, in his 1977 paper: Study of the Various Aspects Involved in the Protection of Folklore, remarked that following Thoms’ definition the term ‘was rapidly adopted by English-speakers who assimilated it to that of ethnology, and by the French who used it “to designate the study of the manners and customs of contemporary primitive peoples”’.<sup>35</sup> In the 1913 *Handbook of Folk-Lore* Charlotte Burne, Vice President of The British Folklore Society, suggested that folklore ‘covers everything which makes part of the mental equipment of the folk as distinguished from their technical skill’.<sup>36</sup> As such, the potential field of study was and is vast. Indeed, as the folklorist Katherine Briggs suggests: ‘the scope of [Thoms’ definition], though quite wide enough to provide a lifetime’s study, does not embrace anything like the ground covered by modern Folklore disciplines’.<sup>37</sup> Moreover, as Alain Gobin suggests, the term is both ‘imprecise [and]

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<sup>32</sup>Charlotte S. Burne, *The Handbook of Folk-Lore* (London: Sidgwick and Jackson, Ltd, 1914) 1.

<sup>33</sup> Burne, *The Handbook of Folk-Lore*, 1.

<sup>34</sup> Burne, *The Handbook of Folk-Lore*, 1.

<sup>35</sup> Gobin also notes that the use of the term ‘was no longer questioned after the middle of the nineteenth century’. Alain Gobin, ‘Study of the various aspects involved in the protection of folklore’ 1977, 2.

<sup>36</sup> Burne, *The Handbook of Folk-lore*, 1. Burnes’ extensive list on p.4 of *The Handbook* includes:

I. *Belief and Practice* relating to:

The Earth and the Sky, The Vegetable World. The Animal World. Human Beings. Things Made by Man. The Soul and Another Life. Superhuman Beings, (Gods, Godlings, and Others). Omens and Divination. The Magic Art. Disease and Leechcraft. II. *Customs*. Social and Political Institutions. Rites of Individual Life. Occupations and Industries. Calender Fasts and Festivals. Games, Sports and Pastimes. III. *Stories, Songs and Sayings*. Stories: (a) told as true; (b) told for amusement. Songs and Ballads. Proverbs and Riddles. Proverbial Rhymes and Local Sayings.

<sup>37</sup> Katherine Briggs, *British Folk-Tales and Legends* (London: Routledge Classics, 2002) 4.

ambiguous’<sup>38</sup> and the breadth of this definition has proved problematic within folkloric studies and associated disciplines, as the folklorist Regina Bendix acknowledges: ‘the effort to invoke disciplinary contours has been a constant’.<sup>39</sup>

As an object of protection, folklore presents several challenges to protection through copyright. Susanna Fischer suggests that ‘[w]hen modern western copyright law originated in early eighteenth century England, it protected individual and identifiable authors of books’.<sup>40</sup> However, writing in 1890, George Gomme defined folklore as ‘old beliefs, old customs, old memories, which are relics of an unrecorded past’.<sup>41</sup> As well as being old and unrecorded, Gomme notes that folklore is ‘handed down by tradition from generation to generation, the origin of which are unknown’;<sup>42</sup> thus immediately highlighting a significant conceptual incompatibility between the object of protection and the mechanism.

In terms of defining folklore in legal instruments, as explored at length in Chapter 1, attempts are still ongoing. Since the late 1950s, when discussions concerning the copyrighting of folklore began, there have been several different definitions and several different terms employed to encapsulate what constitutes folklore. The issue is so problematic that initial attempts to provide copyright protection for folklore did not actually include the term as it was considered ‘too difficult to define’.<sup>43</sup> Gobin, in his 1977 study identifies ‘various types of work covered by the generic term of folklore’.<sup>44</sup> In 2002, Janet Blake noted that at the time several terms were used to refer to folklore, including: ‘traditional culture’, ‘traditional culture and folklore’, ‘folklore’, ‘intangible cultural heritage’, ‘indigenous knowledge’ and ‘intangible

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<sup>38</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, 2.

<sup>39</sup> Regina Bendix, *In Search of Authenticity: The Formation of Folklore Studies* (Wisconsin: University of Wisconsin, 1997), 5.

<sup>40</sup> Susanna Frederick Fischer, ‘Dick Whittington and Creativity: from Trade to Folklore, from Folklore to Trade, 12 Tex. Wesleyan L. Rev. 2, 2005-2006, 19.

<sup>41</sup> George Gomme, *The Handbook of Folklore*, (London: David Nutt, 1890), 2.

<sup>42</sup> Gomme, *The Handbook of Folklore*, 2

<sup>43</sup> Bergstrom, *Records of the Intellectual Property Conference of Stockholm, 1967*, 307. Moreover, Johanna Gibson notes that in addition to defining folklore, the identification and definition of ‘indigenous groups’ is also problematic. (See: Gibson, *Community Resources*, 22).

<sup>44</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, 13.

heritage'.<sup>45</sup> At its fifth session in 2003, the IGC adopted the term 'Traditional Cultural Expressions (TCEs)' to replace folklore as it was deemed to be a 'neutral working term'.<sup>46</sup> Though, the IGC notes that 'the question of whether TCEs or Expressions of Folklore (EoFs) is more appropriate remains undecided',<sup>47</sup> since that time the terms have been used by the IGC 'as interchangeable synonyms'.<sup>48</sup> Moreover, the IGC differentiates between TCEs, Traditional Knowledge (TK) (described as technical traditional knowledge and know-how)<sup>49</sup> and Genetic Resources (GR) as separate categories of folklore. Throughout this thesis, I focus only on TCEs/EoF but, as suggested, employ the term "folklore".

However, rather than using WIPOs terms (unless referring directly to them), I use the term "folklore". I do this for three reasons: firstly because much of the literature concerning the work of Ghanaian playwrights refers to "folklore". Secondly, because the number of terms employed over the time span considered in this thesis highlights that a satisfactory term is yet to be established and, as such, a consistent term is useful. Finally, I use the term in order to explore in Chapter 3, the 'negative connotations associated with the term 'folklore''.<sup>50</sup> These 'negative connotations' are consistently referred to as the reason that an alternative term is necessary and is, I argue, an on-going legacy of the colonial dynamic between Europe and the global South, which has strongly informed the attempts to develop protection for folklore at the international level.

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<sup>45</sup> Furthermore, she suggests that any definition of 'intangible heritage' should incorporate: the spontaneous act of its creation; the social, cultural and intellectual contexts in which it is created; that access and use is often governed by customary rules; the methods of transmission, particularly oral; that it is transmitted from generation to generation; that it is an evolving, living culture; that it is frequently collectively held; that it reflects the values and beliefs of a group or society; its importance to creation of identity; its contribution to cultural diversity; its spiritual and cultural significance. (See: Janet Blake, 'Developing a new standard-setting instrument for the safeguarding of intangible cultural heritage: elements for consideration' (UNESCO, 2001), 10).

<sup>46</sup> WIPO, 'Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options', (Geneva, 2004) 8. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_6/wipo\\_grtkf\\_ic\\_6\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_3.pdf). Accessed 8/4/14

<sup>47</sup> The use of 'traditional cultural expressions' or 'expressions of folklore' in this document is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms. WIPO, 'Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options', 9.

<sup>48</sup> WIPO, 'The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles' (Geneva, 2004) 11. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_7/wipo\\_grtkf\\_ic\\_7\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.pdf). Accessed 8/4/14

<sup>49</sup> WIPO, 'Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options', 11.

<sup>50</sup> WIPO, 'The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles', 11.

## Copyright

Copyright is not the only legal recourse available to states to protect against the illicit use of folklore. Within IP law alone, trademarks are used within the US as a certification of authentic ‘Indian made’ works.<sup>51</sup> Outside IP law, WIPO notes that ‘the general law of unfair competition and various general legal mechanisms beyond the scope of IP law proper (such as criminal law, the law of delict/torts, cultural heritage laws, blasphemy laws, customary laws, contract law, employment law or marketing and labelling laws and schemes)’<sup>52</sup> may all be applicable to the protection of folklore.<sup>53</sup> However, in this thesis I focus on copyright, as it is the instrument employed in Ghana for the protection of folklore.

Copyright is an intangible property right.<sup>54</sup> Characterised as a ‘negative’ right, copyright allows the rights holder (usually the author) to refuse a third party to make use of their work without permission. Copyright is automatic, requiring no formalities of registration in order to arise. The function of copyright, as the IGC suggests, is to ‘carve out exclusive rights to an individual (either a natural person or a legal one) to exploit particular creations of human ingenuity’.<sup>55</sup> The rights afforded the individual are both moral (a right to attribution) and economic and are enforced for a fixed term, usually 50 or 70 years following the death of the author.

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<sup>51</sup> Under the USA’s Indian Arts and Crafts Act, WIPO states that the Indian Arts and Crafts Board to register trademarks only to arts and crafts that are ‘Indian products’ and of genuiness and quality. There are similar systems that apply in First Nation contexts: Australia’s Label of Authenticity, and the ‘Maori Made’ mark of New Zealand, which is licensed to artists of ‘Maori descent to be used on works produced by them which comprise an explicit or implicit Maori referent’ (WIPO, ‘The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles’, Annex II, 18.

<sup>52</sup> WIPO, ‘The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles’, 10.

<sup>53</sup> For more on the role of patents and trademarks in the protection of traditional culture, see: Brown, *Who Owns Native Culture?*.

<sup>54</sup> Alan Story, *An Alternative Primer on national and international copyright law in the global South: eighteen questions and answers* (Kent: Copyright Research Group, 2009) 46.

<sup>55</sup> Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, First Session, *Proposal Presented by the African Group to the First Meeting on Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore*, (2001), 1. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_1/wipo\\_grtkf\\_ic\\_1\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_10.pdf). Accessed 31/1/14.

Copyright is national and territorial in scope.<sup>56</sup> As Jon Baumgarten explains: ‘[t]he term ‘international copyright’ is something of a misnomer, for neither a single code governing copyright protection across national borders, nor a unitary multi-national property right, exists’.<sup>57</sup> However, copyright laws exist within the framework of international law, which acts to harmonise national statutes through establishing minimum standards of protection. Underpinning international copyright law is the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), signed September 9, 1886 and a number of other international treaties enacted at the same time; however, Berne remains the most significant.<sup>58</sup> The Berne Convention establishes minimum standards that each Member State agrees to ensure. For example, under Article 7(1) of the Berne Convention an eligible work is protected for ‘the life of the author and fifty years after his [or her] death’. Though individual states can exceed this term of protection (for example, the term of protection for a literary, dramatic or musical work in the UK is life plus 70 years),<sup>59</sup> they cannot go below it. Currently, the Berne Convention has 167 Contracting Parties, achieving virtually global coverage.<sup>60</sup>

Copyright is primarily a mechanism for protecting the rights of the author. However, it does include exceptions that allow third party access to protected works and so mitigate monopoly.<sup>61</sup> Writing in 2006, Doris Long suggested that ‘no immutable line in the sand exists’ between protection and access to copyrighted works.<sup>62</sup> Further, she suggests that ‘when considering access to expression and information, cultural commentators [...] generally conclude that protection should be less strong’. This, she argues, encourages greater use and leads to the creation of more works.<sup>63</sup> However, there are a number of key ways in which Ghana’s 2005 Copyright Act

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<sup>56</sup> Story, *An Alternative Primer on national and international copyright law in the global South*, 45

<sup>57</sup> Jon Baumgarten, *Primer on the Principles of International Copyright*, in Fourth Annual U.S. Copyright Office Speaks: Contemporary Copyright And Intellectual Property (1992) 471.

<sup>58</sup> The current version is the Berne Convention for the Protection of Literary and Artistic Works, Paris Revision, amended 1979. For a full text see: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698). Accessed 5/10/2011.

<sup>59</sup> UK Copyright, Designs and Patents Act 1988: ‘Copyright expires at the end of the period of 70 years from the end of the calendar year in which the author dies’, Article 12(2).

<sup>60</sup> Correct as of 18/06/14. See: [www.wipo.int/treaties/StatsResults.jsp?treaty\\_id&lang=en](http://www.wipo.int/treaties/StatsResults.jsp?treaty_id&lang=en). Accessed 2/6/14.

<sup>61</sup> Doris Estelle Long, ‘Traditional Knowledge and the Fight for the Public Domain’, *The John Marshall Review of Intellectual Property Law* Vol., 5 No., iii (2005-2006) 319.

<sup>62</sup> Long, ‘Traditional Knowledge and the Fight for the Public Domain’, 321.

<sup>63</sup> Long, ‘Traditional Knowledge and the Fight for the Public Domain’, 319.

appears to prevent the utilisation of folklore in a manner that would be permissible in other copyrightable works.

For example, one of the main ways in which copyright mitigates monopoly and allows access to works is through a set term of protection, on the expiration of which the work falls into the public domain. As noted, the Berne Convention sets a minimum term of protection for many categories of works of life plus fifty years.<sup>64</sup> The reason that works enjoy only a limited term of protection is, as WIPO notes, that ‘the copyright system is based on the notion that the term of protection be limited, so that works ultimately enter the public domain’.<sup>65</sup> However, as Alan Story notes, ‘there is [...] *no maximum period*’<sup>66</sup> and in Ghana (and elsewhere where folklore is protected by copyright) folklore is protected in perpetuity.

Perpetual protection of folklore is designed to reflect the life cycle of the community from which it originates.<sup>67</sup> However, as in the case of Ghana, the community are not necessarily the rights holders; rather the rights reside in the state. Moreover, perpetual protection brings into question the role of the public domain and the ability of artists to use materials once the term of copyright protection has expired. Long suggests that ‘[i]f knowledge is passed through generations from the Western Copyright point of view, that knowledge is in the public domain’,<sup>68</sup> and the role of the public domain has periodically been given as the reason why protection of folklore through copyright is undesirable.<sup>69</sup> One of the issues raised by this, as the

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<sup>64</sup> Berne Convention Paris Act 1979, Art. 7(1).

<sup>65</sup> WIPO, ‘Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options’, 23.

<sup>66</sup> Berne Convention, Paris Act, 1979, Art. 7(6): ‘The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs’. and Alan Story, *An Alternative Primer on national and international copyright law in the global South*, 35.

<sup>67</sup> WIPO/UNESCO, ‘Tunis Model Law on Copyright for Developing Countries’, (1976): ‘The user shall pay to the competent authority... percent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore. (s,17).

<sup>68</sup> Long, ‘Traditional Knowledge and the Fight for the Public Domain’, 321.

<sup>69</sup> For example, in 1985 WIPO noted that mechanisms for protecting folklore were not established in the global North because ‘[i]n the industrialized countries, expressions of folklore are generally considered to belong to the public domain’. The IGC noted in 2003 that ‘the public domain status of cultural heritage is [...] tied to its role as a source of creativity and innovation [...] as it allows the regeneration and revitalization of cultural heritage’. Moreover, they suggest that ‘neither members of a cultural community nor the cultural industries may be able to create and innovate based on cultural heritage if exclusive private property rights were to be established over it.’ (WIPO, ‘Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions’, (Geneva, 2003) 3-4. Available



copyright academic Michael Brown suggests, is that ‘permanent copyright could stunt creativity by throwing up walls around ideas’.<sup>70</sup> What this means is that by applying a perpetual term of protection to folklore, it is removed as a free resource for subsequent generations of artists. Accordingly, in this thesis I discuss whether the terms of protection for folklore set down in the 2005 Act and consequent lack of routes to access folklore, means that the Act can be considered to have tipped into monopoly.

In terms of the development of copyright in Ghana, at independence, the nations of British West Africa shared a common copyright framework, which had been imposed by s.1 of the 1911 Imperial Copyright Act.<sup>71</sup> Following independence, Ghana introduced the Copyright Act of 1961, which Betty Mould-Iddrissu, the former Director of the Ghana Copyright Office, describes as ‘an exact replica of the existing UK law’.<sup>72</sup> Adebambo Adewopo attributes this to the fact that the ‘the geo-political and juridical landscape of sub-Saharan Africa is divided along Imperial lines [and] Colonial laws governing the juridical systems were merely replaced by national institutions and statutes containing similar dispositions’.<sup>73</sup> The 1961 Copyright Act was replaced by the 1985 Copyright Act (PNDC Law 110), which

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at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_5/wipo\\_grtkf\\_ic\\_5\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_3.pdf). Accessed 3/4/14). Molly Torsen and Jane Anderson describe the protection of folklore as ‘restoring copyright’ in works that have fallen into the public domain. They suggest that this is problematic because ‘it is unclear whether a restored cultural work is a new work for copyright purposes or if it is merely a form of copying from an older work – and therefore unprotectable by copyright’ (Molly Torsen and Jane Anderson, ‘Intellectual Property and the Safeguarding of Traditional Culture’, (Geneva, 2010), 47). However, at the fifteenth session of the IGC in 2008, the Nigerian Delegation stated that they ‘did not subscribe to the description of TCEs as being in the public domain since they had never enjoyed any formal protection.’ The Delegation reasoned that as the public domain is a mechanism of copyright, having never been covered by copyright, folklore could not fall into the public domain. (WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Factual Extractions (Geneva, 2008) Annex, 131. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_12/wipo\\_grtkf\\_ic\\_12\\_5\\_b.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_12/wipo_grtkf_ic_12_5_b.pdf). Accessed, 9/4/14).

<sup>70</sup> Brown, *Who Owns Native Culture*, 55.

<sup>71</sup> UK Copyright Act Imperial Copyright Act, 1911, ‘Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work’. s.1(1).

<sup>72</sup> Betty Mould-Iddrissu, ‘Copyright Protection – An African Perspective – The Ghana Experience’ WIPO Regional Seminar on Copyright (Kampala, 1991) 4. Available at: [http://www.wipo.int/mdocsarchives/OMPI\\_OUA\\_DA\\_KA\\_91/OMPI\\_OUA\\_CR\\_KA\\_91\\_3\\_E.pdf](http://www.wipo.int/mdocsarchives/OMPI_OUA_DA_KA_91/OMPI_OUA_CR_KA_91_3_E.pdf). Accessed: 2/8/12.

<sup>73</sup> A. Adewopo, ‘The Global Intellectual Property System and sub-Saharan Africa. A Prognostic Reflection’, *University of Toledo Law Review* (2002) Vol.33, 750.

contained protection for folklore ‘works of Ghanaian folklore’ under s.5.<sup>74</sup> The current copyright law, the Ghana Copyright Act, 2005 came into force in 2010.

Though the 1985 Copyright Act contained provisions for the protection of folklore, much of the criticism of the law followed the introduction of the 2005 Copyright Act. Here, then, it is useful to compare the two Acts in order to identify exactly what restrictions are placed on Ghanaians in terms of utilising folklore and in what ways the 2005 Act differs from the 1985 Act.

### **A Comparison of Ghana’s 1985 and 2005 Copyrights Acts<sup>75</sup>**

The 1985 Copyright Act protected ‘works of folklore’ under s.5 (1). Under the Act ‘folklore’ was defined as ‘all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore’.<sup>76</sup> As such, ‘works of folklore’ were characterised as being either associated with an ethnic group or the product of an anonymous author. In both cases the identity of an individual author is unknown. Moreover, the protected work explicitly resides in the public domain prior to the coming into force of the 1985 Act.

The protection of these works within a copyright paradigm was achieved through a simple statement: ‘[w]orks of folklore are hereby protected by copyright’.<sup>77</sup> The rights to works of folklore were vested in the state ‘as if the republic were the

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<sup>74</sup> Ghana Copyright Act 1985: ‘Works of Ghanaian folklore are hereby protected by copyright’. s.5(1).

<sup>75</sup> For a comparative table of Ghana’s 1985 and 2005 Copyright Acts see Appendix B.

<sup>76</sup> Ghana Copyright Act, 1985, s.5(3).

<sup>77</sup> Ghana Copyright Act, 1985, s.5(1).

original creator of the works'.<sup>78</sup> These rights were administered by the Secretary of State for Culture<sup>79</sup> and were deemed to exist in perpetuity under s.16.<sup>80</sup>

In terms of the restrictions placed upon users of Ghanaian folklore, the Act stated that '[n]o person shall without permission in writing of the Secretary import into Ghana, sell, offer or expose for sale or distribution in Ghana any copies of the following works made outside Ghana (a) works of Ghanaian folklore; or (b) translations, adaptations, or arrangements of Ghanaian folklore'.<sup>81</sup> Accordingly, s.46(1)(a) restricts the commercial exploitation of works of Ghanaian folklore (that is works characterised by their association with one of Ghana's ethnic groups or an anonymous Ghanaian author(s) made in antiquity) in Ghana as long as they were made outside Ghana.<sup>82</sup> Section 46(1)(b) restricted the sale of translations, adaptations and arrangements of Ghanaian folklore made outside Ghana without the requisite permission from the Secretary of State. The intended target of the law was commonly understood to be non-nationals who use elements of Ghanaian folklore to create works that are then sold within Ghana without attribution or economic benefit filtering back to the community or the state. For example, musical works that incorporate traditional Ghanaian beats or melodies.<sup>83</sup>

Though s.46(1)(b) restricts the use of Ghanaian folklore by foreign nationals, it does implicitly appear to permit Ghanaian nationals to utilise Ghanaian folklore for commercial purposes without permission. However, this seems to be contradicted by s.5(3), which states that '[w]here a person intends to use any such folklore other than for a permitted use under section 18 of this Law, he shall apply to the Secretary so to do, and shall pay such a fee as may be prescribed in relation thereto'. Section 18 sets out an extensive list of exceptions that apply to all copyright protected works in

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<sup>78</sup> Ghana Copyright Act, 1985, s5(2).

<sup>79</sup> Ghana Copyright Act, 1985: 'Where a person intends to use and such folklore other than for a permitted use under section 18 of this Law, he shall apply to the Secretary so to do, and shall pay such fee as may be prescribed in relation thereto' (s.5(3)).

<sup>80</sup> Ghana Copyright Act, 1985: 'The rights vested in the republic of Ghana in respect of folklore under section 5 of this Law exist in perpetuity' (s.16).

<sup>81</sup> Ghana Copyright Act, 1985, s46(1).

<sup>82</sup> Boatema Boateng suggests that the law was intended to prevent the importation of cheap imitation textiles flooding the domestic market. (Boateng, *This Copyright Thing Doesn't Work Here*, 11)

<sup>83</sup> Such as Paul Simon's 1990 track *Spirit Voices*, which I discuss in Chapter 4.

Ghana.<sup>84</sup> For example, use of protected work is permitted when such use is for educational purposes, is compatible with fair use, or is incidental. There is nothing within the exceptions that applies specifically to the use of folklore. There is, for example, nothing in s.18 that allows a Ghanaian national to adapt, translate or arrange a work of Ghanaian folklore. As such, though it is clear that the Act protects all works of Ghanaian folklore and places the rights in perpetuity in the Republic, it is unclear whether the Act allows for Ghanaians to utilise Ghanaian folklore for free and without permission, as s.46(1)(b) suggests, or whether to do so would infringe the Republic's copyright, as s.5(3) and s.18 suggest. Thus, there was a significant level of ambiguity in the 1985 Act concerning who had the right to use Ghanaian folklore and under what circumstances.

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<sup>84</sup> Ghana Copyright Act 1985: The Use of a literary, artistic or scientific work either in the original language or in translation shall not be an infringement of the right of the author in that work and shall not require the consent of the owner of the copyright where such use involves-

- (a) the reproduction, translation, adaptation arrangement or other transformation of the work for the user's use only, if the work has been made public;
- (b) subject to subsection (2) of this section, the inclusion with and indication of the source and the name of the author of quotations from such work in another work, including quotations from articles in newspapers or periodicals in the form of press summaries, if the work from which the quotations are taken has been made public;
- (c) subject to sub-section (3) of this section, the utilisation of the work by way of illustration in publications, broadcasts or sound or visual recordings for teaching, to the extent justified by the purpose, or the communication for teaching purposes of the work broadcast for use in educational institutions, or for professional training or public education, if the work has been made public;
- (d) in the case of (i) an article published in one or more newspapers or periodicals on current economic, political or religious topics; or (ii) a broadcast on current economic, political or religious topics; the reproduction of the article or broadcast in the press or the communication of the article or broadcast to the public, if the source of the article or broadcast when so used is clearly indicated, unless the article or broadcast, when first published or made, is accompanied by an express condition prohibiting its use without consent;
- (e) the reproduction or making available to the public by means of photographic works, audio-visual works or other means of communication of any work that can be seen or heard in the course of the reporting of fresh events or new information, if –(i) the work is reproduced or made available for the purpose of reporting by a news medium of fresh events or of new information; and (ii) the use of the work does not extend beyond that justified by the purpose of keeping the public informed of current events;
- (f) the reproduction of works of art or architecture in an audio-visual work for cinema or television or in a broadcast by television and the communication to the public of any of those works of art or architecture so produced, if those works are- (i) permanently located in a place where they can be viewed by the public; or (ii) included in an audio-visual work for cinema or television by way only of background or as incidental to the essential matters represented;
- (g) subject to subsection (4) of this section, the reproduction in the media or the communication to the public of – (i) any political speech delivered in public; (ii) any speech delivered in public during legal proceedings; or (iii) any lecture, address, sermon or other work of a similar nature delivered in public, where the use by reproduction or communication to the public is exclusively for the purpose of reporting fresh events or new information
- (h) subject to subsection (5) of this section, the reproduction by recordings, photography or similar process by a public library, a non-commercial documentation centre, a scientific institution or an educational institution, of a literary, artistic or scientific work that has been lawfully made public before the reproduction is made. s.18(1).

The 1985 Act was repealed by the 2005 Act, which makes several changes to the scope and protection of folklore. Firstly, rather than ‘works of folklore’, the 2005 Act refers to ‘expressions of folklore’ and defines them as ‘the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which *are* created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author’.<sup>85</sup> Thus the definition of folklore is slightly, but significantly, different in the two acts. The 1985 Act defined folklore as works that ‘*were* created, preserved and developed by ethnic or by unidentified Ghanaian authors’. However, in the 2005 Act “folklore” is defined as ‘the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which *are* created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes *kente* and *adinkra* designs, where the author of the designs are not know, and any similar work designated under this Act to be works of folklore’.<sup>86</sup> Though the association with ethnic communities and unidentified authors is retained, under the 2005 Act the characterisation of folklore as belonging to antiquity no longer applies and a work can be designated as folklore as long as it satisfies the criteria of belonging to the cultural heritage of Ghana. As such, the law potentially extends the scope of protection to contemporary works.<sup>87</sup> Rather than vesting the rights in folklore with the state, the 2005 Act states that the rights in an expression of folklore are ‘vested in the President on behalf of and in trust for the people of the republic’,<sup>88</sup> and, like the 1985 Act, these rights are deemed to exist in perpetuity.<sup>89</sup>

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<sup>85</sup> Ghana Copyright Act 2005, ““Folklore” means the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes *kente* and *adinkra* designs, where the author of the designs are not know, and any similar work designated under this Act to be works of folklore’ (s.76).

<sup>86</sup> Ghana Copyright Act, 2005, s.76.

<sup>87</sup> Gertrude Torkornoo argues that this is the case (Torkornoo, ‘Creating Capital from Culture’).

<sup>88</sup> Ghana Copyright Act 2005, ‘The rights of folklore are vested in the President on behalf of and in trust for the people of the Republic’. (s.4(2)) Concerning the change in the rights holder between the two Acts, Ricketson and Ginsburg suggest that the rights holder of a work protected by copyright does not necessarily have to be the author. They note that ‘the author’s right is not an exclusive personal right, but might be disposed of to third parties’. In a discussion on ‘deemed authorship’, which Ricketson and Ginsburg describe as ‘the device of conferring the status of author on persons who are not the actual intellectual creator’, they suggest that ‘as a general matter, Union countries should not extend the status of ‘author’ to persons or entities who are *clearly* not the real creators of the works’. The reason for this is that ‘if someone else is deemed to be the ‘author’ of her work, the true author is, in effect, disenfranchised and deprived potentially of her moral rights’. In the context of Ghana, as the republic could not be ‘the original author of the work’ as the 1985 Act suggests, the change in wording in the 2005 Act, by placing the rights in the president in trust for the people, appears to acknowledge that an author, or a group of authors, did exist but are now unknown, as such the rights are conferred in trust to the office of the president. (Sam Ricketson and Jane Ginsberg, *International Copyright and Neighbouring Rights*, (Oxford: Oxford University Press, 2006), 367-8).

In terms of what uses of folklore are permitted under the 2005 Act, s.44(1) states that '[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'.<sup>90</sup> Thus s.44(1)(a) protects against the sale or distribution of all works of Ghanaian folklore whether made in or outside Ghana. This significantly expands the scope of protection from the 1985 Act, which protected against the sale of works of Ghanaian folklore made outside the republic and imported into it. However, the law does appear to allow space for the adaptation of folklore by Ghanaians for commercial purposes in Ghana. Section 44(1)(b) renders it an offence to sell, distribute and expose for sale translations, adaptations and arrangements 'made outside the Republic'. This suggests that a derivative work made within the Republic falls outside the scope of the offence.

However, as with the 1985 Act, there is a lack of clarity as to what uses of folklore are permitted when the provisions are read together. Section 64(1) of the 2005 Act states that '[a] person who intends to use folklore for any purpose other than as permitted under section 19 of this Act, shall apply to the [National Folklore] Board for permission in the prescribed form and the person shall pay a fee that the Board may determine'. Section 19 is a verbatim copy of s.18 of the 1985 Act. It is, therefore, unclear whether the adaptation of a work or expression of Ghanaian folklore by a Ghanaian is, in fact, permissible.

That said, the perception that the 2005 Copyright Act explicitly protects against the utilisation of folklore by Ghanaians is evidenced by, s.4(1) which states that '[a]n expression of folklore is protected under this Act against (a) reproduction, (b) communication to the public by performance, broadcasting, distribution by cable or

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<sup>89</sup> Ghana Copyright Act 2005, 'The rights vested in the President on behalf of and in trust for the people of the Republic in respect of folklore under section 4 exist in perpetuity'. (s.17).

<sup>90</sup> Ghana Copyright Act 2005, s.44(1).

other means, and (c) adaptation, translation and other transformation'.<sup>91</sup> As such, s.4(1)(c) explicitly protects expressions of folklore against adaptation and so use by Ghanaian artists in the creation of a derivative work. Accordingly, anybody wishing to adapt a work or expression of folklore in order to create a derivative work, as apparently allowed for under s.44(1)(b), would be prevented from doing so under s.4(1)(c) and 64 without securing permission and paying a fee in advance of use.

Thus, though an analysis of the 1985 Act suggests a lack of clarity concerning who was and who was not permitted to utilise Ghanaian folklore, the 2005 Act potentially extends the scope of protection to include contemporaneous works and places further limitations on who is permitted to utilise folklore. Most importantly, it appears to inhibit use within Ghana. Accordingly, two of the main areas I examine in this thesis are the central role that the free use of folklore played, and continues to play, in the development of Ghana's theatre industry and whether Ghana's copyright law disrupts established cultural practice by establishing terms of protection that amount to a monopoly.

### **The need for protection of folklore**

It is not my position in this thesis to argue that folklore does not need to be protected. As the folklorist Katherine Briggs suggests:

folklore is being invaded and captured by the mass media for commercialization [...] this is not the legitimate, spontaneous growth which we find in stories handed down from father to son or in customs that alter as they are practised, it is an ignorant and wilful debasement for the sake of money.<sup>92</sup>

Furthermore, the IGC has stated that 'with the aid of modern digital technologies, works of national folklore [are] subject to commercial use at the global level, without due observance to the cultural and economic interests of the peoples creating them'.<sup>93</sup> Collins suggests that the threat is most applicable to developing countries

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<sup>91</sup> Ghana Copyright Act 2005, s.4(1).

<sup>92</sup> Katherine Briggs, *British Folk-Tales and Legends* (London: Routledge Classics, 2002) 4.

<sup>93</sup> WIPO, 'Adopted Report for the Eleventh Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; (Geneva, 2007) 48.

such as Ghana. In his 2003 paper, he suggests that ‘the world is not a level playing field. There are rich and poor nations, and the rich ones are in a technological position commercially to exploit the folklore of developing nations’.<sup>94</sup> Thus, the problematic of folklore being used out of its original context and without attribution is a genuine concern.

Naturally, the subject goes far beyond the use of folklore in the creation of plays or other artistic works. As the IGC noted at its first meeting in 2001: ‘[o]ver the past decade or so, biotechnology, pharmaceutical and human health care industries have increased their interest in natural products as sources of new biochemical compounds for drug, chemical and agro-products development [...] This interest has been stimulated by the importance of traditional knowledge as a lead in new product development’.<sup>95</sup> Though the products resulting from the use of folklore and traditional knowledge are bio-chemical and agricultural rather than artistic, the underlying issue is the same. As the IGC identifies:

African countries and their local communities have contributed considerably to these industries. However, intellectual property rights of these communities are not often recognized and protected. In addition, indigenous and local communities do not share, at least in a fair and equitable manner, benefits arising from the appropriation of their knowledge and its subsequent commercial use.<sup>96</sup>

What is clear is that accusations that folklore is subject to commercialisation and exploitation that removes it from traditional patterns of transmission could just as easily be levelled at Ghana’s theatre industry as a pharmaceutical company.

As well as protecting against illicit use of folklore, one of the potential benefits of the law is the generation of revenue from the authorised use of folklore. The Act

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Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_11/wipo\\_grtkf\\_ic\\_11\\_15.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_15.pdf). Accessed 9/4/14.

<sup>94</sup> Collins, ‘The Folkloric Tax Problem in Ghana’, 2003, 2.

<sup>95</sup> WIPO, Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, First Session, *Proposal Presented by the African Group to the First Meeting of the Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore*, (Geneva, 2001), 2. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_1/wipo\\_grtkf\\_ic\\_1\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_10.pdf). Accessed 31/1/14

<sup>96</sup> WIPO, Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, First Session, (2001), 2.



establishes a mechanism for the collection of a fund, which, according to the law, 'shall be managed by the [National Folklore] Board and shall be used (a) for the preservation and promotion of folklore, and (b) for the promotion of the indigenous arts'.<sup>97</sup> As such, not only does Ghanaian folklore stand to gain from greater investment and potentially a higher profile, but the indigenous arts, and possibly indigenous artists, also stand to gain. Boateng notes that Ghana is 'a Third World nation, seeking to maximize its revenues, [has] convert[ed] indigenous cultural production into national culture and claims state ownership over that culture by means of intellectual property law'.<sup>98</sup> Though the relationship between copyright and revenue generation is commonly acknowledged (as Paul Goldstein and Bernt Hugenholtz suggest that historically 'the predominant forces that have shaped copyright law are economic'),<sup>99</sup> I argue that by focussing so narrowly upon the economic potential of folklore, Ghana's copyright legislators appear to have overlooked the cultural and political significance of folklore.

## Research Methodology

Though there is an increasing body of literature concerning the mechanics and efficacy of protecting folklore through copyright,<sup>100</sup> there is very little legal literature on the copyrighting of folklore in Ghana.<sup>101</sup> Also, in Ghana there is no central archive for folklore, no inventory of folklore (though an inventory is being planned)<sup>102</sup> and no database of uses of folklore,<sup>103</sup> so there was no opportunity to get figures on how, how often and by whom folklore in Ghana is used. Moreover, there have been no prosecutions or mediations undertaken by the Copyright Office on disputed uses of folklore. As a result, much of what I draw on is taken from interviews undertaken in Ghana. Over two research trips, I undertook ten semi-

<sup>97</sup> Ghana Copyright Act 2005, (s.64(3)).

<sup>98</sup> Boateng, *This Copyright Thing Doesn't Work Here*, 170.

<sup>99</sup> Paul Goldstein and Bernt Hugenholtz, *International Copyright* (Oxford: Oxford University Press, 2010) 8.

<sup>100</sup> The IGC Working Papers are a particularly rich resource. See: <http://www.wipo.int/tk/en/igc/>

<sup>101</sup> The work of Paul Kuruk is a notable exception. See, for example: 'African customary law and the protection of folklore', and Paul Kuruk, 'The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge', *Indiana Intellectual Property and Comparative Law Review*, Vol., 17 (2007), 67–117.

<sup>102</sup> Nyadzie, interview, 2012.

<sup>103</sup> The development and maintenance of such a database does fall under the remit of the National Folklore Board: Ghana Copyright Act 2005 'The Board shall administer, monitor and register expressions of folklore on behalf of the Republic, (b) maintain a register of expressions of folklore at the Copyright Office' s.63(a).

structured interviews with members of the theatre, academic and legal communities. I interviewed a range of stakeholders including the Deputy Minister for Tourism, Culture and the Creative Arts, playwrights, traditional leaders, advocates of the law and its detractors, those involved in establishing the law and those who will potentially be affected by it. I identified contributors based on either their expertise within their area or their knowledge of the copyright law, or both. In 2014, I was invited to deliver a research paper at the University of Ghana's School of Performing Arts and the Institute of African Studies. The responses to these talks also inform my analysis. Taken together, these accounts offer a unique insight into contemporary views on the development of Ghanaian theatre, the utility of folklore within the arts and the development of the 2005 Copyright Act. However, the necessity for such an investigation also highlights a lack of existing secondary material covering either Ghanaian theatre or Ghanaian copyright law from the 1980s to the present day.

## Structure

In chapter 1, in order to contextualise the situation in Ghana, I analyse the former head of the Ghana Copyright Office, Arthur Amagatcher's claim that the extension of the pecuniary obligation to utilise folklore to Ghanaian nationals was 'very much in accordance with the scenario envisaged at the international level'.<sup>104</sup> Through tracing the development of the protection of folklore through copyright since 1960 I argue that, in fact, Ghana's copyright regime is going beyond both international recommendations and sub-regional norms. Through tracing the on-going attempts to develop a binding multi-lateral instrument for the protection of folklore through copyright, I discuss how WIPO and UNESCO initially adopted a broad ethnographic definition of folklore, which led to an amorphous and imprecise understanding of folklore as an object of protection. Further, though significant progress has been made particularly through the work of the IGC, the protection for folklore at the international level remains uncertain, with significant discrepancies in crucial areas. These include defining what the object of protection is, what the purpose of protection is and what uses are permitted. Ultimately, the lack of harmony between

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<sup>104</sup> A.O.Amagatcher, 'Protection of folklore by copyright – a contradiction in terms', *Copyright Bulletin*, Vol. XXXVI, No. 2 (2002) 36.

jurisdictions, particularly in terms of permitted uses of folklore, has the potential to unfairly impact upon Ghanaian artists' ability to utilise folklore.

In chapter 2, having identified that Ghana's copyright regime is exceeding international recommendations and sub-regional norms in terms of its protection of folklore, I analyse the process through which Ghanaian folklore became established as an essential resource for Ghanaian playwrights in the creation of derivative play texts. To do this, I discuss the ways in which playwrights researched and engaged with Ghanaian folklore post independence and then analyse how specific folkloric elements have been consistently repeated within the narratives and performative style of Ghanaian plays in the subsequent decades. I discuss how post-independence playwrights, such as Efua Sutherland (who developed the idiosyncratically Ghanaian theatrical form of *anansegoro*), constructed a modern theatrical aesthetic with specific performance and dramaturgical elements, which were rooted in the folkloric heritage of the Akan of southern Ghana. Moreover, I discuss why the use of folklore in the development of these plays was claimed at the time to represent a key differentiating factor between 'theatre in Africa and African theatre' (as the resultant plays were claimed to be essentially connected with the lives of African people').<sup>105</sup> Whilst demonstrating how the engagement with folklore enabled playwrights to explore contemporary issues of post-colonial national identity, the adoption and development of Sutherland's aesthetic by subsequent generations of playwrights led to its formalisation as the standard theatrical form in Ghana and thus codified folklore as a central resource for Ghanaian playwrights. As such, I argue that the free use of Ghanaian folklore was established as, and remains, a vital resource to Ghanaian playwrights as both a continued source for narratives and characters and as a means of continuing to contribute to an identifiably Ghanaian theatrical canon.

Having discussed the cultural economy of folklore, in chapter 3, I explore the Ghanaian state's dramatic change in position in terms of the utilisation of folklore by nationals. To do so, I analyse the political motivations behind the state's positioning of folklore as a resource in the creation of derivative play texts in two key periods:

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<sup>105</sup> J. Scott Kennedy, *In Search of African Theatre* (New York: Charles Scribner's Sons, 1993) 145.

the Nkrumah presidency (1957-1966) and the revolutionary government of J.J. Rawlings (1981-1991). During these periods, I examine how playwrights were encouraged, through various political mechanisms, to utilise national folklore and examine how the close links between politics and theatre contributed to the methodisation of playwriting in Ghana. To contextualise the situation in Ghana, I explore the ways in which the attribution of ownership rights in folklore has consistently been subject to political motivations, from folklore being held as proof of an absence of civilisation during the colonial period, to the reclamation and reconstruction of folklore as ‘the root of the nation’s cultural tradition’<sup>106</sup> during independence movements. Moreover, I examine how this change was reflected at the level of international copyright during the 1960s when UNESCO and then WIPO conflated folklore with national identity in postcolonial nations, a perception that has persisted. I argue that the current situation in Ghana, in which both nationals and non-nationals are required to seek permission and pay a fee in order to utilise Ghanaian folklore, is rooted in the state’s postcolonial positioning of folklore as a carrier of a unitary national identity rather than multiple community or tribal identities.

In Chapter 4, through an analysis of original interviews undertaken for this research, I explore how the two conflicting views on the function of folklore as a cultural resource (one informed by, amongst other factors, developments in copyright at the international level and one informed by cultural practice in Ghana established post independence) is reflected in the current debate surrounding the levying of fees on Ghanaian nationals who wish to create from folklore. Referring to John Collins’s observation that provisions in the 2005 Act caused a split in the National Folklore Board between the artists, who were against the amendments, and the lawyers, who were in favour, I explore the motivations behind the opposing positions and the various arguments presented for and against the new provisions. I do not seek to suggest that one position is more valid than the other (indeed the positions demonstrate a significant overlap and neither views traditional folkloric practice as sacrosanct). Rather, I argue that because the provisions are based on a series of legal

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<sup>106</sup> Agnes Lucas-Schloetter, ‘Folklore’, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, ed., Silke von Lewinski (Alphen aan den Rijn: Kluwer Law International, 2008), 344.

and economic factors, the law fails to accommodate the cultural practice established post independence in which the state sanctioned, encouraged and funded the free use of national folklore as a resource in the creation of, amongst other things, new play texts. I argue that the 2005 Copyright Act significantly disrupts both this cultural practice and the historic relationship between playwriting and the state by imposing an additional pecuniary obligation on those who wish to create derivative works from national folklore.

Finally, I conclude by arguing that any future amendments to the law should reflect the fact that there are already multiple factors that affect the ability of playwrights' and other artists' ability to contribute to the creative economy. To add a further disincentive by problematising access to such a fundamental creative resource as folklore has the potential to significantly impact upon playwrights' ability to contribute to Ghana's creative economy and to the distinctive repertoire of Ghanaian theatre. Moreover, I discuss whether the protracted development of copyright protection for folklore and the consistent, unresolved problematics associated with that development bring into question the efficacy of protecting folklore within a copyright paradigm at all.

## Chapter 1

### Attempts to develop an international standard for the copyright protection of folklore (1967-2014)

#### Introduction

In 2002, Arthur Amagatcher, who was at that time the Director of the Ghana Copyright Office, stated that the proposal to extend the requirement to pay to make use of folklore to Ghanaian nationals was ‘very much in accordance with the scenario envisaged at the international level’.<sup>1</sup> Also, in 2012, Nyadzie stated that ‘folklore is now protected all over the world’,<sup>2</sup> suggesting that the copyright regime in Ghana is working within accepted and common global norms with regard to the protection and regulation of the exploitation of folklore. Ghana is certainly not unique in providing protection for folklore; indeed, many nations in the global South,<sup>3</sup> including most states in the West African sub-region,<sup>4</sup> protect folklore through their copyright statutes. However, as I go on to discuss, there are significant discrepancies between these regimes as to what uses are permitted and under what

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<sup>1</sup> Amagatcher, ‘Protection of folklore by copyright’, 36.

<sup>2</sup> Nyadzie, interview, 2012.

<sup>3</sup> Currently 141 countries provide protection for either Traditional Cultural Expressions or Traditional Knowledge. This figure is slightly misleading as some states (the UK, for example) simply include a protection for anonymous and pseudonymous works, which, as discussed in this chapter, does not necessarily compel them to protect folklore. For a full list see: [http://www.wipo.int/tk/en/databases/tklaws/search\\_result.jsp?subject=&issue=&country](http://www.wipo.int/tk/en/databases/tklaws/search_result.jsp?subject=&issue=&country). Accessed 2/6/14.

<sup>4</sup> Benin: Law No. 2005-30 on the Protection of Copyright and Neighboring Rights in the Benin Republic; Burkina Faso: Law No. 032-99/AN of December 22, 1999 on the Protection of Literary and Artistic Property; Cape Verde: Decree-Law No.1/2009, of April 27, 2009, Revising the Law on Copyright; Ivory Coast: Law No. 96-564 of July 25, 1996 on the Protection of Intellectual Works and Rights of Authors and Phonogram and Video Producers; Gambia: Copyright Act 2004; Ghana: Copyright Act 2005; Liberia: Copyright Law 1997; Niger: Decree No. 93-027 on Copyright, Related Rights and Expressions of Folklore; Nigeria: Copyright Act – Chapter C28; Senegal: Law No. 20008/09 of January 25, 2008 on Copyrights and Neighboring Rights in Senegal; Sierra Leone: Copyright Act 2011; Togo: Law No. 9112 of June 10, 1991 on the Protection of Copyright, Folklore and Related Rights. Only Guinea, Guinea-Bissau and Mali do not currently provide protection for folklore as part of their copyright law.

terms. In the absence of a binding multilateral treaty on the protection of folklore, the situation at the international level remains unsettled. Consequently, despite Amagatcher and Nyadzie's claims, Ghana's copyright regime is going significantly beyond recommendations made at the international level and norms at the sub-regional level. This, in turn, has the potential to unfairly disadvantage playwrights and other artists in Ghana for two reasons. Firstly, because much of the success of Ghana's post independence success is at least partly attributable to playwrights' utilisation of Ghanaian folklore and, secondly, because many of Ghana's ethnic groups spread across national boundaries. Thus, discrepancies in the terms of protection for folklore have the potential to prevent one person from using folklore in a way that is permissible for someone from the same ethnic group.

To explore this slightly further: as Molly Torsen observes, intellectual property laws are 'domestic in nature'.<sup>5</sup> Silke von Lewinski suggests that this means that 'the effects of national copyright and neighbouring rights legislation are limited to the territory of the legislating state; national copyright and neighbouring rights laws do not have an extraterritorial effect'.<sup>6</sup> However, as is particularly the case in countries that were subject to European colonialism, folklore is maintained by ethnic groups that straddle modern national boundaries. As such, an expression of folklore practiced by a single ethnic community may be subject to two, or more, different regimes of protection.

Since the 1960s both WIPO and UNESCO have made multiple attempts, both together and separately, to provide protection for folklore in a binding, multi-lateral instrument. In the case of WIPO, these attempts are still ongoing and the aim of creating an international instrument remains. What emerges from an analysis of these attempts is, I suggest, three major unresolved issues: how the object of protection, "folklore", is defined; how to find an appropriate balance between

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<sup>5</sup> Anderson and Torsen, 'Intellectual Property and the Safeguarding of Traditional Cultures', 208

<sup>6</sup> Silke von Lewinski, *International Copyright Law and Policy* (Oxford: Oxford University Press, 2008) 6.

protection and exploitation; and, thirdly, how to compensate for the trans-national nature of folklore within the essentially territorial mechanism of copyright.

## **Methodology**

In order to illustrate the current situation at the level of international copyright law, and so contextualise the position of Ghana's 2005 Copyright Act within it, in the first section I trace the attempts by WIPO and UNESCO to develop a multi-lateral instrument for the protection for folklore from the Stockholm Revisions of the Berne Convention in 1967 to the 1996 WIPO Performances and Phonograms Treaty (WPPT). Over this period, I analyse why though the development of an international standard was repeatedly pursued, attempts ended with an acknowledgment that such an aim is either 'unrealistic'<sup>7</sup> or 'premature'.<sup>8</sup>

Following this, I discuss the period following the 1997 WIPO-UNESCO World Forum on the Protection of Folklore. The World Forum, described by Dr Mahaly Ficsor, Director of the Center for Information Technology and Intellectual Property, as 'a fresh start' in the development of international protection for folklore,<sup>9</sup> led to the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in 2001. In section 2, I detail the progress made by the IGC in formulating The Protection of Expressions of Folklore: Draft Articles, Rev. 2 (2014), which represents the latest attempt by WIPO to introduce a hitherto elusive international instrument.<sup>10</sup>

Having established the international context in which Ghana's copyright law sits, in section 3, I analyse the African regional and West African sub-regional provisions

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<sup>9</sup> WIPO, 'Final Report on the National Experiences with the Legal Protection of Folklore', (2002), Available at: [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=2055](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2055). Accessed 10/10/13.

<sup>10</sup> In this chapter my analysis focuses on the chronology of the development of the legal protection for folklore, in Chapter 3, I revisit the international legal context with the purpose of exploring the role that international discourse played in forging and consolidating structural links between folklore and national-identity through the prism of copyright.



for the protection of folklore. Through discussing the regional and sub-regional instruments, I explore whether Ghana's protection for folklore is commensurate with regional norms, as Amagatcher suggests, or operates what might be considered an extreme form of protection of folklore. In the conclusion to this chapter, I consider how the lack of success in the development of protection for folklore at the international level has led to important discrepancies at the sub-regional level in terms of permitted uses and why this is important for playwrights in Ghana.

## **1.1. The international protection of folklore**

In this section, I trace the attempts to provide an international mechanism for the copyright protection of folklore from the 1967 Stockholm Diplomatic Conference for the Revision of the Berne Convention (Stockholm Revisions) to the 1996 WIPO Performances and Phonograms Treaty (WPPT). Over this period WIPO and UNESCO, both separately and together, proposed, tested and found wanting, several different formulations for the protection of folklore. These ranged from an Article in the Berne Convention to *sui generis*<sup>11</sup> model laws that were intended to be adopted into the national statutes of developing countries. By tracing the various attempts to protect folklore, I illustrate the diversity of those attempts and identify the issues that have consistently impeded the successful development of a mechanism for the protection of folklore.

### **1.1.1. Stockholm Revisions (1967): the inclusion of protection for “unpublished works” in the Berne Convention**

Prior to the 1967 Stockholm Revisions, neither of the two global copyright conventions: the Berne Convention, administered by the World Intellectual Property

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<sup>11</sup> *Sui Generis* is a Latin phrase, which literally translated means "of their own kind". I use the term, as the IGC does, to refer to 'a range of mechanisms [that] compliment existing intellectual property rights. These include stand alone legislation or 'amendments to existing legislation to deal specifically with folklore' (WIPO, Presentations on National and Regional Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Expressions (Expressions of Folklore) (Geneva, 2002), Annex II, 1. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_4/wipo\\_grtkf\\_ic\\_4\\_inf\\_2-main1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_inf_2-main1.pdf). Accessed 2/4/14).

Organization (WIPO), nor the Universal Copyright Convention (UCC),<sup>12</sup> administered by UNESCO,<sup>13</sup> made any provision for the protection of folklore.<sup>14</sup> Indeed, by 1967 only two states: Mexico<sup>15</sup> and Papua New Guinea,<sup>16</sup> had made any

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<sup>12</sup> UNESCO was established in 1945 and took the Universal Declaration of Human Rights (in which was enshrined a right to 'the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' as the basis for the creation of a new international copyright regime. (Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 1183). In 1952 UNESCO established the Universal Copyright Convention (UCC) to which both America and the USSR became signatories along with 'the majority of Berne members'. (Ricketson and Ginsberg, 121). The U.S. signed in 1955 and Ginsburg and Kernochan note that 'rather than amend its law to [...] to permit Berne adherence, the U.S. actively promoted the creation of the Universal Copyright Convention' (J.C. Ginsburg and J.M. Kernochan, 'One hundred and two years later: the U.S. joins the Berne Convention' *Columbia-VLA Journal of Law & Arts*, Vol., 13 (1989) 2-3). The UCC differed from the Berne Convention in several key ways, such as moral rights and the term of protection, and was seen generally as less strict. According to Silke von Lewinski, following the introduction of TRIPs and the now virtual global coverage of the Berne Convention, the UCC 'no longer finds application today'. (Lewinski, *International Copyright Law and Policy*, 7). Though I discuss the role of UNESCO at various stages throughout this thesis, I do not discuss the UCC at any length as it no longer plays a significant role in international copyright.

<sup>13</sup> UNESCO had made one previous attempt to provide protection for folklore through copyright. The 1964 UNESCO Draft Model Copyright Law is noted as 'a follow-up to the recommendation of the African Study Meeting on Copyright (Brazzaville)'. The Draft Model Law is aimed solely at developing copyright in Africa and suggests that works of folklore in Africa are exclusively musical. Art. 6 defines a work of folklore as 'a musical work with or without text composed by any author specified in Article 31 below with the aid of elements which belong to the African cultural heritage'. Therefore, UNESCO's initial attempt to protect a work of folklore through copyright excluded any works that were not musical. However, the Commentary to Article 6 (b) does begin to usefully deconstruct the concept of folklore and demonstrates the efforts being made to understand the nature of works in need of protection. The Commentary suggests that there are 'two general types of folklore: (1) folklore orally handed down from generation to generation [and] (2) folklore which has been transformed into contemporary arrangements where one or several persons may qualify as authors'. (UNESCO, Draft Model Copyright Law, 1964, 1. Available at <http://unesdoc.unesco.org/images/0018/001854/185485eb.pdf> - accessed 10, 4, 2012).

<sup>14</sup> Janet Blake does suggest that the UCC could provide 'indirect protection [for folklore] in Art.1 (Each Contracting State undertakes to provide for the adequate and effective, protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture), (Janet Blake, 'Developing a new standard-setting instrument for the safeguarding of intangible cultural heritage: elements for consideration' (UNESCO, 2001) 32, footnote 160). This is echoed by Samantha Sherkin who states that the 'intimate, international relationship between copyright and folklore began in UNESCO in 1952 with the adoption of the Universal Copyright Convention' (Samantha Sherkin, 'A Historical Study on the Preparation of the 1989 *Recommendation on the Safeguarding of Traditional Culture and Folklore*'. Available at: [www.folklife.si.edu/resources/unesco/sherkin1.htm](http://www.folklife.si.edu/resources/unesco/sherkin1.htm), accessed 10.11.12). However, this argument is drawn from the fact that one of the underlying principles of UNESCO since its foundation is 'the preservation of cultural diversity' (Blake, Developing a new standard-setting instrument', 2). Though, in principle, as both writers suggest, UNESCO's broad field of interest does include the preservation of cultural heritage, in fact, as I will go on to discuss in section 1.2.1, the protection of folklore through copyright was not discussed by UNESCO until 1959 and the UCC was not amended to include explicit protection for folklore.

<sup>15</sup> Mexico adopted a Copyright Statute in 1956 'in which works deriving from the public domain (like folklore) were to become registered with a Copyright Directorate', Samantha Sherkin, 'A Historical Study'). Also, according to the Report on the 4<sup>th</sup> Session of the IGC, A noted that the 1922 Bolivian copyright law contained a section relating to protection of folklore and traditional crafts but little actual experience existed with attempts to extend this protection to folklore. (See: WIPO, 'Report on the 4<sup>th</sup> Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', (Geneva, 2002) 25. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_4/wipo\\_grtkf\\_ic\\_4\\_15.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_15.pdf). Accessed 3/4/14).

<sup>16</sup> Papua New Guinea National Cultural Property (Preservation) Act, 1965. The Act defines National Cultural Property as 'any property, movable or immovable, of particular importance to the cultural

attempt to protect national heritage, including folklore, or works deriving from it, through statute; only Mexico had done so through its copyright legislation.

The Stockholm Diplomatic Conference was the fourth Revision Conference of the Berne Convention since its establishment in 1887. The Records of the Conference note that following a proposal by the Indian Delegation a Working Group was established to ‘consider the question of folklore’.<sup>17</sup> Michel Anderson suggests that though the Working Group considered the option of including “works of folklore” in Article 2(1) of the Berne Convention as a protected work’,<sup>18</sup> instead they proposed the insertion of a new Article. The Working Group suggested that in order to qualify for protection under the new Article, works would be required to satisfy the following principles:

- (1) the work is unpublished;
- (2) the author is unknown;
- (3) there is every ground to presume that the author is a national of a country of the Union;<sup>19</sup>

If these three conditions were fulfilled, the Working Group recommended that ‘the legislation of that country may designate a competent authority to represent the author’.<sup>20</sup> The insertion of Article 15(4) into the Berne Convention was accepted by the Committee, and the Report suggests that ‘it is clear [...] that the main field of application of this regulation will coincide with those productions generally described as folklore’.<sup>21</sup>

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heritage of the country, and in particular (but without limiting the generality of the foregoing) includes—(a) any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of any of the peoples of the country, past or present; and (b) any mineral specimen or fossil or mammal remains of scientific or historic interest to the country; and (c) any other collection, object or thing, or any collection, object or thing of a class, declared to be national cultural property under Section 4; and (d) any collection of national cultural property; (Article 1(1)) (Available at: [faolex.fao.org/docs/texts/png65547.doc](http://faolex.fao.org/docs/texts/png65547.doc)). As such, the Act does not directly protect expressions of folklore but appears to protect tangible objects. As Mark Busse suggests, the Act kept the definition of national cultural property ‘intentionally broad and general’. Also it introduced ‘the language of National Cultural Property’ (Kathy Whimp and Mark Buss eds., *Protection of Intellectual, Biological, and Cultural Property in Papua New Guinea* (Canberra: Asia Pacific Press, 2000) 88.

<sup>17</sup> Bergstrom, ‘Records of the Intellectual Property Conference of Stockholm’, 2.

<sup>18</sup> Anderson, ‘Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge’, 152. The proposal to include works of folklore in Art 2(1) was made by the Indian delegation.

<sup>19</sup> Bergstrom, ‘Records of the Intellectual Property Conference of Stockholm’, 307.

<sup>20</sup> Bergstrom, ‘Records of the Intellectual Property Conference of Stockholm’, 307.

<sup>21</sup> Bergstrom, ‘Records of the Intellectual Property Conference of Stockholm’ 308.

However, as Barbara Ringer, Assistant Register of Copyrights in the Library of Congress observed at the time, the fact that the Berne Convention requires unanimity of the votes cast for any revision to the substantive text, can lead to ‘some deliberately vague or ambiguous language [...] and some compromises’.<sup>22</sup> This is in evidence in the wording of Art. 15(4), as the most immediate issue raised by the Article is the absence of the word “folklore” to denote the object of protection. The Report notes that the Article does not mention the word “folklore” because, as mentioned in the Introduction, it was ‘considered to be extremely difficult to define’.<sup>23</sup>

Despite the lack of explicit reference to the intended object of protection, when the Stockholm Revisions Conference concluded on 14 June 1967, Article 15(4) was included in the changes to the Convention. The Article reads:

(a) 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.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Subsection (a) provides protection for anonymous or pseudonymous works (such as folklore) where the author is presumed to be a national of a country of the Berne Union. Under subsection (b), the designated authority is charged with liaising with the Director General of WIPO, thereby developing a network of communication regarding the protection of folklore between WIPO and Member States. The

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<sup>22</sup> Barbara Ringer, ‘The Stockholm Intellectual Property Conference of 1967’, *Bulletin, Copyright Society of the U.S.A.* Vol.14 (1966-1967) 426.

<sup>23</sup> Bergstrom, Records of the Intellectual Property Conference of Stockholm, 307. As noted in the Introduction, the definition of “folklore” adopted from Thoms’ original definition in 1846 was very broad.

inclusion of Art.15(4) attests to WIPO's position at the time that not only should folklore be protected through copyright, but also that a regulatory instrument which could be applied across all Member States was both possible and desirable. However, Ringer suggested at the time that 'the practical effect of this provision is by no means clear'.<sup>24</sup>

The copyright academic Agnes Lucas-Schloetter suggests that though Art. 15(4) was 'the first regulation concerning intellectual property rights applicable to folklore at the international level',<sup>25</sup> in terms of providing protection for folklore it is largely 'redundant'.<sup>26</sup> The reason for this is that the Article commits Member States to very little. As Lucas-Schloetter explains: for the Article to have any effect 'Member States must enact domestic legislation that protects folklore. Only if a state's national copyright legislation includes folklore can the state seek international copyright protection under the Berne Convention'.<sup>27</sup> If, for example, a state decides that folklore belongs to the public domain, Art.15(4)(a) does not compel them to provide protection for folklore in their copyright statute, nor does it compel them to recognise folklore as a protected category in another Member State. Moreover, even if a state does protect folklore, Lucas-Schloetter suggests that the adoption of Art.15(4)(b) is 'optional [...] in the sense that the countries of the Union are at liberty to designate a competent authority responsible for protecting their own folklore or not'.<sup>28</sup> Writing in 2002, the Ghanaian copyright academic Paul Kuruk stated that 'to date, no state has notified the WIPO about the creation of any such competent bodies'.<sup>29</sup> Though,

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<sup>24</sup> Ringer, 'The Stockholm Intellectual Property Conference of 1967', 425.

<sup>25</sup> Lucas-Schloetter, 'Folklore' (2008), 350. Also see Johnson, 'The Origins of the Stockholm Protocols', *Bulletin of the Copyright Society U.S.A.* (1970) Vol.18, 105; WIPO, Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, Second Session, 'Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore' (December, 2001), 4. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_2/wipo\\_grtkf\\_ic\\_2\\_8.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_8.pdf). Accessed 1/4/14 and WIPO, 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, Annex', (Geneva, 2003) 6. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_5/wipo\\_grtkf\\_ic\\_5\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_3.pdf). Accessed 3/4/14

<sup>26</sup> Lucas-Schloetter, 'Folklore', 352.

<sup>27</sup> Lucas-Schloetter, 'Folklore', 352.

<sup>28</sup> Lucas-Schloetter, 'Folklore', 352.

<sup>29</sup> Paul Kuruk, 'African customary law and the protection of folklore', 45.

in fact India has registered a competent authority with WIPO, it remains the only member state to have done so.<sup>30</sup>

As well as not defining the object of protection or compelling Member States to protect folklore, another problem identified with the Stockholm Revisions is that no term of protection is specified for folklore. As such, Lucas-Schloetter suggests that if a work or collection of folklore is published 'the rules for anonymous and pseudonymous works must apply by analogy, that is to say that a period of 50 years starting from publication must apply'.<sup>31</sup> However, as Janet Blake suggests, one of the defining factors of folklore is that 'by its very nature, [it] has been developed over generations'.<sup>32</sup> This being the case, the application of a limited term of protection to such work is counterintuitive as once the term of protection has expired the work or expression of folklore would be subject to exploitation despite the fact it continues to be maintained and developed by the authoring community. In spite of these shortcomings identified in the Stockholm Revisions,<sup>33</sup> the 1971 Paris Revisions of the Berne Convention<sup>34</sup> retained Article 15(4) verbatim.<sup>35</sup>

As such, following two revisions of the Berne Convention a number of problems remained. Significantly, folklore, as the intended object of protection, had neither been named nor defined. Added to this, Member States were not obliged to protect folklore or register a competent authority for regulating the protection of folklore with WIPO. If protection is afforded by a Member State to unpublished anonymous works the form of that protection, in terms of who the rights holder is, the term of

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<sup>30</sup> WIPO, 'Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore' 4. See also: Lucas-Schloetter, 'Folklore', 352.

<sup>31</sup> Lucas-Schloetter, 'Folklore' (2008) 352.

<sup>32</sup> Blake, 'Developing a new standard-setting instrument' 14.

<sup>33</sup> See: Johnson, 'The Origins of the Stockholm Protocols' and Ringer, 'The Stockholm Intellectual Property Conference of 1967'

<sup>34</sup> Compliance with the Paris Act Appendix is 'required as a condition of adherence to the World Trade Organization ('WTO') under the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 ('TRIPs Agreement') as well as under the WIPO Copyright Treaty ('WCT'), regardless of whether the country in question is a Berne member'. (Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 881).

<sup>35</sup> Berne Convention, Stockholm Act, 1967, Art. 15(4).

protection and whether that protection is afforded to rights holders in all Member States, is unclear.<sup>36</sup>

### 1.1.2. The Bolivian Request (1973)<sup>37</sup>

Though Article 15(4) was quickly accepted as largely inadequate,<sup>38</sup> the desire to develop an international mechanism for the protection of folklore remained. In 1973, the Bolivian government handed an official request to UNESCO asking the organisation to ‘determine the extent to which folklore might involve copyright’.<sup>39</sup> The Bolivian Request was made in response to what the Bolivian government saw as the need to protect its national folklore ‘against all kinds of depredations’.<sup>40</sup>

The issues outlined in the Bolivian request relate to two main areas: the destruction of ‘the traditional artistic culture of the peoples’, and the identification of folklore as a ‘possible source of legitimate economic gain’.<sup>41</sup> It cites specific examples where Bolivian folklore had been the victim of ‘filching’ which had resulted in the ‘the clandestine transfer of another people’s culture’.<sup>42</sup> The Memorandum that accompanied the request notes that: ‘[i]n the musical sphere, there are instances of melodies being appropriated by persons unconnected with their creation who register them as their own compositions to secure to themselves the benefits conceded by the copyright regulations’.<sup>43</sup> Both Samantha Sherkin and Robert Albro suggest that this

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<sup>36</sup> The issue of National Treatment and whether it extends to folklore is discussed at length in Chapter 4.

<sup>37</sup> Like the Stockholm Revisions, the Bolivian Request contains no definition of folklore. However, it does highlight the contemporary international conventions which the Bolivian government felt could, but did not, provide protection for folklore: ‘the Universal Copyright Convention, the Interamerican Copyright Convention, Washington 1964; and, in particular, the Recommendation on the protection of property of artistic, historical or archeological value, approved by Unesco in 1964’. The Request suggests that the problem with these instruments with regards to the protection of folklore was that they ‘are aimed at the protection of tangible objects, and not of forms of expression such as music and dance, which are at present undergoing the most intensive commercialization and export, in a purpose of commercially oriented transculturation destructive of the traditional cultures’. (Gobin, ‘Study of the various aspects involved in the protection of folklore’, annex).

<sup>38</sup> See: Johnson, ‘The Origins of the Stockholm Protocols’ and Barbara Ringer, ‘The Stockholm Intellectual Property Conference of 1967’.

<sup>39</sup> Robert Albro, ‘The Challenges if Asserting, Promoting, and Performing Cultural heritage’, *Theorizing Cultural Heritage*, Vol.1, No.1 (2005) 3.

<sup>40</sup> Albro, ‘The Challenges if Asserting, Promoting, and Performing Cultural heritage’, 4.

<sup>41</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, annex A.

<sup>42</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, annex A, Memorandum, 1.2.2.

<sup>43</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, annex A, Memorandum, 1.2.2.

refers to the recording of *El Condor Pasa* by Simon and Garfunkel for their 1970 album *Bridge Over Troubled Water*, which takes its melody from an Andean folksong.<sup>44</sup>

The other problem noted in the Request relates to Bolivian folk dances, which though deemed as collective creations, ‘historically localized in specific geographical zones, to belong to groups of people who, traditionally, hold them in usufruct are [...] being appropriated by other countries wholly unconnected with their genesis to be passed off by them, even in international competitions, as folk dances of their own’.<sup>45</sup> To address these issues, the Bolivian government proposed that a Protocol to be added to the UCC declaring the ‘all rights in cultural expressions of collective or anonymous origin which have been elaborated or acquired traditional character in the territory of particular Member States to be the property of such States’.<sup>46</sup> This marks a key moment in the understanding of folklore as simultaneously representative of a national culture and a resource with an associated economic potential for the state.

Following the Bolivian Request, the UCC’s Intergovernmental Committee and the Executive Community of the Berne Union concluded that ‘although folklore was in need of protection, a solution at the international level was unrealistic’.<sup>47</sup> However, a significant development that came as a result of the Bolivian Request was, as Albro suggests, that the ‘subject of folklore was [...] explicitly divided between the overall question of folklore and the intellectual property aspect of folklore’.<sup>48</sup> Acknowledging that copyright did not easily map on to folklore, WIPO and UNESCO pursued the development of *sui generis* model laws that could compensate for the characteristics that differentiate folklore from conventional copyrightable works.

### 1.1.3. The Tunis Model Law (1976)

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<sup>44</sup> Paul Simon and Art Garfunkel, *Bridge Over Troubled Water* (Columbia Records, 1970) .

<sup>45</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, annex A, Memorandum, 1.2.2.

<sup>46</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, annex

<sup>47</sup> Samantha Sherkin, ‘A Historical Study’ 4.

<sup>48</sup> Albro, ‘The Challenges if Asserting, Promoting, and Performing Cultural heritage’, 3.



In March 1976, nine years after the inclusion of Article 15(4) in the Berne Convention, WIPO and UNESCO adopted the Tunis Model Law on Copyright for Developing Countries.<sup>49</sup> Unlike the Berne Convention, the Model Law is not binding. It was designed to ‘cater for the specific needs of developing countries’<sup>50</sup> who at this time still largely had versions of colonial legislation, by providing a framework in which their national copyright statutes could be developed. Included in the Model Law is protection for folklore under s.6.<sup>51</sup> The Model Law defines “folklore” as:

[meaning] 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.<sup>52</sup>

Though this represents the first attempt to define folklore in an international legal instrument, the definition drew criticism as it provides no definition of what constitutes ‘the traditional cultural heritage’, nor any criteria by which folklore might be identified.<sup>53</sup>

However, the Tunis Model Law does address many of the shortcomings identified with the Stockholm Revisions. For example, the Model Law specifically names ‘works of folklore’ as the object of protection under s.6(1) and vests the rights in such works with a national ‘competent authority’.<sup>54</sup> Further, for the first time, s.6(2) allowed for the protection of works of folklore ‘without any limitation in time’.<sup>55</sup> The Model Law allows that works of folklore, unlike conventional copyrightable works, do not have to be fixed in a material form in order to qualify for protection. Under

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<sup>49</sup> The Tunis Model Law on Copyright for Developing Countries was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO.

<sup>50</sup> WIPO/UNESCO, ‘Tunis Model Law on Copyright for Developing Countries’, (1976), 14. Available at: <http://www.wipo.int/cgi-bin/koha/opac-detail.pl?bib=25497>. Accessed 5/11/2011. However, Blake suggests that it was only adopted by UNESCO.

<sup>51</sup> WIPO/UNESCO, ‘Tunis Model Law’: ‘In the case of works of national folklore, the rights referred to in Sections 4 and 5(1) shall be exercised by the competent authority as defined in Section 18. s.6(1)

<sup>52</sup> WIPO/UNESCO, Tunis Model Law on Copyright for Developing Countries, Definitions, s.18(iv)

<sup>53</sup> See: Samantha Sherkin, ‘A Historical Study’.

<sup>54</sup> WIPO/UNESCO, ‘Tunis Model Law’: “competent authority” means ones or more bodies, each consisting of one or more persons appointed by the Government for the purpose of exercising jurisdiction under the provisions of this Law whenever any matter requires to be determined by each authority. s.18(iii).

<sup>55</sup> WIPO/UNESCO, ‘Tunis Model Law’: ‘Works if national folklore are protected by all means in accordance with subsection (1), without limitation in time’, s.6(2).

s.5(bis) the Model Law states that '[w]ith the exception of folklore, a literary, artistic or scientific work shall not be protected unless the work has been fixed in some material form'.<sup>56</sup> The reason for excluding folklore from the criteria of fixation, which in the common law tradition is required for a work to receive copyright protection,<sup>57</sup> is articulated in the Commentary to the section. It states that 'the fixation requirement cannot possibly apply to works of folklore: such works form part of the cultural heritage of peoples and their very nature lies in their being handed on from generation to generation orally'.<sup>58</sup> Accordingly, the Model Law clearly attempts to accommodate key characteristic elements of folklore in a manner that the Stockholm Revisions had not.

Significantly, the Model Law also acknowledges the status of folklore in Africa as a resource for artists creating derivative works by protecting 'works derived from folklore' as original works under s.2 (1)(iii).<sup>59</sup> This means that a derivative work (such as a play text based on folklore) would be protected as an original work without prejudice to the folklore upon which it is based. To clarify this: under copyright law it lies with the rights holder to authorise or deny an adaptation of their work.<sup>60</sup> Though, as WIPO notes, derivative works may themselves 'qualify for copyright protection if sufficiently original',<sup>61</sup> the protection afforded to such derivative works vests only in the original aspects of the work. This is referred to as 'thin copyright'.<sup>62</sup> This phrase is used to refer to the thin layer of original elements in a work where the remaining elements belong to either another author or are in the

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<sup>56</sup> WIPO/UNESCO, 'Tunis Model Law': (s.5bis). The inclusion of '(bis)' denotes that the section is optional. In the case of the Tunis Model Law, options are provided in order to cater for the fact that some African states follow the common law tradition and others follow the civil law tradition.

<sup>57</sup> Under the civil law tradition, rather than requiring that works be in a fixed form, copyright extends to 'works of the mind'. The Berne Convention allows for either under Art. 2(2): 'It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form'.

<sup>58</sup> WIPO/UNESCO, 'Tunis Model Law', Commentary, 5.

<sup>59</sup> WIPO/UNESCO, 'Tunis Model Law': 'The following are also protected as original works: works derived from national folklore', s.2 (1)(iii)).

<sup>60</sup> WIPO, in its 2014 Glossary of Key Terms, defines adaptation as 'the act of altering a pre-existing work (either protected or in the public domain) or a traditional cultural expression, for a purpose other than for which it originally served, in a way that a new work comes into being, in which the elements of the pre-existing work and the new elements—added as a result of the alteration—merge together'. (WIPO, 'Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms', 264).

<sup>61</sup> WIPO, 'Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms', 264.

<sup>62</sup> WIPO, 'Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms', 264.

public domain. As such, although a derivative work may be copyrightable, that protection cannot prejudice an earlier author's rights or, if the work is in the public domain, prevent any future artist from utilising the same work.<sup>63</sup>

Another significant aspect of the Model Law, and one that responds to the Bolivian government's identification of the economic potential of folklore for states, is the introduction of the *domaine public payant* under s.17. This allows states to charge for the use of folklore and other works in the public domain, with payments going to the competent authority. Importantly, unlike Ghana's 2005 Copyright Act which requires payment prior to use, s.17 of the Model Law is very specific that payments shall be based on a percentage of the receipts 'produced by the use of works in the public domain or their adaptation, including works of national folklore'.<sup>64</sup> As such, the Model Law takes into account the fact that folklore is both a resource for the state or the originating community with an economic potential in its own right, and simultaneously an important resource from which artists create derivative works that feed into the creative economy.

Despite the progress made by the Model Law a year after its adoption, the 1977 Expert Committee on the Legal Protection of Folklore, convened in Tunis under the auspices of UNESCO and WIPO, concluded that there were still major difficulties protecting folklore, which 'involv[ed] issues such as definition [and] identification'.<sup>65</sup> In order to address these issues, WIPO and UNESCO worked together to develop the 1982 Model Provisions Against Illicit Exploitation and Other Prejudicial Actions.

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<sup>63</sup> WIPO, 'Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options', 21-22. Even works derived from materials in the public domain can be copyright protected, because a new interpretation, arrangement, adaptation or collection of public domain materials, or even their "re-packaging" in the form of digital enhancement, colorization and the like, can result in a new distinct expression which is sufficiently 'original.' This also helps to explain why a contemporary literary and artistic production derived from or inspired by traditional culture that incorporates new elements or expression can be considered a distinct, original work and is thus protected.

<sup>64</sup> WIPO/UNESCO, 'Tunis Model Law: 'The user shall pay to the competent authority ... percent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore', s.17.

<sup>65</sup> Sherkin, 'A Historical Study', 3.

#### 1.1.4. The 1982 Model Provisions Against Illicit Exploitation and Other Prejudicial Actions

Like the Tunis Model Law, the Model Provisions were an attempt to provide a *sui generis* framework for the protection of folklore. Unlike the Model Law, WIPO and UNESCO saw them as a first step towards an international standard for the protection of folklore.

During the development of the Model Provisions, the Working Group articulated five key points that illustrate WIPO and UNESCO's position. These were:

- (i) adequate legal protection of folklore was desirable;
- (ii) such legal protection could be promoted at the national level by model provisions for legislation;
- (iii) such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed;
- (iv) the said model provisions should also allow for protection by means of copyright and neighbouring rights where such forms of protection could apply; and,
- (v) the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of folklore'.<sup>66</sup>

These points clearly demonstrate that a comprehensive multilateral instrument was still the ultimate aim of both organisations and that regional and sub-regional protection should be standardised.

Like the Tunis Model Law, the Model Provisions allow that folklore be protected without limitation in time, that protection does not require fixation and that a fee is applicable for the use of folklore 'when they are made both with gainful intent and outside their traditional or customary context'.<sup>67</sup> However, it allows for the free 'borrowing of expressions of folklore for the creating of an original work of an

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<sup>66</sup> WIPO, 'Final Report on the National Experiences with the Legal Protection of Folklore', (2002), 10

<sup>67</sup> WIPO/UNESCO, 'Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Use and Prejudicial Actions', (1985), s.3. Available at: [http://www.wipo.int/export/sites/www/freepublications/en/tk/768/wipo\\_pub\\_768.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/768/wipo_pub_768.pdf). Accessed 5/3/13.

author or authors’.<sup>68</sup> The notes accompanying the Model Provisions state that the reason for this exception is that ‘The Model Provisions do not want to hinder in any way the creation of original works based on expressions of folklore’.<sup>69</sup> This is highly significant in terms of Ghana’s current legislation as it represents the continued recognition at the international level - during what was intended to be the development of a binding treaty - that folklore has a significant role in states’ creative industries. By so doing, the Model Provisions maintain the position of the Tunis Model Law that folklore is both a national asset with economic potential but is also a generative resource for artists creating derivative works.<sup>70</sup>

As noted by Paul Kuruk, another innovation in the Model Provisions is that they ‘employ the terms “expressions” or “productions” instead of “works” to distinguish between [the] unique protection of folklore and ordinary copyright laws.’<sup>71</sup> According to Kuruk this was to reflect the intangible nature of the object of protection. The 1982 Model Provisions do not provide a definition of ‘expressions of folklore’ but rather attempt to circumvent the problem by articulating a non-exhaustive list of the forms that folklore might take. These include: ‘(i) verbal expressions, such as folk tales, folk poetry and riddles; (iii) expression by action, such as folk dances, plays and artistic forms or rituals’.<sup>72</sup>

Though the Model Provisions seem to encompass a far more comprehensive array of expressions than the Tunis Model Law, in 2002 WIPO noted that the Model Provisions did not have an ‘extensive impact on the legislative frameworks of member states [because] the scope of protected expressions was not extensive enough’.<sup>73</sup> As noted in the IGC’s Second Session in 2002, this was attributed to the fact that ‘only “artistic” heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible

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<sup>68</sup> WIPO/UNESCO, ‘Model Provisions’, s.4(iii).

<sup>69</sup> WIPO/UNESCO, ‘Model Provisions’, Commentary, 44.

<sup>70</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 54.

<sup>71</sup> Kuruk, ‘African customary law and the protection of folklore’, 47.

<sup>72</sup> WIPO/UNESCO, ‘Model Provisions’ s.2.

<sup>73</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 10.

traditional artistic forms of their expression, do not fall within the scope of the proposed definition of “expressions of folklore”.<sup>74</sup> Accordingly, following the adoption of the Model Provisions two main problems were identified: firstly (as noted with the Tunis Model Law), that the Model Provisions ‘do not fully explain the concept of protectable folklore’,<sup>75</sup> and secondly, ‘the lack of a workable mechanisms for settling the question of expressions of folklore that can be found not only in one country, but in several countries of a region’.<sup>76</sup>

Like the Tunis Model Law, the Model Provisions had no binding legal status, but were designed to assist member states to develop their own legislation.<sup>77</sup> However, confident that the Model Provisions addressed many of the key areas upon which previous attempts to protect folklore had faltered, WIPO and UNESCO explored the possibility of developing the Model Provisions into an international convention. A Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property met in Paris in December 1984. The Committee of Experts drafted an international treaty on folklore that closely followed the Model Provisions in terms of its definition of subject matter, term of protection, remedies for unauthorised use, and permitted uses.<sup>78</sup> Their intention was that the treaty would place an ‘obligation on States to protect folklore’<sup>79</sup> and designate a competent authority to administer the protection of expressions of folklore at state level.

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<sup>74</sup> WIPO, ‘Questionnaire on National Experiences with Protection of Expressions of Folklore’, (Geneva, 2002) 11. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_2/wipo\\_grtkf\\_ic\\_2\\_7.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_7.pdf). Accessed: 10/5/14

<sup>75</sup> Fischer, ‘Dick Whittington and Creativity’, 34. Moreover, Fischer states that the Model Provisions ‘do not specify any test or method for separating what is a protectable expression in a folk tale from the unprotectable substance of the legend’. She regards this as akin to the ideas/expression dichotomy in copyright law which stipulates that only the expression may be protected, not the idea which prompted it. When applied to the protection of expressions of folklore, Fischer argues that only the expression of folklore, not the legend from which it derives should receive protection.

<sup>76</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, (2002), 11

<sup>77</sup> Although the Model Provisions, 1982 are provisions for a law, the word ‘law’ appears in square brackets ‘in order to make it clear that they do not necessarily have to form a separate law, but may constitute, for example, a chapter of an intellectual property code, and do not have to be a statute passed by the legislative body, but may be a decree or decree law’. See: WIPO, ‘The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles’, 10.

<sup>78</sup> WIPO/UNESCO, Draft Treaty for the Protection of Expressions of Folklore against illicit Exploitation and other Traditional Actions (1984), reprinted in *Copyright Bulletin of UNESCO*, no.2 (1985), 34.

<sup>79</sup> Janet Blake ‘Developing a new standard-setting instrument’, 19.

The following year, the Executive Committee of the Berne Union and the IGC of the UCC met in Paris to discuss the Treaty. At the meeting ‘the overwhelming majority of the participants were of the opinion that a treaty for the protection of expressions of folklore was premature’.<sup>80</sup> The reasons given for this were firstly that ‘there was not sufficient experience available as regards the protection of folklore at the national level’.<sup>81</sup> Further, Mihály Ficsor, states that the Draft Treaty was rejected due to ‘the absence of any reliable source of identification of folklore creations in many countries; and the thorny question of “regional folklore”, that is, folklore shared by more than one – or sometimes many – countries’.<sup>82</sup> Finally, Lexinski suggests that the Draft Treaty ‘was rejected by industrialized nations who objected to protecting community-based cultural expressions’.<sup>83</sup> Thus, even though the Model Provisions and the subsequent Draft Treaty represent significant progress, there remained substantial questions over how folklore was defined, how to compensate for the trans-national nature of folklore, and a lack of consensus concerning the efficacy of protecting folklore at all. However, certain elements in the protection of folklore had, by this time, been established. For example, both the Model Law and the Model Provisions set a perpetual term of protection, they allow that folklore need not be fixed and that uses of folklore made with commercial intent should be subject to permission and a fee. Following the failure of the 1984 Draft Treaty, Samantha Sherkin notes that ‘UNESCO and WIPO convened no further conferences on [folklore] for the remainder of the decade’.<sup>84</sup>

### **1.1.5 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore (1989)**

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<sup>80</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, (2002), 11.

<sup>81</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, (2002), 11.

<sup>82</sup> WIPO, ‘The Protection of Traditional Cultural Expressions/Folklore’, (2005), 3-4. Available at: <http://www.wipo.int/tools/en/gsearch.html?cx=000395567151317721298%3Aaqrs59qtjb0&q=THE+PROTECTION+OF+TRADITIONAL+cultural+expressions%2Ffolklore&cof=FORID%3A11&siteurl=http%3A%2F%2Fwww.wipo.int%2Fwipolex%2Fen%2Fdetails.jsp%3Fid%3D7468>. Accessed 1/3/13.

<sup>83</sup> Lucas Lexinski, *Intangible Cultural Heritage in International Law* (Oxford, Oxford University Press, 2013) 57.

<sup>84</sup> Sherkin, ‘A Historical Study’ (2011), 6.

At the UNESCO General Conference in Sofia in 1985 (the year Ghana enacted its first Copyright Act that included protection for folklore) a new definition of folklore was adopted:

“Folklore” includes everything a people provides itself in order to constitute its existential basis. It is, and it makes manifest, the culture of a human group, a popular and traditional culture which changes in the course of a group’s history as it needs to change, but to which the group is strongly attached because it is the source of community life.<sup>85</sup>

The introduction of the word ‘popular’ marks an interesting definitional development and demonstrates the semantic intricacies of the task. As Janet Blake suggests: the word ‘popular’ serves to underline ‘that the culture in question is not an elite ‘high culture’.<sup>86</sup> However, she also notes that the word connotes ‘a contemporary, urban culture and thus would exclude both ancient and rural forms’.<sup>87</sup> Perhaps not surprisingly, the General Conference appendix notes that ‘No unanimity had been reached at expert committee meetings on matters of definition, identification, safeguarding and conservation’.<sup>88</sup>

UNESCO’s next document on the protection of folklore, and perhaps its most significant to date, was the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore. According to Blake the Recommendation ‘addressed the safeguarding of ‘traditional culture and folklore’ from an interdisciplinary standpoint’,<sup>89</sup> rather than a copyright perspective. The Recommendation can be seen as the culmination of UNESCO’s investigation into the ‘overall question of folklore’,<sup>90</sup> which was prompted by the Bolivian Request in 1973. Professor Lauri Honko, the Director of the Nordic Institute of Folklore, notes that ‘the Recommendation wisely emphasizes the positive aspects of folklore protection such as proper ways for the preservation and dissemination of folklore. The negative aspects such as the problematic application of the “intellectual property

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<sup>85</sup> UNESCO, ‘Desirability of Adopting an International Instrument on the Safeguarding of Folklore’, General Conference, 23<sup>rd</sup> Session, Sofia, 1985, Annex II. Available at: <http://unesdoc.unesco.org/images/0006/000657/065779eo.pdf>. Accessed: 23/5/13.

<sup>86</sup> Blake, ‘Developing a new standard-setting instrument’, 7.

<sup>87</sup> Blake, ‘Developing a new standard-setting instrument’, 7.

<sup>88</sup> UNESCO, ‘Desirability of Adopting an International Instrument on the Safeguarding of Folklore’, Annex i.

<sup>89</sup> Blake ‘Developing a new standard-setting instrument’, 19.

<sup>90</sup> Albro, ‘The Challenges if Asserting, Promoting, and Performing Cultural heritage’, 3.



right” are relegated aside’.<sup>91</sup> However, the Recommendation was intended to provide a common vocabulary for addressing the issue of protecting folklore, though not to presuppose that such protection would be delivered through the mechanism of copyright. Blake notes that ‘the intellectual property aspects of the international protection of folklore – to be addressed jointly with WIPO – [would] only be dealt with after the question of the international protection of folklore had been clarified through the Recommendation text’.<sup>92</sup>

Though the Recommendation avoids the question of copyright, there are familiar themes that run throughout. For example, the document highlights the ‘social, economic, cultural and political importance’ of folklore,<sup>93</sup> and suggests that ‘each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media’.<sup>94</sup> Though the Recommendation encourages member states to develop means to identify, conserve, preserve and disseminate folklore, as it was not intended as a mechanism for protection in itself, it stops short of addressing the issue of exploitation and regulation of use.

Perhaps the most significant development offered by the Recommendation is the definition of folklore, which goes far beyond the definition of ‘artistic folklore’, included in the Model Law. Indeed, Blake suggests that the definition in the Recommendation is, ‘the only attempt so far to define this area of heritage for a formal legal text’.<sup>95</sup> The Recommendation defines folklore as follows:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its social and cultural identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language,

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<sup>91</sup> Quoted in Sherkin, ‘A Historical Study’ (2011), 7.

<sup>92</sup> Blake ‘Developing a new standard-setting instrument’, 32.

<sup>93</sup> UNESCO, ‘Recommendation on the Safeguarding of Traditional Culture and Folklore’ (November 1989). Available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html). Accessed 22/4/14.

<sup>94</sup> UNESCO, ‘Recommendation on the Safeguarding of Traditional Culture and Folklore’. Preamble.

<sup>95</sup> Blake ‘Developing a new standard-setting instrument’, 8.

literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.<sup>96</sup>

Blake notes that this definition asserts that folklore ‘comes out of a traditional culture and that it relates to a specific community’ and that furthermore, though it omits that folklore is transmitted generation to generation, it ‘does not exclude the possibility that a culture and its expressions may evolve and change over time’.<sup>97</sup> Though the definition included in the Recommendation is far more comprehensive than those that preceded it, Blake suggests that the definition ‘suffers from a narrowness of focus [and] does not provide a sufficiently broad definition to encompass all the aspects of ‘traditional culture and folklore’ that need safeguarding’.<sup>98</sup>

#### **1.1.6. The WIPO Performances and Phonograms Treaty (WPPT), 1996**

Independently of UNESCO, WIPO returned to the subject of folklore in the WIPO Performances and Phonograms Treaty (WPPT) of 1996.<sup>99</sup> The Treaty provides protection to ‘performers of expressions of folklore’<sup>100</sup> and is designed to be ‘applied in tandem with the [1961] Rome Convention’, which provides protection to performers of artistic works.<sup>101</sup>

The Report from the Second Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in 2002, notes that ‘folk tales, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances’<sup>102</sup> and, as a

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<sup>96</sup> UNESCO, ‘Recommendation on the Safeguarding of Traditional Culture and Folklore’, Article 1.

<sup>97</sup> Blake ‘Developing a new standard-setting instrument’, 10.

<sup>98</sup> Blake, ‘Developing a new standard-setting instrument’, 10.

<sup>99</sup> The treaty came into force in 2002 and came into force in Ghana 16 February, 2012.

<sup>100</sup> Blake, ‘Developing a new standard-setting instrument’, 24.

<sup>101</sup> The Rome Convention (1961) does set out minimum standards of protection for performers of literary and artistic works. It makes no explicit mention of folklore, though Blake suggests that ‘it is open for States to include the performers of traditional culture and folklore’. (Blake, ‘Developing a new standard-setting instrument’, 24).

<sup>102</sup> WIPO, ‘IGC Second Session Report’, 7.

result, the WPPT may accord protection to performances of expressions folklore. Though the International Convention for the Protection of Performers, Producers, the Producers of Phonograms and Broadcasting Organizations (the 1961 Rome Convention) restricts protection to performers defined as ‘actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works’,<sup>103</sup> the WPPT includes ‘performers of folklore’ within its scope.<sup>104</sup> Though the WPPT allows performers to authorise repetition of fixation of their work,<sup>105</sup> it does not address the issue of ownership of the material being performed, nor how that material is defined as folklore.

In terms of providing protection for folklore, the WPPT does not represent significant progress. However, at the Diplomatic Conference held in 1996 at which the WPPT was adopted, two WIPO committees (the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms) both recommended that ‘provision should be made for the organization of an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore and the harmonization of the different regional interests’.<sup>106</sup>

#### **1.1.7. WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, 1997**

Following the recommendation from the 1996 Diplomatic Conference, UNESCO and WIPO convened the World Forum on the Protection of Folklore in 1997 in

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<sup>103</sup> International Convention for the Protection of Performers, Producers, the Producers of Phonograms and Broadcasting Organizations (Rome, 1961). Art 3(a).

<sup>104</sup> WIPO Performers and Phonograms Treaty (Geneva, 1996) *Agreed statement concerning Article 15*: It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain. Note 13.

<sup>105</sup> Though performers have been protected under the 1961 Rome Convention, the Convention defines ‘performers’ as ‘actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works’ ‘As expressions of folklore do not correspond to the concept of literary and artistic works proper, the definition of “performers” in the Rome Convention does not seem to extend to performers who perform expressions of folklore’. (Janet Blake ‘Developing a new standard-setting instrument’, 12).

<sup>106</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 12.

Phuket, Thailand. The meeting adopted a Plan of Action which identified the following needs and issues: ‘(i) the need for a new international standard for the legal protection of folklore; and (ii) the importance of striking a balance between the communities owning the folklore and the users of expressions of folklore’.<sup>107</sup> Thus, though the need for balance between protection and allowing utilisation of folklore had been implicit within previous instruments, WIPO and UNESCO now saw it as central to the development of a future instrument.

However, though WIPO and UNESCO again asserted their desire for an international standard, long standing opposition to such an agreement was in evidence as ‘participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with [the Plan of Action]’.<sup>108</sup> The major advancement from the meeting was that ‘WIPO accepted that there should be a forum for discussion to develop the necessary consensus between member states’.<sup>109</sup>

#### **1.1.8. WIPO Fact-Finding Missions (1998/99)**

Following the World Forum, WIPO undertook a series of fact-finding missions (FFMs) in 1998/99, to gather first hand information of uses of traditional knowledge, which ‘included expressions of folklore as a sub-set’,<sup>110</sup> and how state’s incorporated and implemented protection of folklore in their jurisdictions. Nine FFMs were conducted in 28 countries and over 60 cities in the South Pacific, Southern and Eastern Africa, South Asia, North America, Central America, West Africa, the Arab Countries, South America and the Caribbean.<sup>111</sup>

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<sup>107</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 12.

<sup>108</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 12.

<sup>109</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 49.

<sup>110</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 13.

<sup>111</sup> WIPO, ‘Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) 19. Available at: [http://www.wipo.int/export/sites/www/freepublications/en/tk/768/wipo\\_pub\\_768.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/768/wipo_pub_768.pdf), Accessed: 20/5/2013.

The FFM Report identified several areas, variously legal, conceptual and administrative, that required attention and illustrated the diverse positions on the protection of folklore across Member States. Amongst the issues raised on which Member States desired guidance were ‘the identification, [and] classification’ of expressions of folklore’,<sup>112</sup> ‘greater understanding and clarity on the subject matter for which protection is sought’,<sup>113</sup> the role of the Model Provisions as a possible foundation for ‘the elaboration of regional and international frameworks for the protection of expressions of folklore’, and ascertaining ‘the economic value of folklore’.<sup>114</sup>

From the FFMs, WIPO focused on two issues: first, that ‘some [nations] wish to benefit from the commercialisation of their cultural expressions, and second that others were ‘more concerned with the cultural, social and physical harm caused by the unauthorized use of their art’.<sup>115</sup> WIPO noted that the first group wished to be ‘compensated for their creativity, and to exclude non-indigenous or non-traditional competitors from the market’,<sup>116</sup> whilst the latter group wished to ‘control, and even prevent altogether, the use and dissemination of their cultural expressions’.<sup>117</sup> Thus, though previous instruments, such as the Model Law and Model Provisions had attempted to accommodate the various roles that folklore played within a society, both in terms of traditional communities and contemporary artists, as a result of the FFMs there was a much clearer sense that protection of folklore meant different things to different stakeholders. Notwithstanding these different positions, it was also apparent that a desire existed for an international instrument.

Following the FFMs, WIPO and UNESCO undertook Regional Consultations on the Protection of Expressions of Folklore, 1999. The African Regional Meeting took

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<sup>112</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 13.

<sup>113</sup> WIPO, ‘WIPO Fact-Finding Missions on Traditional Knowledge, Innovations and Practices of Indigenous and Local Communities: Progress Report’, (Geneva, 1999), 2. Available at: [http://www.wipo.int/edocs/mdocs/mdocs/en/pcipd\\_1/pcipd\\_1\\_10.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/pcipd_1/pcipd_1_10.pdf). Accessed: 12/7/12.

<sup>114</sup> WIPO, ‘Fact-Finding Missions: Progress Report’, 7.

<sup>115</sup> WIPO, ‘IGC Second Session Report’, 8.

<sup>116</sup> WIPO, ‘IGC Second Session Report’, 7.

<sup>117</sup> WIPO, ‘IGC Second Session Report’, 7.

place in Pretoria, South Africa in March 1999.<sup>118</sup> The African states recommended that folklore should receive protection at the national level ‘as a matter of urgency’.<sup>119</sup> To WIPO and UNESCO, they recommended that ‘work towards the protection of expressions of folklore and of traditional knowledge should be taken in parallel, taking into account the common elements, as well as the distinct characteristics and social functions of each’.<sup>120</sup> Also, they recommended that the WIPO and UNESCO ‘increase their efforts to develop, in the shortest possible time, a broad consensus among States in favor of an adequate and effective international regime for protection of expressions of folklore’.<sup>121</sup> Added to this, the Asian Regional Meeting recommended the establishment of ‘a Standing Committee on Traditional Knowledge and Folklore’.<sup>122</sup>

Though no binding multi-lateral agreement for the protection of folklore had been successfully developed, there were clear trends emerging at the international level in terms of the issues that faced the development of an international instrument. Since the Stockholm Revisions of 1967, significant developments had occurred in several areas, including the development of a definition of folklore within a legal text, a perpetual term of protection and the extension of protection to works that are not fixed. The two *sui generis* instruments, the 1976 Model Law and the 1982 Model Provisions, acknowledge that the value of folklore is multifaceted. As a work or expression, folklore is simultaneously part of the national heritage; a commodity with economic potential in its own right; and a resource for the creation of derivative works. Thus, both instruments had highlighted the importance of protecting and preserving folklore whilst simultaneously encouraging states to exploit its economic

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<sup>118</sup> WIPO-UNESCO, ‘African Regional Consultation on the Protection of Expressions of Folklore, Resolutions’, (Pretoria, 1999), Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unesco\\_folk\\_afr\\_99/wipo\\_unesco\\_folk\\_afr\\_99\\_1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unesco_folk_afr_99/wipo_unesco_folk_afr_99_1.pdf). Accessed 2/4/14. Representatives from 18 countries (including Ghana) were in attendance as were representatives from ARIPO and OAPI.

<sup>119</sup> WIPO-UNESCO, ‘African Regional Consultation on the Protection of Expressions of Folklore, Resolutions’, 3.

<sup>120</sup> WIPO-UNESCO, ‘African Regional Consultation on the Protection of Expressions of Folklore, Resolutions’, 3.

<sup>121</sup> WIPO-UNESCO, ‘African Regional Consultation on the Protection of Expressions of Folklore, Resolutions’, 4.

<sup>122</sup> WIPO-UNESCO, ‘Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific, Recommendations’, (Hanoi, 1999) 4, Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unesco\\_folk\\_asia\\_99/wipo\\_unesco\\_folk\\_asia\\_99\\_1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unesco_folk_asia_99/wipo_unesco_folk_asia_99_1.pdf). Accessed 2/4/14. The meeting was attended by representatives from 16 Asian and Pacific countries with facilitators from six countries and representatives of four NGOs.

potential through regulating utilisation and acknowledging the status of folklore as a generative resource for artists. Moreover, following the 1997 World Forum and the FFMs, there was a strong desire amongst some Member States for an international instrument but a lack of agreement in terms of what balance copyright protection should strike.

Following the FFMs and the recommendation from the Asian Regional Meeting, the WIPO General Assembly, at its twenty-sixth Session held from September 25 to October 3, 2000, ‘approved the establishment of the Intergovernmental Committee [on] Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore’.<sup>123</sup> At the Twenty-Seventh Session held in March 2014, the Protection of Traditional Cultural Expressions: Draft Articles, Rev.2<sup>124</sup> were put forward for consideration. In the following section, I explore the most recent trends emerging at the international level in order to illustrate how far developments in the protection of folklore have advanced at the international level and how far removed Ghana’s copyright law is from these developments.

## **1.2. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore working papers (2001 – 2014)<sup>125</sup>**

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<sup>123</sup> Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, First Session, April 30 to May 3, 2001, *Rules of Procedure*, 1. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_1/wipo\\_grtkf\\_ic\\_1\\_2.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_2.pdf). Accessed 31/3/14.

<sup>124</sup> WIPO, ‘The Protection of Traditional Cultural Expressions: Draft Articles’ (Geneva, 2014). Available at: [www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_27/wipo\\_grtkf\\_ic\\_27\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_5.pdf). Accessed 10/4/14.

<sup>125</sup> In tandem with WIPO’s work, UNESCO has also developed a series of international legal instruments for regulating products of culture as 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 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. 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. Gertrude Tokornoo, ‘Creating Capital from Culture’, 31.

At the first session of the IGC in April 2001, the African group presented a proposal to the Committee in which it stated that ‘the protection of traditional knowledge under current forms of intellectual property protection is incomplete and inadequate’.<sup>126</sup> The African group attributed these the lack of success in the formulation of appropriate protection to folklore to ‘the rigidities built [of copyright] and the very nature of traditional knowledge’.<sup>127</sup> To address this, the African group urged the IGC to ‘redress the imbalance in the current international property protection regime and improve it in order to make it work to the benefit of all the members of the international community’.<sup>128</sup> Therefore, the hope, at least of the African group, was that the IGC would continue to pursue an international instrument for the protection of folklore.

However, rather than attempt to develop a single instrument capable of protecting all the various manifestations of folklore, the IGC began its work with the observation that ‘Intellectual property issues related to genetic resources, traditional knowledge and folklore have emerged in a wide range of policy areas, including food and agriculture, biological diversity and the environment, human rights, cultural policy, trade and economic development’.<sup>129</sup> As a consistent criticism levelled at previous attempts to protect folklore had been the absence of a definition of folklore capable of encompassing all of its possible forms, at the first session of the IGC, Member States divided folklore into three themes: (i) genetic resources, (ii) traditional

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<sup>126</sup> WIPO, Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, First Session, ‘Proposal Presented by the African Group to the First Meeting on Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore,’ (2001), 5-6. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_1/wipo\\_grtkf\\_ic\\_1\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_10.pdf). Accessed 31/1/14).

<sup>127</sup> WIPO, ‘Proposal Presented by the African Group to the First Meeting’, 5-6.

<sup>128</sup> Writing in 2002, Janet Blake suggested that ‘WIPO itself questions the efficacy of IP mechanisms for the protection of aspects of traditional knowledge’ Janet Blake (2002) 58. WIPO noted that ‘many TK holders have expressed the view that inappropriate forms of intellectual property should not be imposed on the communities who hold TK and TCEs/EoF. As was identified during these dialogues, some “believe that the [IP] system is unsuitable as a modality to protect TK because of what they regard as the system’s private property, exclusive rights and individual author/inventor-centric nature. One of the bases expressed for this criticism was that TK and the kind of innovation and creativity that the IP system was established to protect are too different. Certain of these persons are critical of the IP system *per se*, while others expressed opposition merely to its deployment in the TK arena. The latter stressed the holistic and communally-shared nature of TK, which, they said, should not become the subject of private IPRs in the hands of outside parties.” (WIPO, ‘Proposal Presented by the African Group to the First Meeting’, 5-6).

<sup>129</sup> WIPO, ‘Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore-An Overview’, 3.



knowledge, and (iii) expressions of folklore.<sup>130</sup> Though the Committee noted that common characteristics are found between the three themes (for example, the concept of “common heritage”<sup>131</sup> and that they ‘constitute subject matter which transforms and evolves beyond the logic of individualized human intellectual activity’),<sup>132</sup> from this point the IGC treated the three themes separately but in parallel.<sup>133</sup>

In terms of the discussion on Expressions of Folklore, the first action of the IGC was to commission the ‘Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore’.<sup>134</sup> Of the 110 states that attended the First Session<sup>135</sup> and the 97 states that attended the Second Session,<sup>136</sup> only 32 responses were submitted.<sup>137</sup> By January 2002, WIPO had received 64 responses, upon which the Final Report is based. The Final Report notes that ‘[w]hile a number of countries provide specific legal protection for expressions of folklore (23, or 36% of the 64 that responded to the Questionnaire), it appears that there are few countries in which it may be said that such provisions are actively utilised and functioning effectively in practice’.<sup>138</sup> Further, the Report notes that ‘stakeholders have wide and diverse

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<sup>130</sup> The IGC suggested that ‘Expressions of folklore (as opposed to genetic resources and traditional cultural knowledge) encompass the folkloric narratives and expressions that are utilised in the development of new artistic works’. WIPO, ‘Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore-An Overview’, 3.

<sup>131</sup> WIPO, ‘Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore-An Overview’, 4. The IGC cited previous definitions of folklore in international instruments, for example: “folklore forms part of the universal heritage of humanity” (Recommendation on the Safeguarding of Traditional Culture and Folklore (1989), Preamble); “folklore represents an important part of the living cultural heritage of the nation” (UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore for Illicit Exploitation and Other Prejudicial Actions (1982), Preamble).

<sup>132</sup> WIPO, ‘Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore-An Overview’, 4.

<sup>133</sup> The decision to treat three themes together was first mentioned under: WIPO, ‘A Policy and Action Agenda for the Future.’ Meeting Statement. WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge, Chiang Rai, Thailand, November 9 to 11, 2000 (“the Chiang Rai Statement”).

<sup>134</sup> WIPO, Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, Second Session, ‘Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore’, (December, 2001). Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_2/wipo\\_grtkf\\_ic\\_2\\_7.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_7.pdf). Accessed 1/4/14. The number of attendant states has continued to be around one hundred.

<sup>135</sup> WIPO, Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, ‘First Session, Report’, (April-May, 2001). Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_1/wipo\\_grtkf\\_ic\\_1\\_13.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_13.pdf). Accessed 1/4/14

<sup>136</sup> WIPO, ‘IGC Second Session, Report’, 1.

<sup>137</sup> WIPO, ‘Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore’, 2.

<sup>138</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 52.

understandings of what is covered by the term “expressions of folklore”.<sup>139</sup> Finally, the Report notes that ‘many respondents had expressed a need for an international agreement for the protection of folklore, although some respondents, including the United States, took the view that it was premature to develop such an agreement’.<sup>140</sup> Though these findings represented familiar themes in the development of protection for folklore, the desire to develop a binding international instrument was gaining some impetus.

The Report to the third session<sup>141</sup> notes that the Algerian Delegation, on behalf of the African group, stated that the group favoured ‘the establishment of a comprehensive international binding instrument on the protection of expressions of folklore, with some form of dispute settlement mechanism either similar to that which is obtainable under the TRIPS Agreement or a mediation process as is provided by the WIPO Arbitration and Mediation Center’.<sup>142</sup> The issue of a dispute mechanism was also articulated by delegates from the African Regional Intellectual Property Office (ARIPO) as a pressing matter to address the ‘utilisation of folklore expressions which formed part of the national heritage of several countries’.<sup>143</sup>

The development of an international instrument failed to gain consensus at the time and as a result the African group called for the reinvigoration of *sui generis* approaches to protection.<sup>144</sup> The Report to the fourth session notes that the group ‘recommended that WIPO and UNESCO should update the Model Provisions for

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<sup>139</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 30.

<sup>140</sup> Fischer, ‘Dick Whittington and Creativity’, 52.

<sup>141</sup> WIPO, ‘Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session Report’ (Geneva, 2002), Available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_3/wipo\\_grtkf\\_ic\\_3\\_17-main1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_17-main1.pdf). Accessed 4/4/14.

<sup>142</sup> WIPO, ‘IGC Third Session Report’, 72.

<sup>143</sup> WIPO, ‘Report on the 4<sup>th</sup> Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore’, (Geneva, 2002) 30. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_4/wipo\\_grtkf\\_ic\\_4\\_15.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_15.pdf). Accessed 3/4/14.

<sup>144</sup> One of the problems that faced the development of an international instrument was the issue of Member States subscribing to it. As the IGC notes: ‘[o]f the WIPO treaties that are in force and that concern IP protection, the number of countries that have elected to adhere currently (April 1, 2005) ranges from 169 (Paris Convention) to 10 (Patent Law Treaty). Several treaties, concluded with the intention of formulating standards binding on contracting parties, have not entered into force due to an insufficient number of ratifications.’ WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’ (Geneva, 2005) 12. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_8/wipo\\_grtkf\\_ic\\_8\\_6.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_6.pdf). Accessed 9/4/14.

National Laws on the Protection of Expressions of Folklore’.<sup>145</sup> However, the IGC was divided on the best course of action to pursue, an international instrument or *sui generis* protection.

Though the fifth session ended without a formal decision on further work concerning the development of protection for TCEs, at the sixth session in March, 2004, the IGC produced the document: ‘Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options’.<sup>146</sup> The document notes that ‘several States supported the development of [...] a menu of options’.<sup>147</sup> Further, as a sign that the IGC was making some progress in developing a consensus on the need to protect folklore at the international level, ‘the WIPO General Assembly [...] indicated that the Committee’s mandate for the 2004-05 biennium excludes no outcome, including ‘the possible development of an international instrument or instruments’.<sup>148</sup> The following year, however, WIPO’s position on an international instrument was clear when it renewed the mandate for the Committee’s work and ‘requested the Committee to focus in particular on the international dimension of the issues under its mandate’.<sup>149</sup> Thereby suggesting that the desire to address the protection for folklore at the international level was being driven as much by the WIPO Committee as it was by delegates of the IGC.

One of the key themes to emerge from the early period of the IGC was a shift from viewing the aim of copyright protection as a means of preserving folklore, to focusing more on preventing ‘misuse and misappropriation’<sup>150</sup> and encouraging ‘the utilisation of [cultural] heritage’.<sup>151</sup> Thus, at this stage, serious consideration was being given to how copyright could be used to harness the generative nature of

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<sup>145</sup> WIPO, ‘Report on the 4<sup>th</sup> Session’, 24.

<sup>146</sup> WIPO, ‘Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options’, (Geneva, 2004). Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_6/wipo\\_grtkf\\_ic\\_6\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_3.pdf). Accessed 8/4/14

<sup>147</sup> WIPO, ‘Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options’, 9.

<sup>148</sup> WIPO, ‘Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options’, 8.

<sup>149</sup> WIPO, ‘The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles’, 13.

<sup>150</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimensions of the Committee’s Work’, 2.

<sup>151</sup> WIPO, ‘Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore-An Overview’, 4.

folklore, rather than simply preventing all access with commercial intent, as is the situation in Ghana.

By the sixth session, the Committee concluded that ‘the international dimension was not a distinct issue but an integral part of the substantive consideration of the protection of TCEs/EoF’.<sup>152</sup> By the Eighth Session in June 2005, the Committee produced the document: ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’.<sup>153</sup> The document notes that ‘a significant number of Committee participants had ‘stated in the Committee and in other fora that the conclusion of a binding international instrument or instruments in this area is an important or fundamental priority’.<sup>154</sup> However, the document further notes that ‘there is as yet no consensus within the Committee on the appropriate vehicle or procedural steps to give effect to any substantive outcome’.<sup>155</sup> Despite the lack of consensus, there was now a distinct momentum developing behind the desire for a ‘new international binding law in this domain’.<sup>156</sup> Consequently, the IGC officially focussed its work on developing ‘draft provisions on protection of TK and TCEs/EoF’.<sup>157</sup>

Having made this decision, the ninth and tenth sessions of the IGC focused on the international dimensions of protection of TCEs.<sup>158</sup> At the ninth session the

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<sup>152</sup> WIPO, ‘The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles’, 13.

<sup>153</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’, 3.

<sup>154</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’, 3.

<sup>155</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’ 3.

<sup>156</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’ 2.

<sup>157</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’ 8.

<sup>158</sup> See reports: WIPO, Intergovernmental Committee in Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, ‘Ninth Session Draft Report (Second Draft)’, (Geneva, April 2006).

Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_9/wipo\\_grtkf\\_ic\\_9\\_14\\_prov\\_2.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_14_prov_2.pdf). Accessed 4/3/14. WIPO, Intergovernmental Committee in Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, ‘Tenth Session Revised Draft Report’ (Geneva: Dec, 2006). Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_10/wipo\\_grtkf\\_ic\\_10\\_7\\_prov\\_2.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_7_prov_2.pdf). Accessed 4/3/14.

Committee officially included the ‘international dimension of its work’ in its renewed mandate.<sup>159</sup> By the twelfth session, the Nigerian delegation felt that an international instrument was an inevitability<sup>160</sup> and, clearly frustrated at the pace of negotiations stated that:

the concerns of the African countries for the protection of TCEs The African Working Group on Copyright had, in Brazzaville in 1963 (40 years ago), [...] the Delegation joined other delegations in asking when the issues would be considered mature for serious discussions beyond merely providing answers to a list of questions.<sup>161</sup>

Despite the Nigerian delegate’s frustrations, the pace of progress continued to be slow. Though the development of draft provisions had been identified as the aim of the IGC’s work, the Report from the fourteenth session in 2009, states that ‘[f]ollowing successive decisions of the WIPO General Assembly in 2003, 2005 and 2007, the mandate of the Intergovernmental Committee [...] has provided that “no outcome is excluded,” including the possibility of an international instrument or instruments’.<sup>162</sup> The report outlines six possible outcomes ranging from ‘a binding international instrument’ to ‘coordination of national legislative developments’.<sup>163</sup>

However, following this the IGC focused exclusively on the development of an international instrument. Finally, at the twenty-fourth session in 2013, the IGC produced The Protection of Folklore: Draft Articles. These were followed at the twenty-fifth session by The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2, which were submitted to the WIPO General Assembly in 2014 and represent WIPO’s first attempt since the unsuccessful 1985 Draft Treaty Against Illicit Exploitation and Other Prejudicial Actions to produce a binding international instrument for the protection of folklore.

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<sup>159</sup> WIPO, ‘Ninth Session Draft Report (Second Draft)’, 6.

<sup>160</sup> WIPO, ‘The Protection of Traditional Cultural Expressions/Expressions of Folklore: Factual Extractions’, Annex, 180.

<sup>161</sup> WIPO, ‘The Protection of Traditional Cultural Expressions/Expressions of Folklore: Factual Extractions’, Annex, 172.

<sup>162</sup> WIPO, ‘Report on the Fourteenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore’, (Geneva: 2009). 9. Available at: [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=17452](http://www.wipo.int/meetings/en/details.jsp?meeting_id=17452). Accessed 12/11/2011.

<sup>163</sup> WIPO, ‘Fourteenth Session Report’, 9.

In key areas the Draft Articles give several alternatives for each Article, indicating that consensus is yet to be reached. For example, in terms of providing a definition for ‘Traditional Cultural Expressions’, the Draft Articles state that: ‘[f]or the purposes of this instrument:

[Traditional] cultural expression means any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].<sup>164</sup>

Thus, in its scope the definition echoes Thomas’s 1846 definition of folklore as ‘the learning of the people’ and Charlotte Burne’s suggestion in 1914 that folklore ‘covers everything which makes part of the mental equipment of the folk as distinguished from their technical skill’.<sup>165</sup> However, in terms of the development of a legal instrument, the definition does represent some progress as it acknowledges (or potentially acknowledges) that expressions of folklore may be intangible, embodied and spiritual. When compared to Molly Torsen’s suggestion quoted in the Introduction that copyright was intended to protect the rights of ‘individual and identifiable authors of books’, the Draft Articles represent a substantial step.

The square brackets denote where decisions on the final formulation of words are yet to be made. As such, the definition suggests that a decision is yet to be made as to whether adaptations of traditional cultural expressions will be protected as a category of folklore, or whether folklore is necessarily ‘traditional’. In terms of allowing for the utilisation of folklore: under ‘Specific Exceptions’, Article 5.4 states that:

[Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:

(b) [with the prior informed consent or approval and involvement of the [holders]/[owners] of the original work, the creation of an original work [of

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<sup>164</sup> WIPO, ‘The Protection of Traditional Cultural Expressions: Draft Articles Rev.2’ (Geneva: 2014) Annex, 5. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_28/wipo\\_grtkf\\_ic\\_28\\_6.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf). Accessed, 10/6/14.

<sup>165</sup> Burne, *The Handbook of Folk-Lore*, 1.

authorship] inspired by, based on or borrowed from traditional cultural expressions;]<sup>166</sup>

Thus, though it is still subject to negotiation, the utilisation of folklore for the creation of an original work of an author is explicitly dealt with in the Draft Articles and, potentially, will be permissible with prior consent. Moreover, though utilisation of folklore requires prior informed consent and, under Article 3.3(d), the user is required to ‘where applicable, deposit any user fee into the fund constituted by such [Member State]/[Contracting Party]’,<sup>167</sup> there is no suggestion that the fee will be payable prior to use. As both WIPO’s *sui generis* instruments, the 1976 Tunis Model Law and the 1982 Model Provisions required a royalty based on revenue generated from the use of folklore, it is reasonable to expect that some form of payment to use folklore will be present in any future international instrument. However, there is a clear trend at the international level that such payments are based on revenue generated and so expected following use.

The question of whether any future instrument will mandate a specific exception for the borrowing of folklore is a crucial one to the situation in Ghana. As the IGC has acknowledged: ‘some of the legal and cultural policy issues relevant to TCEs may pivot on whether or not to grant a right of adaptation in respect of TCEs, and on the exceptions and limitations that might be appropriate’.<sup>168</sup> At the twenty-sixth session, the Ghanaian delegation made their position clear when they stated that they were ‘more concerned about preventing misappropriation than about enabling people to practice their art’.<sup>169</sup> Thus, in terms of where Ghana’s legislation sits within the international framework, what is clear is that Amagatcher’s claim to a set of settled international norms is inaccurate and it is equally clear that the decision to prevent nationals from utilising folklore for commercial ends unless they gain permission and pay a fee in advance of use, is a policy decision taken by Ghana’s legislators, rather than a recommendation drawn down from the international level.

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<sup>166</sup> WIPO, ‘The Protection of Traditional Cultural Expressions: Draft Articles Rev.2’, Annex, 5.

<sup>167</sup> WIPO, ‘The Protection of Traditional Cultural Expressions: Draft Articles Rev.2’, Annex, 5.

<sup>168</sup> WIPO, ‘Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options’, (Geneva, 2004) 21-22. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_6/wipo\\_grtkf\\_ic\\_6\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_3.pdf). Accessed 8/4/14

<sup>169</sup> WIPO, ‘Report to the Twenty-Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Geneva, 2014) 44. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_27/wipo\\_grtkf\\_ic\\_27\\_ref\\_grtkf\\_26\\_8.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_ref_grtkf_26_8.pdf). Accessed 10/4/14.

Furthermore, though Amagatcher made his claim in 2002 when the amendments to Ghana's copyright law were still being negotiated,<sup>170</sup> twelve years later the scenario at the international level remains unsettled. Going forward, WIPO has confirmed that the IGC will 'continue to expedite its work with open and full engagement, on text-based negotiations with the objective of reaching an agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCE'.<sup>171</sup> As such, the development and bringing in to force of a binding international instrument for the protection of folklore remains on WIPO's agenda. However, before that aim can be achieved, there remain key areas that need to be resolved. At the twenty-seventh session held in March 2014, the Chair of the IGC, Ambassador Wayne McCook identified four areas in which greater clarity is needed prior to the conclusion of an international instrument. These are:

- (1) the meaning of "traditional";
- (2) the beneficiaries of protection, in particular, the role of states or "national entities";
- (3) the nature of the rights, including the meanings of "misappropriation" and "misuse";
- (4) and the treatment of publicly available and/or widely diffused TK and TCEs.<sup>172</sup>

Though there has clearly been significant progress made by the IGC in several areas, not least committing to the development of an international instrument for the protection of folklore. As noted by McCook, fundamental questions that are familiar to the issues that have prevented the development of an international instrument, such as the inter-generational nature of folkloric development and how to compensate for expressions of folklore that are found in several jurisdictions, remain unresolved.

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<sup>170</sup> Collins notes that in it was in 1997 that 'the government Copyright Administration incorporated the Folklore Board's [...] recommendations in the draft of a new copyright bill' Collins, 'The Folkloric Tax Problem in Ghana', 3.

<sup>171</sup> WIPO, 'the Protection of Traditional Cultural Expressions: Draft Articles' (Geneva, 2014) 1. Available at: [www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_27/wipo\\_grtkf\\_ic\\_27\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_5.pdf). Accessed 10/4/14.

<sup>172</sup> WIPO, 'Traditional Knowledge and Traditional Cultural Expressions: Cross-Cutting Issues' (Geneva, 2014) 2. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_27/wipo\\_grtkf\\_ic\\_27\\_inf\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_inf_10.pdf). Accessed 10/4/14.



### 1.3. Regional Treaties and sub-regional norms

Though attempts to develop copyright protection for folklore have yet to be concluded at the international level, most states in Africa do currently provide protection through their copyright statutes.<sup>173</sup> Additionally, in Africa there are two continental instruments on the protection of folklore through copyright: the Organisation Africaine de la Propriete Intellectuelle (OAPI)'s 'Bangui Agreement' (1999), and the African Regional Intellectual Property Organisation (ARIPO)'s 'Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore' (2010). In this section I discuss these instruments, following which, I compare the copyright statutes of countries in West Africa in order to identify the areas in which Ghana's legislation is arguably exceeding regional norms and potentially extending into over-protection of folklore.

#### 1.3.1: Regional Treaties

ARIPO has a membership of largely Anglophone states,<sup>174</sup> and OAPI has a membership of Francophone African states.<sup>175</sup> The combined membership of ARIPO and OAPI accounts for 30 African states, plus 12 observer states in the case of ARIPO, thus achieving significant coverage of the continent. Both ARIPO and OAPI are affiliated to WIPO and both the Bangui Agreement and the Swakopmund Protocol were developed with assistance from WIPO.<sup>176</sup> Neither instrument is legally binding on the signatories, rather, both (as with other 'soft law' instruments) are designed to 'generate compliance'<sup>177</sup> through establishing shared aims. They are not

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<sup>173</sup> Currently 38 of 54 African States provide protection for folklore through copyright. For a list of African states that include protection for folklore within their copyright statutes see Appendix C. For a full list of all countries see: [http://www.wipo.int/tk/en/databases/tklaws/search\\_result.jsp?subject=tce&issue=&country=](http://www.wipo.int/tk/en/databases/tklaws/search_result.jsp?subject=tce&issue=&country=). Accessed 15/4/2014.

<sup>174</sup> Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.

<sup>175</sup> Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal and Togo.

<sup>176</sup> See: Silke Von Lewinski, 'Folklore', *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, ed., Silke von Lewinski (Alphen aan den Rijn: Kluwer Law International) 467-469.

<sup>177</sup> Andrew Guzman and Timothy Meyer, 'International Soft Law', *The Journal of Legal Analysis*, Vol. 2, No. 1, (Spring, 2011) 10.

backed by sanction and do not necessarily establish minimum standards between member states. That said, due to the continental coverage of the organisations and their affiliation with WIPO, it is reasonable to suggest that the instruments were expected to have some guiding influence on the national laws of the signatory states. As such, they do give some indication of what the shared aims of a large number of African states are in terms of how folklore should be protected and whether Ghana's legislation diverges from that.

### **1.3.1.1. The Bangui Agreement (1999)**

The Bangui Agreement was originally developed in 1977, and included provision for the protection of 'expressions of folklore and works derived from folklore' under Art.5(1)(xii). The 1977 text was replaced in 1999. The new text also protects expressions of folklore and works derived from folklore' as part of a larger category of protected Cultural Heritage under Article 67(2)(i).<sup>178</sup> In terms of its scope, the Agreement is wide-ranging and acknowledges that folklore exists in a multiplicity of forms. The Agreement defines folklore as 'the literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation'.<sup>179</sup> It also enumerates a list of potential manifestations of folklore under Article 68(2), which includes:

- (a) literary works of all kinds, whether oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles;
- (b) artistic styles and productions:
  - (iii) dramatic, dramatico-musical, choreographic and pantomime productions.<sup>180</sup>

<sup>178</sup> OAPI, 'Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property', (1977), revised 1999. Available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=141261](http://www.wipo.int/wipolex/en/text.jsp?file_id=141261). Accessed 28/11/11.

<sup>179</sup> OAPI, 'The Bangui Agreement, 1999', Title II, Chapter I, Article 68(1). Available at: [www.wipo.int/edocs/lexdocs/treaties/en/oa002/trt\\_oa0002\\_2.pdf](http://www.wipo.int/edocs/lexdocs/treaties/en/oa002/trt_oa0002_2.pdf). Accessed 5/6/2013.

The Bangui Agreement notes that 'Expressions of Folklore' include: literary works of all kinds, whether oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles; (b) artistic styles and productions: (i) dances, (ii) musical productions of all kinds, (iii) dramatic, dramatico-musical, choreographic and pantomime productions, (iv) styles and productions of fine art and decorative art by any process, (v) architectural styles; (c) religious traditions and celebrations: (i) rites and rituals, (ii) objects, vestments and places of worship, (iii) initiations; (d) educational traditions: (i) sports, games, (ii) codes of manners and social conventions; (e) scientific knowledge and works: (i) practices and products of medicine and of the pharmacopoeia, (ii) theoretical and practical attainments in the fields of natural science, physics, mathematics and astronomy; (f) technical knowledge and productions: (i) metallurgical and textile industries, (ii) agricultural techniques, (iii) hunting and fishing techniques. Art. 2(a).

Though the Bangui Agreement is not explicit in terms of who hold the rights in expressions or works derived from folklore, it places significant responsibility on Member States to ensure that provision is made for the ‘protection, safeguarding and promotion of the cultural heritage’.<sup>181</sup>

Like the Tunis Model Law and the 1982 Model Provisions, the Bangui Agreement requires that anyone, national or non-national, wishing to utilise folklore for commercial purposes must gain permission from the relevant competent authority.<sup>182</sup> Specifically, under Article 73(2)(a) (Prohibited Acts), the Act requires that permission be gained for:

- (a) the publication, reproduction and distribution of copies of any cultural property, whether classified or not, listed or not, ancient or recent, and considered by this Act as part of the national cultural heritage

As with Ghana’s 2005 Copyright Act, protection is extended to ‘recent’ works of folklore, suggesting that works do not necessarily need to have been handed down through generations to qualify as folklore. However, significantly in terms of exceptions, the Bangui Agreement provides far more space for utilisation by non-rights holders than Ghana’s 2005 Act. Under Art 74 (Free Use), the Agreement states:

- (1) The Provisions of Article 73(2) shall not apply in the following cases: (a) use for teaching; (b) use as illustration of the original work of an author on condition that the scope of such use remains compatible with honest practice; (c) borrowings for the creation of an original work from one or more authors.

Thus, Art. 74(c), like the Tunis Model Law and the 1982 Model Provisions, explicitly envisages that artists should be free to ‘borrow’ from national folklore in

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<sup>181</sup> Further, under Article 75 The Bangui Agreement states that: ‘[i]n order to prevent looting, loss or deterioration, the State shall undertake the control of export, distribution, disposal and sale of cultural property, whether classified or not, listed or not, ancient or recent’.

<sup>182</sup> The Bangui Agreement, ‘Except where a special authorization is issued by the competent national authority designated to that end, the following shall remain prohibited when carried out for profit making purposes’. Art.50(2).

order to create a work that qualifies for copyright protection as an original work. Moreover, the Agreement appears to encourage this use of folklore under Article 94 (Right to the Cultural Heritage) by setting down that ‘the State shall afford [...] (b) to craftsmen, artists and other creators, a right to assistance and encouragement’. Thus, far from preventing artists’ access to folklore as a resource for their work, the Bangui Agreement suggests that it is the responsibility of the state to encourage such use.

### **1.3.1.2. The Swakopmund Protocol**

ARIPO extended its mandate to include folklore at the eighth session of its Council in August 2002. The aim of the Secretariat at this time was limited to, in cooperation with Member States, carrying out a feasibility study into establishing ‘an inventory or database’.<sup>183</sup> With technical assistance from WIPO, ARIPO began to investigate the legal options for the development of a legislative framework and a regional legal instrument for the protection of traditional knowledge and expressions for folklore. At WIPO’s IGC Council’s tenth session in 2005, the IGC requested that OAPI and ARIPO work together to develop a harmonised legislative framework that could be ‘adopted by the competent organs of the two organizations’.<sup>184</sup> Though this aim is yet to be realised, ARIPO’s subsequent efforts did result in the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010), which is currently ratified by nine states including Ghana.<sup>185</sup>

Like the Bangui Agreement, the definition of ‘expressions of folklore’ in the Swakopmund Protocol is wide ranging. Under s. 2.1 it states that:

“expressions of folklore” are any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are

<sup>183</sup> ARIPO, ‘ARIPO’s Initiatives on the Protection of Traditional Knowledge and Expressions of Folklore’ (Harare: 2009). Available at: [www.aripo.org/traditional knowledge](http://www.aripo.org/traditional%20knowledge). accessed: 1/9/2012

<sup>184</sup> ARIPO, ‘ARIPO’s Initiatives on the Protection of Traditional Knowledge and Expressions of Folklore’.

<sup>185</sup> ARIPO, ‘The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore’ (Harare: 2010). Available at: [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=294&group\\_id=21](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=294&group_id=21). Accessed 5/11/11. The current signatories to the Protocol are: Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia, Zimbabwe.

manifested, and comprise the following forms of expressions or combinations thereof:

- i. verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names and symbols;
- ii. musical expressions, such as but not limited to songs and instrumental music;
- iii. expressions by movement such as but not limited to dances, plays, rituals and other performances; whether or not reduced to material form; and
- iv. tangible expressions, such as productions of art, in particular drawings, designs, paintings (including body painting), carving, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts, musical instruments; and architectural forms

Though this definition does not explicitly include recent works, its classification of expressions of folklore as works ‘in which traditional culture and knowledge are expressed, appear or are manifested’, does suggest that the age of individual expression is not necessarily a factor in whether that expression is classified as folklore.

Like the Bangui Agreement, there is no requirement for expressions of folklore to be in a fixed form in order to qualify for protection. Unlike the Bangui Agreement and Ghana’s 2005 Copyright Act, the Protocol explicitly links folklore with a community, rather than a state, and emphasises community control over the rights. Under s.16, the Protocol states that ‘[p]rotection shall be extended to expressions of folklore, whatever the mode or form of their expression, which are:

- (a) the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and
- (b) characteristic of a community’s cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.

Moreover, s.18 states that ‘[t]he owners of the rights in expressions of folklore shall be the local and traditional community’.<sup>186</sup> The theme of community control continues throughout the document. For example, rather than the term of protection

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<sup>186</sup> ARIPO, ‘The Swakopmund Protocol’, s18.

being perpetual, the Protocol links the term to the lifecycle of the community,<sup>187</sup> and requires that authorisation to utilise folklore be gained from a national authority that acts ‘on behalf of and in the interest of the community concerned’.<sup>188</sup> Though Ghana is a signatory to the Swakopmund Protocol, the status of the traditional community (which receives no mention in either the 1985 Act or the 2005 Act) is entirely obfuscated in favour of the state.

In terms of exceptions, again the Protocol focuses on the use of and transmission of folklore within the traditional community,<sup>189</sup> suggesting that regulation of the use of folklore should ‘extend only to uses of expressions of folklore taking place outside their traditional or context, whether or not for commercial gain’.<sup>190</sup> Thus, the Protocol places significant emphasis on enabling traditional communities to utilise folklore and be acknowledged in any third party use ‘where practical and possible’. The common exceptions (such as non-commercial use, teaching and incidental use) are retained and the reproduction of expressions of folklore is permitted in order to compile an archive intended for ‘safeguarding cultural heritage’.<sup>191</sup> As such, the space allowed under the Protocol for the utilisation of folklore for commercial purposes by individuals who are not members of the traditional community (whether nationals or not) is very limited. However, under s.20.2 the Protocol does suggest under that ‘[t]he measures put in place for the protection of expressions of folklore may make special provision for their use by the nationals of the country concerned’.<sup>192</sup> Hence, it is possible for states to allow nationals who are not members of the traditional community to utilise folklore. This may extend to allowing nationals to utilise folklore without permission and for free.

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<sup>187</sup> ARIPO, ‘The Swakopmund Protocol,’ Expressions of folklore shall be protected against all acts of misappropriation, misuse or unlawful exploitation for as long as the expressions of folklore fulfill the protection criteria set out in section 16’, s.21.

<sup>188</sup> Further, under s. 22(2), the Protocol requires that ‘Authorisations to exploit expressions of folklore shall be obtained from the national authority which acts on behalf of and in the interests of the community concerned’.

<sup>189</sup> ARIPO, ‘The Swakopmund Protocol, ‘[m]easures for the protection of expressions of folklore shall:

(a) be such as not to restrict or hinder the normal use, development, exchange, dissemination and transmission of expressions of folklore within the traditional or customary context by members of the community concerned, as determined by customary laws and practices’, s. 20(1).

<sup>190</sup> ARIPO, ‘The Swakopmund Protocol, s. 20(1) (b).

<sup>191</sup> ARIPO, ‘The Swakopmund Protocol, 20(1)(c).

<sup>192</sup> ARIPO, ‘The Swakopmund Protocol, s.20(2).

### 1.3.2. Sub Regional statutes

As mentioned, as well as the two regional agreements that provide protection for folklore, most states in Africa protect folklore. In West Africa all states, with the exception of Guinea, Guinea-Bissau and Mali provide protection for folklore in their copyright statutes. The West African sub-region consists of four Anglophone states<sup>193</sup> and eight Francophone states.<sup>194</sup> Ghana is bordered by three Francophone states: Togo, Burkina Faso and Cote d'Ivoire. In this section, in order to identify sub-regional norms and so identify whether Ghana's protection of folklore exceeds that of its regional neighbours, I analyse the provisions for the protection of folklore in a selection of West African states.<sup>195</sup>

#### 1.3.2.1. Anglophone states<sup>196</sup>

As well as Ghana, the other Anglophone states in the sub-region are Nigeria, The Gambia, and Sierra Leone. Currently, Sierra Leone's new copyright act is being developed and so is not available for analysis in this section.<sup>197</sup> Nigeria, the most populace state in the region,<sup>198</sup> protects folklore through its current copyright statute, which was enacted in 1999.<sup>199</sup> The law's extensive scope of protectable expressions includes:

- (a) folklore, folk poetry, and folk riddles;
- (b) folk songs and instrumental folk music;
- (c) folk dances and folk plays;
- (d) productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles.

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<sup>193</sup> Ghana, Nigeria, Sierra Leone and the Gambia.

<sup>194</sup> Niger, Mali, Burkina Faso, Cote d'Ivoire, Togo, Cameroon, Senegal, Guinea and Benin.

<sup>195</sup> In terms of Anglophone states, I restrict my analysis to Nigeria and The Gambia as these countries' copyright statutes all share a common root in UK law and Sierra Leone is yet to make available its new copyright law. In terms of Francophone states, I analyse the states that share a land border with Ghana and so share traditional ethnic populations. Also, as mentioned, Mali, Guinea and Guinea-Bissau do not protect folklore through their copyright codes.

<sup>196</sup> For a comparison table of Anglophone states' protection for folklore in West Africa see Appendix D.

<sup>197</sup> Accurate as of 25/09/14.

<sup>198</sup> Currently, Nigeria's population is estimated to be over 177 million. Available at: [www.worldpopulationreview.com/countries/nigeria](http://www.worldpopulationreview.com/countries/nigeria). Accessed 2/9/2014.

<sup>199</sup> Nigeria Copyright Act, 1999 (Cap. 68, Laws of the Federation of Nigeria, 1990 as amended by the Copyright Amendment Decree No. 98 of 1992 and the Copyright (Amendment) Decree 1999) Repealed Copyright Act of 1970 (in which there is no mention of folklore).

Like the Swakopmund Protocol, Nigeria's Copyright Act emphasises the association of folklore with the community from which the expressions derive. To that end, the Act defines folklore as 'a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means'.<sup>200</sup> However, the rights in folklore reside with the Nigerian Copyright Commission (s.4(1)), though there is no specific mention of duration of rights in folklore. Section 2(3) states that 'In the case of anonymous or pseudonymous literary, musical or artistic works the copyright therein shall subsist until the expiration of seventy years from the end of the year in which the work was first published'.<sup>201</sup> However, as the definition links folklore with the traditional community, it is likely that protection is either perpetual or linked to the lifecycle of the community.

Under Nigerian law an offence is committed when a person 'without the consent of the Nigerian Copyright Commission, uses an expression of folklore in a manner not permitted by section 28'.<sup>202</sup> Section 28 states that works of folklore are protected against reproduction, communication and adaptation 'when such expressions are made either for commercial purposes or outside their traditional or customary context'.<sup>203</sup> Thus, as is the case in Ghana, adaptations of works of folklore made with commercial intent require permission. However, there is no mention of use being contingent on the payment of a fee either prior or post use.

In terms of exceptions, Nigerian law allows for a standard list of exceptions, such as fair dealing as long as such use is 'accompanied by an acknowledgment of the title of the work and its source',<sup>204</sup> utilisation for the purposes of education',<sup>205</sup> and for illustration of an authors work.<sup>206</sup> Unlike Ghana, it allows for 'the borrowing of expressions of folklore for creating an original work of an author: provided that the

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<sup>200</sup> Nigeria Copyright Act, s.28(5).

<sup>201</sup> Nigeria Copyright Act, s.2(3).

<sup>202</sup> Nigeria Copyright Act, s.29.

<sup>203</sup> Nigeria Copyright Act, s.28(1)(c).

<sup>204</sup> Nigeria Copyright Act, Second schedule, s.2(1)(a).

<sup>205</sup> Nigeria Copyright Act, Second schedule, s.2(1)(b).

<sup>206</sup> Nigeria Copyright Act, Second schedule, s.2(1)(c).



extent of such utilisation is compatible with fair practice'.<sup>207</sup> Under these circumstances, there is no requirement to register use, gain permission or pay a fee.

Under Gambian law, folklore 'means the literary, artistic and scientific work belonging to the cultural heritage of The Gambia, which are created, preserved and developed by ethnic communities of The Gambia or by unidentified Gambian authors'.<sup>208</sup> The definition of what constitutes an expression of folklore is more specific. An expression of folklore, like in Nigerian law, is characterised by its status as a 'group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means'. Again, like Nigeria, the list of possible expressions of folklore is wide ranging and includes 'folktale, folk poetry and folk riddle; (b) folk song and instrumental folk music; (c) folk dance and folk play; and (d) production of folk art, in particular, drawing, painting, carving, sculpture, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, handicraft, costume and indigenous textile'.<sup>209</sup> In The Gambia, in a manner similar to Ghana, the rights in folklore are vested in the Secretary of State on behalf of and in trust for the people, and exist in perpetuity.<sup>210</sup>

An offence is committed by a person who sells, offers or exposes for sale or distribution in The Gambia copies of:

- (a) expression of folklore made in or outside The Gambia;
- (b) a translation, an adaptation, arrangement or expression of folklore made outside The Gambia without the permission in writing of the Centre;
- (c) which willfully misrepresents the source of an expression of folklore, or
- (d) willfully distorts an expression of folklore in a manner prejudicial to the honour, dignity or cultural interests of the community in which it originates,

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<sup>207</sup> Nigeria Copyright Act, Second schedule, s.2(1)(d).

<sup>208</sup> The Gambia Copyright Act 2004, s.2(1).

<sup>209</sup> The Gambia Copyright Act 2004, s.2(1) "expressions of folklore" definition.

<sup>210</sup> The Gambia Copyright Act 2004, Part III, s.26.

<sup>211</sup> The Gambia Copyright Act 2004, s.55. (1).

As with Nigeria's copyright law, utilisation of folklore for the purposes of education or to illustrate the work of an author is permitted.<sup>212</sup> Also, like Nigeria, use is permitted as long as it is in a manner that is compatible with fair dealing and as long as such use is accompanied by an acknowledgement of the title of the work and its source.<sup>213</sup> Again, like Nigeria but unlike Ghana, The Gambia allows for the 'borrowing of an expression of folklore for creating an original work of an author'.<sup>214</sup>

Thus, Nigerian law protects the moral rights of the community, recognises the importance of folklore to both the traditional communities that maintain it and within the contemporary artistic landscape by establishing an exception that allows for the utilisation of folklore by artists in a manner that is compatible with fair practice. In The Gambia, artists are permitted to borrow an expression of folklore in order to create an original work without the need for permission. Consequently, artists in both countries are able to feed in to their respective cultural economies with works that draw on folklore without registering their intention to use folklore, paying a fee or risking prosecution.

### **1.3.3. Francophone states<sup>215</sup>**

Three Francophone states share a border with Ghana: Togo, Cote d'Ivoire and Burkina Faso. All three countries provide protection for folklore within their copyright statutes but define them in slightly different ways, with some accentuating the role of the state and others the traditional community. For example, Togo defines folklore as 'the totality of literary and artistic productions created in the national territory by authors anonymous, unknown or forgotten presumed to be Togolese or from ethnic Togolese communities, transmitted from generation to generation and constituted from fundamental elements of national cultural heritage'.<sup>216</sup> On the other

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<sup>212</sup> The Gambia Copyright Act 2004, s.2(b).

<sup>213</sup> The Gambia Copyright Act 2004, s(2)(a).

<sup>214</sup> The Gambia Copyright Act 2004, s.2(c).

<sup>215</sup> For a comparison table of Francophone states' protection for folklore in West Africa see Appendix E.

<sup>216</sup> Cote d'Ivoire, Law No. 96-564 of July 25, 1996 on the Protection of Intellectual Works and the Right of Authors, Performers and Phonogram and Videogram Producers, Art.66.

hand, Burkina Faso characterises works of folklore as “expressions of traditional cultural heritage” which it defines as:

productions made up exclusively of characteristic elements of traditional artistic and literary heritage, which is developed and continued by a national community of Burkina Faso or by individuals who are considered to meet this community’s traditional artistic expectations, especially popular tales, popular poetry, popular songs and instrumental music, popular dance and shows and artistic expressions of rituals and productions of popular art.

Cote d’Ivoire is different again. It protects works of folklore under Article 6(12)<sup>217</sup> and provides separate definitions for both ‘folklore’<sup>218</sup> and ‘works derived from folklore’ under Art. 8 as ‘any work composed of elements borrowed from the Ivorian traditional cultural heritage’.<sup>219</sup>

All three states administer the rights in folklore through competent authorities associated with ministries. In Togo, Article 73 creates a professional public body called the Bureau of Author’s Rights, which is placed under the Minister for Culture. Similarly, both Burkina Faso<sup>220</sup> and Cote d’Ivoire’s<sup>221</sup> Acts establish collective management organisations, which fall under the countries’ Minister of Culture.

In terms of allowing the utilisation of folklore, Togolese law requires that ‘[a]daptation of folklore or the use of elements borrowed folklore must be declared

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<sup>217</sup> Cote d’Ivoire, 1996: ‘the protection of the rights of authors applies to all original works, regardless of the genre, merit, purpose or manner or form of expression thereof, including: (12) works of folklore, Art.6(2).

<sup>218</sup> Cote d’Ivoire, 1996: “folklore” means all literary and artistic productions handed down from generation to generation and forming part of the traditional Ivorian cultural heritage, the authors of the said productions being unknown but affording every reason to believe that they are nationals of Cote d’Ivoire’. Art. 8.

<sup>219</sup> Cote d’Ivoire, 1996, Art.8.

<sup>220</sup> Burkina Faso, Law No. 032-99/AN On the Protection of Literary and Artistic Property, 2012: ‘The collective management organization shall be under the technical supervision of the Ministry of Culture. Its status shall be approved by the Council of Ministers at the proposal of the Minister of Culture. Bureau Burkinabe du droit d’auteur (BBDA)’, Art. 97.

<sup>221</sup> Cote d’Ivoire, 1996: ‘The exploitation and protection of the rights of authors provided for in this Law shall be entrusted to a body of authors and composers... That body, to the exclusion of any other natural body or legal entity, shall be qualified to act as intermediary for the issue of authorization and the collection of related royalties in the dealings between the author or his heirs and the users of literary and artistic works. It is placed under the authority of the department responsible for cultural affairs’. Art 62.

to the Bureau',<sup>222</sup> and states that any use made 'with a view to profit making' is contingent on the payment of a fee to the Bureau.<sup>223</sup> It does, however, permit use 'by a public person' free of charge,<sup>224</sup> though a 'declaration' must still be made to the Bureau. In the region, Cote d'Ivoire's law is the most similar to Ghana's in as much as it does not include an exception that allows for the borrowing of an expression of folklore for the creation of an original work. However, as noted, works derived from folklore are protected under Art.7(3) as 'original works, without prejudice to the rights of the author of the original work'. As such, unlike Ghana, Cote d'Ivoire's copyright law does acknowledge that folklore is a resource for artists within their national cultural landscape and affords authors a form of 'thin' copyright protection.

Moreover, Art.8 states that authorisation to utilise folklore 'shall be granted against the payment of a royalty' rather than being required in advance of use as it is in Ghana.<sup>225</sup> As such, if the work, though made for commercial purposes, enjoys no commercial success then no royalty will be required. Burkina Faso's law states under Art.93 that any use of Burkinabe folklore is subject to the payment of a royalty, the amount of which 'shall be set according to the conditions customary for protected works in the same category'.<sup>226</sup> However, under Art.92 it states that '[t]he creation of works derived from expressions of traditional cultural heritage which are part of national heritage such as adaptations, translations, transcriptions, collections with or without agreement, and other alterations shall be free of charge for the people of Burkina Faso'. Furthermore, it only requires nationals to declare the creation of such a work 'after its production'.<sup>227</sup>

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<sup>222</sup> Togo, Loi n° 91-12 du 10 juin 1991 portant protection du droit d'auteur, du folklore et des droits voisins, Art. 68.

<sup>223</sup> Togo, 1991, Art. 69.

<sup>224</sup> Togo, 1991: 'The provisions of section 69 above are not applicable when the works of folklore are utilised by a public person for non-profit purposes. However, this public person required to make a declaration to the Bureau'. Art 70.

<sup>225</sup> Cote d'Ivoire, 1996: 'The right of exploitation of folklore shall be administered by the body of authors referred to in Article 62. The public performance of a work of folklore and its reproduction with a view to profit-making exploitation require authorization by that body. Authorization shall be granted against payment of a royalty', Art.8.

<sup>226</sup> Burkina Faso, 2012, Art.93.

<sup>227</sup> Burkina, Faso, 2012, Art. 92.

Thus, like Ghana, all three Francophone states protect folklore and all have established a competent body that administers the rights in folklore. However, each state, to a greater or lesser extent, permits the utilisation of folklore by nationals without the need to pay a fee in advance of use.

### **Conclusion: does Ghana's copyright protection for folklore exceed regional treaties and sub-regional norms?**

Throughout this chapter, I have discussed whether Amagatcher and Ben Nyadzie's assessment that Ghana's copyright law is consistent with international norms is accurate and, if not, whether Ghana's protection for folklore exceeds regional and sub-regional norms. What the analysis in this chapter demonstrates is that though states continue to express a desire for a binding international instrument, such an instrument remains elusive. As such, the situation at the international level remains unsettled though there are clear trends that suggest that Ghana's legislation goes beyond contemporary ideas of best practice.

There are several areas where Ghana's copyright legislation is similar to that of its regional neighbours. For example, Ghana places the administration of rights in folklore within a competent, state appointed body. The scope of protection in Ghana, as with all other states analysed, is extensive and protects contemporary works of folklore as well as those belonging to antiquity. Further, nearly all states require that uses of folklore are registered with the component authority and a fee, in some form, is often applicable. Though no state goes as far in facilitating the use of folklore by nationals as the two regional agreements encourage, all states examined in this section with the exception of Ghana allow to some extent the use of folklore by nationals for the creation of an original work, and no state other than Ghana requires payment *in advance of use*. As no international standard exists and Ghana is not regulating use of folklore in a manner that is consistent with the recommendations set down in the regional instruments, the lack of uniformity between states in the West African sub-region has the potential to lead to significant disadvantages to artists working in Ghana.

To explore this further: in an interview given for this research Carlos Sakyi, Chairman of the Ghana Music Rights Organization (GAMRO), notes that '[w]e have artificial borders in most of Africa; [...] there are rhythms and songs in Ghana that are used in Togo too'.<sup>228</sup> As noted, Ghana shares its borders with Cote d'Ivoire, Burkina Faso and Togo. Major ethnic groups who share folkloric practice and expressions straddle each country's national boundaries. Sakyi makes the point that '[i]f someone in Togo is not paying for the use of [folklore] but someone in Ghana is paying for the use of that, the Ghanaian is at a disadvantage'.<sup>229</sup>

Perhaps the clearest example of disharmony is between Ghana and Burkina Faso. Burkina Faso is Ghana's northern neighbour and they share a large Housa ethnic group. As mentioned, Burkina Faso, under Article 92 of the 1999 Copyright Act, explicitly allows for nationals and foreigners to be treated differently with respect to the utilisation of folklore for derivative works by allowing Burkinabe nationals to utilise Burkinabe folklore without permission and without the requirement of a fee.<sup>230</sup> Thus, though two artists may share a common cultural heritage, one may freely create from folklore, and the other, using the same folkloric resource, must pay a fee in advance.

The existence of a binding international instrument would not necessarily solve this imbalance. As Alan Story suggests, international treaties only establish 'mandatory minimum standards'<sup>231</sup> and a future instrument may not necessarily extend to mandating that nationals be allowed to borrow elements of folklore for the creation of an original work. However, if exceptions specific to the use of folklore are set down in a binding instrument that stop short of mandating such an exception, unlike now, it would be evident to those charged with enforcing the law at the Ghana Copyright Office that Ghana's protection of folklore is going further than its regional neighbours and placing its national artists at a disadvantage.

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<sup>228</sup> Sakyi, interview, 2012.

<sup>229</sup> Sakyi, interview, 2012.

<sup>230</sup> Burkina Faso, 2012, Art. 92.

<sup>231</sup> Story, *An Alternative Primer on national and international copyright law in the global South*, 46.

In terms of Ghana's theatre industry, this discrepancy has the potential to prove significantly problematic due to playwrights' historic reliance on the free utilisation of folklore. In the following chapter, I discuss how the free utilisation of folklore by playwrights played a central role in the development of Ghana's modern theatre industry. By so doing, I explore what is at stake in terms of Ghana's theatre industry if playwrights are no longer permitted to utilise Ghanaian folklore for free.

## Chapter 2

### The Cultural Utility of Folklore in Post-independence Ghana

#### Introduction

In the previous chapter, I suggested that the lack of a binding international standard that includes explicit exceptions for the use of folklore allows for different and potentially conflicting levels of protection and permitted uses in different jurisdictions that share ethnic groups. Further, I argued that though Ghana's copyright administration believe that the protection of folklore in Ghana is commensurate with international recommendations and regional norms, in fact, by not containing exceptions that permit the borrowing of folklore and requiring a fee in advance of use, Ghana's copyright law is arguably tipping into "over-protection" in terms of prohibiting Ghanaian nationals' access to folklore for the creation of original works. One of the significant tensions to arise from this situation is the potential impact on Ghanaian playwrights and other artists who routinely utilise folklore as a resource for their work.

In post-independence Ghana the use and re-use of folklore by playwrights has been central to the development of Ghana's theatre industry. In his 2003 paper 'The Folkloric Tax Problem in Ghana', John Collins, Professor of Music at the University of Ghana, notes that prior to the introduction of the 2005 Copyright Act, the Folklore Board raised a series of objections to what they saw as the proposal to charge nationals to utilise folklore. The first objection was 'that such a law applied internally to Ghana would stunt the creativity of local artists'.<sup>1</sup> To explain this position, in this chapter I explore the role of folklore in the development of Ghana's

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<sup>1</sup> Collins, 'The Folkloric Tax Problem in Ghana', 2.



post-independence theatre industry and the significance of folklore as a resource in the creation of an idiosyncratic theatrical aesthetic in Ghana.

In order to ascertain what, in terms of playwriting practice, the current copyright law has the potential to disrupt, I identify the specific folkloric elements that have been codified by Ghanaian playwrights within their creative practice. In order to do so, I undertake a reading of a selection of Ghanaian play texts and identify the expressions of folklore that consistently appear in these plays. My reading of these plays is by no means definitive; there are significant works by James Gibbs, Kofi Agovi and Awo Asiedu that undertake alternative analysis through different critical frames.<sup>2</sup> I engage with these selected texts in order to trace how specific elements drawn from Ghanaian folklore have been codified as part of the lexicon of Ghanaian playwriting. I argue that use of folklore influenced the development of a specific theatrical aesthetic but that rather than being simply a historic influence on Ghanaian playwrights, specific elements of folklore retain a dramaturgical and narrative importance. In the conclusion, I discuss how the folkloric elements highlighted within this chapter interact with Ghana's copyright act and consider whether the reuse of these elements by playwrights trigger liability under the 2005 Copyright Act. However, in order to illustrate the impact of the utilisation of folklore on the development of Ghana's post-independence theatre industry, it is useful here to briefly outline the state of Ghana's pre-independence theatrical landscape.

### **Background: folklore in colonial-era plays**

Prior to independence in 1957, playwrights in Ghana utilised, referred to and viewed folklore in very different ways. Kobina Sekyi's *The Blinkards* (1916) and Mabel Dove's *A Woman in Jade* (1934), for example, are concerned with the clash of traditional culture and colonial culture but from antithetical positions. *The Blinkards* is a critique of contemporary life in Cape Coast, the centre of colonial administration

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<sup>2</sup> See: James Gibbs, *Nkyin-Kyin: Essays on the Ghanaian Theatre*, ed. James Gibbs (Amsterdam: Editions Rodolphi, 2009); Awo Mansa Asiedu, 'Abibgromma: Abdallah's Search for an African Aesthetic', *Trends in Twenty-First Century African Theatre and Performance*, ed., Kene Igweonu (Amsterdam: Rodopi, 2011); Kofi Agovi, 'The Origin of Literary Theatre in Colonial Ghana, 1920-1957', *Research Reviews NS*, Vol.6 No.1 1990.

in the Gold Coast at the time. Sekyi is highly critical of what he sees as the affectation of the colonisers' manners and customs and the obfuscation of Fanti traditions. The play ends with an appeal delivered in Fanti directly to the audience in which Mr Brofoesem states: '[t]he people of the old days were wise indeed: if only we would follow the customs they left us a little more, and adopt the ways of other races a little less, we should all be as healthy as they were'.<sup>3</sup> Conversely, Dove uses her play to promote British values and education and she positions traditional tribal culture as the root of contemporary social problems in Accra.<sup>4</sup>

J.B. Danquah's *The Third Woman* (1934) represents traditional culture and folk stories in a very different way. The play is primarily a means through which Danquah, a leading political figure of the period, attempts to articulate a political nationalism within the reality of colonialism through constructing a space in which the tradition of Ghana's Akan people and modernity are merged.<sup>5</sup> Set in the mythical land of Tekyiman, the legendary home of the Akan,<sup>6</sup> Danquah uses the Akan myth of Sasahooden<sup>7</sup> to explore hopes of developing a third way between the contrasting colonial and indigenous cultures that can deliver a political future for the Gold Coast.

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<sup>3</sup> Sekyi, *The Blinkards*, 173.

<sup>4</sup> Dove, *Selected Writings of a Pioneer West African Feminist*.

<sup>5</sup> Danquah, as well as writing a play, was the foremost political figure of his time. A lawyer, Danquah trained in England and returned to the Gold Coast where he established the United Gold Coast Convention (UGCC), the major indigenous political party of the time. Politically active in the 1930s and 1940s, his vision for the Gold Coast was for political and cultural autonomy within the British Empire, a position that is reflected within *The Third Woman*. He was one of the 'Big Six', the founding fathers of Ghanaian independence but was overshadowed by Nkrumah's greater populism and demands for total independence from Britain. Following independence, Danquah remained active in Ghanaian politics and ran against Nkrumah for the presidency. He was arrested by Nkrumah for sedition and died in prison in 1965.

<sup>6</sup> Charles Angmor, *Contemporary Literature in Ghana 1911-1978: A Critical Evaluation* (Accra: Woeli Publishing Services, 1996) 195.

<sup>7</sup> The dramatic peril in the story is delivered in the form of a deadly gnome of Akan myth, Kwasi Sasahooden, whose cries are fatal and who can only be placated by gluing hair to his bald head. Despite the story of Oni (the eponymous third woman) seeming to be the main theme, it is the story of Sasahooden that lends drama and structure to the play. Priesie, the village fool, puts himself forward as the kingdom's champion, defeats Sasahooden with a chant, and so gains Oni's hand and the kingship of Tekyiman. Angmor notes that 'there are different versions of [the Sasahooden myth] but its essential theme is the defeat of a devilish power' Charles Angmor, *Contemporary Literature in Ghana 1911-1978*, 199.

Only four plays are extant from colonial Ghana and each is the work of a different writer.<sup>8</sup> All four plays are loosely naturalistic in style and largely derivative of contemporary British drama. For example, *The Third Woman*, which was performed once in 1934 and published in 1943,<sup>9</sup> is described by the Nigerian playwright Ola Rotimi as being ‘rather in the mode of Closet Drama’, which he describes as being ‘more predisposed ‘to being read, than to being performed’.<sup>10</sup> Furthermore, he describes Sekyi’s *The Blinkards* as being ‘modelled on 18/19<sup>th</sup> century British examples with characteristic features of witticism and stylistic elegance’.<sup>11</sup> Only F. Kwesi Fiawoo’s 1943 play, *The Fifth Landing Stage*, received multiple performances at the time and so these plays do not represent a developing theatre industry but rather four writers’ unrelated, individual endeavour. By 1957, the Gold Coast had no dedicated theatre spaces, no funding body and no training institutions.<sup>12</sup> This was consistent with the situation across British Africa where, as Janet Beik notes, prior to 1957 only ‘three long and three short plays [were] published in English’.<sup>13</sup> Though this figure is possibly misleading in terms of the totality of theatrical endeavour, it does suggest that playwriting was not an occupation in British West Africa.

By contrast, in the two decades that followed independence theatre studios, theatre companies, training institutions, funding bodies and literary journals were all established and dozens of new plays had received publication or performance.<sup>14</sup> This striking transformation of Ghana’s theatre industry was in large part due to the development of idiosyncratic theatrical forms, which adapted elements of Akan

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<sup>8</sup> The other is F. Kwesi Fiawoo’s *The Fifth Landing Stage* (1943). The play is set in historical Eweland and foregrounds traditional systems of community and justice specific to the area. Following a series of deceptions and betrayals committed by the central character Agbebada, he is sentenced to death at the fifth landing stage, a punishment that involved being buried to the neck at low tide and drowned as the tide came in. Having reformed his character and accepted his punishment, Agbebada is saved by his friend Kumasi and leaves to pursue a better life. Fiawoo suggests in the introduction to his play that it comes ‘a messenger from our forefathers [...] for the benefit of the present generation in Ewe land, and all who desire to know something about the customs of our ancient people’. The play is the only one of the four to have received multiple performances and for Fiawoo there is a simple message for his audience: ‘that every lover of his country will always labour to do the right thing, avoiding all evil actions’. (Fiawoo, *The Fifth Landing Stage*, vii).

<sup>9</sup> It has enjoyed subsequent revivals, most recently as part of the Ghana@50 programme in 2007, Directed by Dzifa Glikpoe.

<sup>10</sup> Ola Rotimi, ‘The Attainment of Discovery’, 19.

<sup>11</sup> Ola Rotimi, ‘The Attainment of Discovery’, 12.

<sup>12</sup> See: Gibbs *Bibliography* and ‘In Search of the Founding Father’.

<sup>13</sup> Janet Beik, *Hausa Theatre in Niger: A Contemporary Oral Art* (New York and London: Garland Publishing, 1987) 20.

<sup>14</sup> James Gibbs, *Ghanaian Theatre: A Bibliography*.

folklore for the stage. The first clear manifestation of this was Efua Sutherland's *anansegoro*, which as Rotimi notes, was constructed through a combination of 'appropriate traditional image, expressive idioms, and structural devices'.<sup>15</sup> Sutherland drew these elements from the long established conventions of the traditional Akan storytelling art *anansesem*, and, through research in the 1960s and 1970s; she developed and classified them as *anansegoro*.<sup>16</sup>

In order to describe the importance of folklore within the development of *anansegoro*, I discuss how the creation of Sutherland's most famous play, *The Marriage of Anansewa* (1975), was directly influenced by her research into Akan storytelling (*anansesem*) in the village of Ekumfi Atwia. The significance of this was that the theatrical aesthetic that developed from Sutherland's research into the folkloric heritage of the Akan of southern Ghana, was quickly claimed as a key differentiating factor between 'theatre in Africa and African theatre',<sup>17</sup> as the resultant plays were claimed to be 'essentially connected with the lives of African people'.<sup>18</sup> Sutherland's development of *anansegoro* had a significant and long-lasting impact on the development of Ghana's theatre industry, gaining artistic and (as will be discussed in chapter 3) political support. Though by no means all Ghanaian plays written after *The Marriage of Anansewa* contain the elements drawn from folklore that are contained within Sutherland's play, as discussed in this chapter a significant number do and their rendering of folklore is strikingly similar. To explicate the importance of this in terms of the development of Ghana's theatre industry, in this chapter I explore how Sutherland's position as a researcher and playwright influenced subsequent generations of playwrights to utilise elements of Ghanaian folkloric in their work and thus embed the representation of Akan folklore as a central tenet of Ghana's playwriting culture.

## Methodology

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<sup>15</sup> Ola Rotimi, 'The Attainment of Discovery', 23.

<sup>16</sup> Efua Sutherland, *The Marriage of Anansewa*, (Accra: Sedco, 1975) v.

<sup>17</sup> J. Scott Kennedy, *In Search of African Theatre* (New York: Charles Scribner's Sons, 1993) 142

<sup>18</sup> Kennedy, *In Search of African Theatre*, 145.

In order to illustrate how *anansesem* directly influenced the development of *anansegoro*, in the first section, I discuss three of the elements developed by Sutherland from Akan folklore that play a significant role in *The Marriage of Ananswewa*: the *mbogwo* (1.1), the Storyteller (1.2) and the character of Ananse (1.3). In the second section, I discuss how Sutherland researched and codified elements of Akan folklore. Through a description of her trajectory as a playwright to joining the Institute of African Studies as a research fellow, I identify the motivations behind Sutherland's desire to engage with Akan folklore (2.1). I go on to discuss the *Kodzidan* research project in the village of Ekumfi Atwia, which Sutherland established as a means of researching Akan storytelling traditions in order to informing her own playwriting practice (2.2).

In the following section (3), in order to demonstrate the scale of Sutherland's influence and explain the continuing appeal of *anansegoro*, I discuss how Sutherland's codification of aspects of Ghanaian folklore are repeated and developed by subsequent playwrights and so established as essential elements of a Ghanaian theatrical aesthetic over an extended period. I trace how the elements drawn from folklore identified in section 1 are present in the work of these writers and underline a conscious adoption of Sutherland's practice. To explicate how significant the utilisation of folklore has become in Ghana's theatre industry, in the fourth section, I discuss the work of Mohammed ben Abdallah, who through his plays *The Witch of Mopti* (1988) and *the Trial of Mallam Ilya* (1982), developed the derivative form *abibigoro* from *anansegoro*.

Finally, in order to illustrate how Ghana's current copyright law has the potential to disrupt the established cultural practice discussed in this chapter, I conclude by discussing how the work of Sutherland and subsequent playwrights relates to the regime of protection of folklore set down in the 2005 Copyright Act.

## **2.1. *Anansesem*, *Anansegoro* and *The Marriage of Anansewa***

Sutherland's *anansegoro* is a distinct theatrical style that is present in both performance and play texts. Performances are characterised by action that is intercut by drumming, dancing and a playful interaction between performers and audience. There is, as James Gibbs describes, not simply a suspension of disbelief but a 'fully conscious enjoyment of the willing suspension of disbelief'.<sup>19</sup> The playfulness that results from the permeability of the fourth wall is often acknowledged in the set design and the dramaturgy of the plays. For example, in Sutherland's play *The Marriage of Anansewa* the 'Props Man' is on stage throughout providing the characters with essential items and so moments of physical comedy for the audience, whilst remaining unacknowledged by the characters who occupy the world of the play.<sup>20</sup>

The ancient story-telling tradition of *anansesem* upon which *anansegoro* is based was developed and maintained by the Akan of southern Ghana.<sup>21</sup> Sutherland notes that as a term, "*anansesem*" is used to denote 'both the body of stories and the story-telling art itself'.<sup>22</sup> Awo Asiedu, former Director of the School of Performing Arts at the University of Ghana, notes that etymologically, *anansegoro* replaces the word *asem* of *anansesem*, meaning 'word' or 'words', with *agoro* meaning 'play'. This, as Asiedu suggests, shifts the emphasis 'from just the spoken word to action, drama, performance'.<sup>23</sup> She also notes that the word *agoro* is polysemic and that beyond 'play' the word means 'beauty or aesthetics', and also 'fun'. For example, to say '*odiegoro*' could mean 'she is playing' or 'she is joking'.<sup>24</sup> As Asiedu notes: 'Sutherland's use of *anansegoro* thus captures accurately the Akan cultural concept of performance'.<sup>25</sup> The stories in *anansesem* revolve around the exploits of the Akan spider god, the trickster Ananse. Writing in 1916, Robert Sutherland Rattray noted that '[t]he spider in Ashanti folk-lore comes easily first as the hero in most of their

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<sup>19</sup> James Gibbs, 'Introduction', in Yaw Asare, *Ananse in the Land of Idiots* (Legon: StudyGhana Foundation, 2006) xiv.

<sup>20</sup> For example, in one passage, the main character George Kweku Ananse returns from running errands in the hot sun. He sits and turns on his 'electric' fan, which is manually operated by the Props Man in full view of the audience. As Ananse paces the stage, so the 'fan' follows him.

<sup>21</sup> Asiedu, '*Abibgromma*', 370.

<sup>22</sup> Sutherland, *The Marriage of Anansewa*, v.

<sup>23</sup> Asiedu, '*Abibgromma*', 369.

<sup>24</sup> Asiedu, '*Abibgromma*', 369.

<sup>25</sup> Asiedu, '*Abibgromma*', 369.

animal tails. This is true to such an extent that the very word for a story in this language, be the spider one of the *dramatis personae* or not, is *anansesem*'.<sup>26</sup>

Asiedu notes that 'within the story-telling tradition of *anansesem* are certain conventions';<sup>27</sup> Sutherland suggests that *anansegoro* develops these conventions into a 'full theatrical expression'.<sup>28</sup> The presence of these conventions now acts as a familiar set of visual and dramaturgical codes. The elements developed from *anansesem* are not just aesthetic or performance elements that are added in the rehearsal process but are written into play texts, ensuring that they are repeated in each reproduction of the play.

Sutherland's fullest expression of *anansegoro* is her 1975 play *The Marriage of Anansewa*. Set in a newly independent Ghana, the play follows the fortunes of George Kweku Ananse who, in order to escape his impoverished state, sends a photograph of his daughter, Anansewa, to four local chiefs hoping that one might marry her. Ananse's plans go too well and each of the four Chiefs falls in love with Anansewa. With the marriage date set for four different weddings, George extricates himself from the ensuing confusion by faking the death of his daughter. At the end of the play three of the chiefs express their condolences, but when the paramount Chief-who-is-Chief offers to pay for the funeral as though he and Anansewa were already married, Anansewa miraculously recovers and she, George and Chief-who-is-Chief live happily ever after. Asiedu notes that the play 'heavily foregrounds theatricalism and makes no pretence of realism'.<sup>29</sup> It is the elements drawn from folklore analysed below that provide the play with this 'theatricalism'.

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<sup>26</sup> Robert Sutherland Rattray, *Ashanti Proverbs: The Primitive Ethics of a Savage People*, (London: Oxford University Press, 1916) 73. Rattray notes the meaning of: *ananse asem*, literally translates as 'words about a spider'.

<sup>27</sup> Asiedu, 'Abibgromma', 370.

<sup>28</sup> Sutherland, *The Marriage of Anansewa*, v.

<sup>29</sup> Asiedu, 'Abibgromma', 370.

### 2.1.1. The *Mboguo*<sup>30</sup>

Sutherland developed *anansegoro* as a framework of aesthetics and theatrical devices that consists of a combination of traditional songs, rhythms and dances, which move the action. Added to this is a narrator who provides the performance with a link to traditional village storytelling by speaking directly with the audience and encouraging them to speak back. Sutherland termed the combination of elements ‘*mboguo*’,<sup>31</sup> a term borrowed from *anansesem*.

The Ghanaian theatre academic David Donkor notes that within traditional *anansesem* there is an ‘embodied interactivity that is distinct about performance’.<sup>32</sup> This interactivity, he suggests, is formalised within the *mboguo*, which is a contribution made by the audience to both the storyteller and the story. Donkor suggests that the function of the *mboguo* in *anansesem* is to unsettle the ‘authorial knowledge and authoritative knowledge’<sup>33</sup> of the storyteller. The intervention can affect the narrative direction of the performance and so test the storyteller’s skill. For example, through *mboguo* ‘the audience halts the narration and contributes a song, mimed action or comic playlet’.<sup>34</sup> Dzifa Glikpoe, former Director of the National Theatre of Ghana Players, describes the *anansesem* event and the function of *mboguo*:

I grew up in a village with no electricity [...] An old man is telling a story and say I have just eaten [...] and start to doze off. Then somebody comes in with a song “Yes! I was there; I was there when the hunter did that and this is how the song goes”. Then everybody starts to sing and clap, and you are not dozing anymore. Then the story continues. The story telling sessions are not passive where you sit down and just listen.<sup>35</sup>

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<sup>30</sup> *Mboguo* has various spellings, for consistency I use Sutherland’s spelling: *Mboguo*, throughout this chapter unless quoting another writer directly.

<sup>31</sup> Sutherland, *The Marriage of Anansewa*, v.

<sup>32</sup> David Donkor, ‘*Kodzidan Mboguw*: Supplanted Acts, Displaced Narratives and the Social Logic of a Trickster in the “House of Stories”’ *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 40.

<sup>33</sup> Donkor, ‘*Kodzidan Mboguw*’, 44.

<sup>34</sup> Donkor, ‘*Kodzidan Mboguw*’, 43.

<sup>35</sup> Interview with Dzifa Glikpoe, former Director of the National Theatre of Ghana Players (*Abibigromma*), September, 2012.



As Donkor notes, the *mboguo* (literally translated as ‘a kicking inside’) ‘prevents a story from being closed by manufacturing a subversive narrative opening’.<sup>36</sup> In this way, the *mboguo* is simultaneously a formalised and spontaneous element that inserts a potentially disruptive but structurally accommodated dialogue between the storyteller and the audience. Thus bringing the audience actively into the creation of the story’s narrative and the storytelling performance.

As an event, *anansesem* is ‘an evening pastime [in which] young as well as the old come together to tell stories that revolve around Ananse’.<sup>37</sup> As *anansesem* constituted a full evening’s entertainment for the village, the *mbogwo* was also used as a bridge between two stories. Owusu Brempong notes that Akan folktales contain what he calls ‘opening and closing formulas’.<sup>38</sup> These formulas are codified dialogue between the storyteller and the audience which, rather than keeping the current story open, enable a new story to begin:

Performer: They say, they say, o!  
 Audience: If it was never said, you would not have heard it  
 [...]
   
 Performer: This story I told, Whether it is sweet, oo  
 Whether it is not sweet, oo  
 Take it away and bring some<sup>39</sup>

Brempong notes that the final line is a ‘formulaic ending [that] invites the audience to tell another story’ and so the evening’s entertainment continues.<sup>40</sup>

Sutherland suggests that in *anansesem* the storyteller works with the audience not only to bridge between two separate stories but also to sustain the performance of a single narrative. In the introduction to *The Marriage of Anansewa*, Sutherland states:

People come to a session to be, in story-telling parlance, ‘hoaxed’. [...] Hence in the course of a particularly entrancing story it is normal for an appreciative listener to engage in the following exchange:

<sup>36</sup> Donkor, ‘*Kodzidan Mboguw*’, 44.

<sup>37</sup> Faith Ben-Daniels, *A Study of Some Major Influences in Efo Kodjo Mawugbe’s Plays*, MPhil thesis, Kwame Nkrumah University of Science and Technology, 2009, 63.

<sup>38</sup> Brempong, ‘Folktale Performance in Highlife Songs’, 20.

<sup>39</sup> Brempong, ‘Folktale Performance in Highlife Songs’, 21.

<sup>40</sup> Brempong, ‘Folktale Performance in Highlife Songs’, 21.

LISTENER: Keep hoaxing me! (*Sisi me!*)

NARRATOR: I am hoaxing you and will keep on hoaxing you!  
(*Mirisisi wo, misisi wo bio!*)

Like Brempong, Sutherland suggests that ‘the formula is practically a form of applause, an encouragement to the Storyteller to sustain his artistry’.<sup>41</sup> Thus, in performance the audience encourage the Storyteller to continue the narrative.

These conversational formulas between the storyteller and the audience are an intrinsic element of the storytelling event of *anasesem*. As Brempong suggests, the ‘mmoguo [...] is always a part of a folktale [and] can introduce a tale or can occur in the middle of a tale’.<sup>42</sup> Rather than ‘a kicking inside’, Brempong states that etymologically the term “mmoguo” breaks down into two roots: ‘mmo (from bo), meaning “hit” and guo meaning “fall”. In a sense, then, the mmoguo performer hits the folktale with a song to begin it or interrupt it (make it fall)’.<sup>43</sup> The various spellings of *mboguo*, and the various etymological extrapolations, suggest that though the device is common to storytelling events across Akan communities of southern and central Ghana, its function within those events is subject to some regional variation.

Though Sutherland suggests that ‘Mboguo in its traditional concept and usage has been inherited wholesale by Anansegoro’,<sup>44</sup> her codification of *mboguo* is very specific. Though she acknowledges that ‘it is a convention for *Mboguo* to be contributed by other people present’ and that the audience ‘are permitted to halt the narration of a story to make such contributions’,<sup>45</sup> in Ghanaian theatre, *Mboguo* has developed a formal structure and function. In *The Marriage of Anansewa*, for example, rather than providing a disruptive element, Sutherland describes *mboguo* as

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<sup>41</sup> Sutherland, *The Marriage of Anansewa*, vii.

<sup>42</sup> Brempong, ‘Folktale Performance in Highlife Songs’, 22.

<sup>43</sup> Brempong, ‘Folktale Performance in Highlife Songs’, 22.

<sup>44</sup> Sutherland, *The Marriage of Anansewa*, vii.

<sup>45</sup> Sutherland, *The Marriage of Anansewa*, vi.

‘musical performances [which] are part and parcel of the stories themselves and are performed in context, led by the Storyteller’.<sup>46</sup>

As Donkor notes, in *The Marriage of Anansewa*, Sutherland presents *mboguo* as the ‘strict reserve of specialist performers’.<sup>47</sup> Within Sutherland’s *anansegoro*, the right of the audience to spontaneously contribute to the story disappears and is replaced by a Chorus who, Sutherland suggests, provide ‘an element of community participation’.<sup>48</sup> Rather than disrupting or interjecting in the narrative, the Chorus provide musical accompaniment to the action, emphasising important plot points and occasionally moving the action along through sung exposition. Thus, in *anansegoro* the *mboguo* is no longer disruptive but is ‘rehearsed and restricted to selected performers in a bid to present ‘flawless’ performance’.<sup>49</sup> However, though the function of *mboguo* has changed, as it is no longer required to segue from one story into another in order to sustain a full evening’s entertainment, it still retains the elements of music, dance and rhythm and narrative flow characteristic of *anansesem* that work to reinforce the audience’s suspension of disbelief and lend a ‘theatricalism’ to the performance.

### 2.1.2. The Storyteller<sup>50</sup>

Connected to the codification of *mboguo*, the role of the storyteller is also a key element in Sutherland’s *anansegoro*. In *anansegoro*, the storyteller acts a direct link between the action and the audience. He is a quasi-supernatural character who jumps between the action and direct address, talking to Ananse about his present, whilst joking with the audience about Ananse’s immanent future.

In the traditional *anansesem*, Sutherland suggests that the storyteller ‘tells the whole

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<sup>46</sup> Sutherland, *The Marriage of Anansewa*, vi.

<sup>47</sup> Donkor, ‘Kodzidan Mboguw’, 46.

<sup>48</sup> Sutherland, *The Marriage of Anansewa*, vii.

<sup>49</sup> Donkor, ‘Kodzidan Mboguw’, 46.

<sup>50</sup> For an in-depth analysis of the role of the story teller and the context in which it developed in traditional African oral storytelling see Isidore Okpewho, *African Oral Literature: Backgrounds, Character, and Continuity* (Bloomington: Indiana University Press, 1992), particularly Chapter 5.

story himself'.<sup>51</sup> This role is adapted in *anansegoro*, where the storyteller 'is still seen as the owner of the story with a conventional right to know everything, to have a right to be personally involved in the action',<sup>52</sup> but the story itself is told through the actors. Moreover, though in *anansesem* the audience and the storyteller can both 'move in and out of secondary characterisation in order to objectify and comment critically upon certain events and relationships',<sup>53</sup> in Sutherland's codification of *anansegoro*, this function is restricted to the storyteller. The effect of this restriction is, as Sandy Arkhurst suggests, the establishment of 'a model for more formalised exchange between actors and audience' within the theatrical performance'.<sup>54</sup>

In an echo of the traditional *anansesem*, in *The Marriage of Anansewa*, the Storyteller communicates directly with the audience providing a bridge between them and the world of the play. When, for example, George's plans start to prove fruitful, the Storyteller and the Players, who at this point represent the audience, share the following dialogue:

Storyteller: So then, Ananse didn't toil in vain?  
 Players: No.  
 Storyteller: Still, isn't this the first sign of trouble?  
 Players: We shall see.  
 Storyteller: All right, whatever the case may be.<sup>55</sup>

At this point the Storyteller ushers in what the script describes as an 'mboguo', during which two women 'share a song with the players' about a young woman who marries and dies, thus foregrounding for the audience the two major upcoming plot points.<sup>56</sup> Moreover, the Storyteller's suggestion that a small, initial gain for Ananse is the 'first sign of trouble', underlines for the audience the basic nature of the character and the inevitability of his plans unravelling, thereby allowing the audience to anticipate the enjoyment of witnessing Ananse being caught in his own web.

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<sup>51</sup> Sutherland, *The Marriage of Anansewa*, vii.

<sup>52</sup> Sutherland, *The Marriage of Anansewa*, vii.

<sup>53</sup> Sutherland, *The Marriage of Anansewa*, vii.

<sup>54</sup> Sandy Arkhurst, 'Kodzidan', *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 174.

<sup>55</sup> Sutherland, *The Marriage of Anansewa*, 25.

<sup>56</sup> Sutherland, *The Marriage of Anansewa*, 25.

### 2.1.3. Kweku Ananse

The third element developed from *anansesem* by Sutherland and consistently repeated in Ghanaian plays is the character Kweku (or Kwaku) Ananse, the ‘master-schemer and mischief maker’.<sup>57</sup> Ananse is the spider god of the Akan and a key figure in Ghanaian theatre and across Ghana’s cultural landscape. John Collins notes in *Highlife Time* that Ananse informed the Concert Party’s central character, the Bob: ‘the Bob character [...] is a fusion of an American minstrel with Ananse’.<sup>58</sup> Carlos Sakyi suggests that Ananse still informs Ghana’s contemporary music scene, stating that: ‘a lot of the major hits have been developed out of our folklore [...] most of them were influenced by songs in our system, like Ananse songs, these were the songs we sang in the villages’.<sup>59</sup> In terms of Ghana’s theatre industry, Dzifa Glikpoe suggests that ‘the beginning of [Ghanaian] theatre as we know it today comes from folklore, because all the stories that were told or performed at the early stages, at the developmental stages, were all from folklore’. These stories, she suggests, focused on ‘Kweku Ananse, the trickster, the spider’.<sup>60</sup>

For Donkor, the enduring appeal of Ananse to artists lies in the fact that he is ‘an excessive subversive who arouses affection and admiration while posing the problems and possibilities of his morphological and moral ambivalence’.<sup>61</sup> In *The Marriage of Anansewa*, Ananse is ‘a kind of everyman, artistically exaggerated and distorted to serve society as a medium for self-examination’.<sup>62</sup> As such, the function of Ananse’s presence in the play and in *anansegoro* in general is as a ‘medium for society to criticise itself’.<sup>63</sup> Though Donkor suggests that Ananse embodies an

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<sup>57</sup> Donkor, ‘Kodzidan Mboguw’, 45.

<sup>58</sup> John Collins, *Highlife Time*, (Accra: Anansesem Publications, 1994), 24. The populist concert party form, in which small troupes perform skits, topical sketches and songs, started ‘as British imperial cultural propaganda honoring Empire Day [May 24th]’ Catherine Cole states that the concert party and was ‘popular, modern, commercial, [and] traveling’ From the 1920s ‘African actors trekked the length and breadth of the British colony [the Gold Coast] performing comic variety shows’.<sup>58</sup> The concert party borrowed heavily from popular western forms, American humour, music and drama brought by African American sailors, and silent films showing stars such as Charlie Chaplin and Al Jolson. Performers would wear ‘blackface’ makeup and there was a strong emphasis on slapstick and physical comedy. (See: Cole, *Ghana’s Concert Party Theatre*, particularly the Chapter 1).

<sup>59</sup> Carlos Sakyi, interview, September 2012.

<sup>60</sup> Glikpoe, interview, 2012.

<sup>61</sup> Donkor, ‘Kodzidan Mboguw’, 46.

<sup>62</sup> Sutherland, *The Marriage of Anansewa*, v.

<sup>63</sup> Sutherland, *The Marriage of Anansewa*, v.

‘admixture of craft and deadliness’,<sup>64</sup> Sutherland depicts Ananse as an allegorical figure, and thus the world he inhabits is parabolic, wherein his successes are harmless, ‘doubtful and temporary’.<sup>65</sup>

Ananse returns again and again in Ghanaian theatre and, as explored below, often in tandem with a combination of the other elements explored above. The significance of these elements to the development of Ghana’s theatre industry was not that they were strictly repeated by Ghanaian playwrights but, rather, that their inclusion linked modern plays to a folkloric indigenous past, thus differentiating between imported western theatre and an indigenous modern theatre. To illustrate this point: though *The Marriage of Anansewa* was not published until 1975, the play was performed several times both in English and Twi from 1970.<sup>66</sup> J. Scott Kennedy, an African American who taught at the University of Ghana recalled:

I saw *Lock up Your Daughters* in Uganda (Kampala), and *Pink String and Sealing Wax* in Nairobi, Kenya. I had previously seen *The Crucible* in Ghana. But these plays were theatre in Africa and not African theatre, for they were not essentially connected with the lives of African people. Upon my return to Africa in 1972 I witnessed *Anansegoro* in Ghana. This was African theatre.<sup>67</sup>

Having seen an early version of *The Marriage of Anansewa*, Kennedy clearly believed that *anansegoro* was an expression of a theatrical aesthetic that generated a genuine symbiosis between the lives of the people and what they saw on stage.

## 2.2. Researching *anansegoro*

Having identified the specific elements of Akan traditional culture that were developed by Sutherland into her *anansegoro*, in this section I discuss the process by which the development of these folkloric elements took place. The purpose of this section is to illustrate the manner in which Ghanaian folklore was accessed and how

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<sup>64</sup> Donkor, ‘Kodzidan Mboguw’, 46.

<sup>65</sup> Sutherland, *The Marriage of Anansewa*, v.

<sup>66</sup> Gibbs, *Ghanaian Theatre: A Bibliography*, 30-2.

<sup>67</sup> Kennedy, *In Search of African Theatre*, 45.

Sutherland's work set a precedent for future playwrights. Moreover, this precedent was compounded by Sutherland's position at the University of Ghana, and her role in the development of a new syllabus for drama, which suggests that her interest in Ghanaian folklore influenced playwrights who trained under her.

### 2.2.1. The *Kodzidan* of Ekumfi Atwia

Robert July notes that in 1962, in large part due to the growing success and profile of Sutherland's theatre, the Ghana Drama Studio, her attention turned to the need for 'systematic training in the theatre arts and [the need for] an institutional base that would ensure the permanence of the studio'.<sup>68</sup> In 1963, Sutherland took up a post as a Research Fellow in African Literature 'with a focus on drama' at the Institute of African Studies.<sup>69</sup> Her daughter, Amowi Sutherland Philips, notes that when Sutherland joined the Institute of African Studies, the Drama Studio was 'absorbed into the Institute [...] and its theatre programmes adopted by the new School of Music and Drama [later the School of Performing Arts] at the University of Ghana'.<sup>70</sup> When the drama course was inaugurated at the University of Ghana 'most of the students came from the Drama Studio company'.<sup>71</sup>

When Sutherland joined the faculty in 1963, her first task was to create a new drama syllabus.<sup>72</sup> J.H. Kwabena Nketia, the Director of the Institute of African Studies at that time, highlighted 'the dilemma of the person who has to plan education [of Ghanaian cultural heritage] as well as the teacher who has to implement policy who lacks knowledge of the cultural background of the children'.<sup>73</sup> Though Sutherland was an Akan from Cape Coast, her background and education meant that her knowledge of the form and content of traditional storytelling required her to undertake research into Akan folklore.<sup>74</sup> Sutherland later recalled that 'I saw the need

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<sup>68</sup> July, *An African Voice*, 78.

<sup>69</sup> Rotimi, 'The Attainment of Discovery', 18.

<sup>70</sup> Amowi Sutherland Philips, 'Chronology', *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 240

<sup>71</sup> July, *An African Voice*, 78.

<sup>72</sup> July, *An African Voice*, 79.

<sup>73</sup> Agovi, 'The Origin of Literary Theatre in Colonial Ghana, 1920-1957', 4.

<sup>74</sup> Sutherland's research methodology was not new. Rattray notes in the forward to his *Ashanti Proverbs* that in 1879 'a book of *Tshi Proverbs*' was published by the Basel Evangelical Missionary

for research to develop an African dimension in the [drama] program [...] I went straight back to my original thoughts on African sources'.<sup>75</sup> As July suggests 'the return to sources was literal'.<sup>76</sup>

In pursuit of research subjects, Donkor notes that Sutherland 'encountered Ekumfi Atwia's vibrant storytelling tradition'.<sup>77</sup> In an interview given to Robert July, Sutherland recalled how after her first visit to the village of Ekumfi Atwia she was 'so stuck with that village [...] I couldn't rest. I thought, now what do you do about this mine of sources?'.<sup>78</sup> Sandy Arkhurst, a former student of Sutherland's, suggests that Sutherland 'finally settled on Atwia, because the village was prepared to give her a chance to try'.<sup>79</sup> In order to establish her research project Sutherland 'contributed part of her own research funds to the construction of a theatre house in the village'.<sup>80</sup>

Sutherland noted that one of the major motivations of establishing the *Kodzidan* was to 'find out what the forms of traditional drama that exist can do for modern theatre'.<sup>81</sup> She felt that there was a 'natural transition of the oral tradition to the written tradition'<sup>82</sup> and thus, a written, performed product (what became *The Marriage of Anansewa*) was firmly established as the desired outcome of the project.

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Society. Rattray quotes the collections compiler who described that the proverbs were 'taken down by the missionaries themselves from the oral communication with certain elders [...] or were written by native assistants who increased their previous knowledge by learning from experienced countrymen. Robert Sutherland Rattray, *Ashanti Proverbs*, 7.

<sup>75</sup> July, *An African Voice*, 78.

<sup>76</sup> July, *An African Voice*, 78.

<sup>77</sup> Donkor, 'Kodzidan Mboguw', 30.

<sup>78</sup> July, *An African Voice*, 78.

<sup>79</sup> Arkhurst, 'Kodzidan', 169. Sutherland's choice of Atwia as a location was doubtless also informed by her 30-year friendship with 'the chief of Ekumfi Atwia [Nana Baah Okoampah] [who] gave her permission to build a centre'. (Donkor, 'Kodzidan Mboguw', 38) Anne Adams notes that Nana Okoampah was interested in theatre arts. As a result she 'offered Sutherland the singular honour of opening up to her the entrancing world of her stories, and other forms of oral literature for which her community had become famous in its local area'. Adams' account underlines Sutherland's position as a researcher of traditional knowledge heritage and the duality of Sutherland's position as a playwright and researcher. (Anne Adams, 'Introduction', *The Legacy of Efua Sutherland: Pan- African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 30)

<sup>80</sup> Donkor, 'Kodzidan Mboguw', 30.

<sup>81</sup> July, 'Here, Then, is Efua', 163.

<sup>82</sup> Vivian Windley, "Pan-African Partnership on Children's Literature: Reminiscences of a Diaspora Educator," *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 196.



Arkhurst suggests that the *Kodzidan* programme took the form of ‘participatory research’,<sup>83</sup> in which the villagers shared their storytelling traditions with Sutherland and her students in exchange for theatre in education programmes. Arkhurst states that Sutherland used her skills as a theatre maker to engage with the villagers:

by using the powerful, exciting and popular medium of African theatrical forms for educating the community, Auntie Efua was acknowledging the potency of the authentic indigenous forms which draw their intensity and uniqueness from (a) their use of familiar symbols, local images, intellectual values and linguistic registers; (b) their compelling aesthetic quality in terms of humour, wit and subtle modes of rendition; (c) their people-based, communal participation facility, and (d) their adaptive and flexible form.<sup>84</sup>

In this passage, Arkhurst articulates that the elements identified at the beginning of this chapter: the *mboguo* and the interactivity between the storyteller and the audience that became central, necessary elements of Ghana’s playwriting industry were derived directly from the *Kodzidan* project.

The work that Sutherland undertook in Atwia informed the drama syllabus at the Institute of African Studies and thus established her methodology as the pattern for future drama students. As Kofi Anyidoho states, in the years following Sutherland’s initial research, groups of students ‘examined village ceremonies and festivals, and religious rites as a basis for development of modern dramatic writing’.<sup>85</sup> Further, Anyidoho claims that the success of Sutherland’s research and cultural output had implications that reached across the continent: ‘[t]hrough the Drama Studio Programme and the Drama Research Unit at the Institute, Efua Sutherland worked with the late Joe de Graft to lay the foundations of what was to become a model programme in drama and theatre studies and practice in Africa’.<sup>86</sup> This influence is attested to by Mohammed ben Abdallah who, in an interview given to Pietro Deandrea for his book *Fertile Crossing’s*, suggests that:

[Sutherland and de Graft] started the School of Music and Drama, but the interesting thing is that quite a few people came from Nigeria to study the model and then went back, and suddenly Nigeria took over. There was Wole

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<sup>83</sup> Arkhurst, ‘Kodzidan’, 172.

<sup>84</sup> Arkhurst, ‘Kodzidan’, 172.

<sup>85</sup> July, *An African Voice*, 191-2.

<sup>86</sup> Kofi Anyidoho, ‘Dr Efua Sutherland (A Biographical Sketch), *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 236.

Thus, the research work that led to the development of *anansegoro* was influential in two distinct ways. Firstly, it resulted directly in of *The Marriage of Anansewa*, which was received as an expression of an 'authentic' African theatre that resonated throughout the continent. Secondly, for Sutherland's students, it rooted Ghanaian folklore at the centre of the playwriting process.

### 2.3. The influence of *anansegoro*

*Anansegoro* was highly successful in terms of its immediate acceptance as a pioneering form of an authentic African theatre. In the context of the development of Ghanaian playwriting, Sutherland's influence as a playwright, researcher and educator was multifaceted. In 1960, she founded, edited and wrote for the long running literary journal *Okyeame*. In 1973, she founded the publishing house, Afram Publications, in which she 'maintained an active role in the editorial work'.<sup>88</sup> As a director, Sutherland 'provided creative leadership for the Workers' Brigade Drama Group and to the Drama Studio Players',<sup>89</sup> the two major theatre companies in Ghana at the time. Kofi Anyidoho notes that Sutherland 'founded *Kusum Agromma*, a full time drama company based at the Drama Studio and dedicated to performing quality plays in Akan, in towns and villages all over the country'.<sup>90</sup>

Both the popular success of *The Marriage of Anansewa*, combined with Sutherland's role as an artist and educator meant that the elements that she developed from folklore were taught to and adopted by the next generation of playwrights. As Dzifa Glikpoe, former Director of the National theatre Players suggests, in the 1970s and early 1980s new writers habitually copied the codes of *anansegoro*: 'Young people began to copy the style [...] you find the same running through, the music, it's just the subject matter [that changes]'.<sup>91</sup> Indeed, some of the most well known Ghanaian

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<sup>87</sup> Pietro Deandrea, *Fertile Crossings: Metamorphoses of Genre in Anglophone West African Literature* (Amsterdam: Editions Rodolphi, 2002) 222.

<sup>88</sup> Anyidoho, 'Dr Efua Sutherland', 238.

<sup>89</sup> Anyidoho, 'Dr Efua Sutherland', 236.

<sup>90</sup> Anyidoho, 'Dr Efua Sutherland', 236.

<sup>91</sup> Glikpoe, interview, 2012.

plays of the 1980s and 1990s maintained a strong stylistic link to Sutherland's work: 'you look at Martin Owusu, *the Legend of Aku Sika* and *The Story Ananse Told*, all of these are folktales which we've taken and up on stage. So these plays maintain the fusion of the dialogue, the music, the dance'.<sup>92</sup>

Significantly, not only are these folkloric elements consistently repeated but the skill with which they are incorporated came to be regarded as a way of assessing the ability of the playwright. When describing Efo Kodjo Mawugbe's, former Director of the National Theatre of Ghana's first play, Glikpoe recalls that 'the dancing was slapped on to the thing'.<sup>93</sup> Glikpoe's contextualisation of this remark gives an insight into the expectation placed on playwrights to replicate the codified form of Ghanaian theatre:

if you go to Abdallah's plays [...] you cannot take out the music and dance and get the play to stand up, you cannot, but there were some who slapped music and dance onto the play, and you can take out the music and the dance and the play will run, it won't suffer any defect at all, and that's the difference.<sup>94</sup>

Though not all Ghanaian playwrights who came after Sutherland engaged with or represented Ghanaian folklore in their plays,<sup>95</sup> the utilisation of Sutherland's *anansegoro* can be traced to plays written throughout the 1980s, 1990s and into this century. Not only do these playwrights adopt some or all of Sutherland's *anansegoro*, but the playwrights stretch and adapt these elements. By so doing, modern playwrights have claimed and developed *anansegoro*, changing it from the style of a single playwright to a fundamental tenet of Ghanaian playwriting. Thus, developing a long lasting theatrical form that is rooted in, and continues to draw from and re-present, Ghana's folk heritage. In order to illustrate the continuing influence of *anansegoro*, in the following section, I discuss three plays by playwrights whose careers span from the 1970s to the present day.

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<sup>92</sup> Glikpoe, interview, 2012.

<sup>93</sup> Glikpoe, interview, 2012.

<sup>94</sup> Glikpoe, interview, 2012.

<sup>95</sup> For example, Bill Marshal wrote several plays during the 1970s and 1980s, the most famous of which, *In the Shadow of an Eagle* (Accra: Sedco Publishing, 1978) examines contemporary social and political issues in a post-Nkrumah Ghana, with no reference to Ghana's folk culture or *anansesem*.

### 2.3.1: *The Story Ananse Told* (1987)

Martin Owusu is Professor of Playwriting at the University of Ghana and was a pupil of Sutherland. Perhaps his most famous play, *The Story Ananse Told*, was first performed in 1987 and adopts many of the elements present in *anansegoro*. The play is set in a non-specific, mystical forest where a hunter mortally wounds a magical stag that turns into a woman. The woman, a princess who has been under a curse, marries the hunter and conjures him a kingdom to rule over. The hunter quickly shows himself to be arrogant and power hungry and eventually breaks his oath to his Queen by revealing the secret of her origin. As punishment, he is returned to his former state and eaten by the Akan Monster King, Subruku.

Though Owusu subscribes to Sutherland's *anansegoro*, the ways in which he employs the elements of *anansesem* is more strictly formalised. For example, throughout the play the action is intercut by music and dance sequences typical of *mboguo* but they do not further the action as they do in *The Marriage of Anansewa*. Rather, they are relegated to stage directions: (*Enter hunter, dancing [...] he mimes eating and drinking to rhythm*).<sup>96</sup> Although the Chorus performs *mboguo*, they only do so in the first scene of the play, providing musical backing for the hunter as he encounters the first supernatural signs of the princess.

Owusu's use of *mboguo* as a musical device, rather than a mechanism for allowing the audience or Chorus to disrupt the narrative is more limited than Sutherland's use. Moreover, the bridge between the audience and the action characteristic of the original *anansesem* and Sutherland's work is absent. It is Ananse's presence as both trickster and storyteller that breaks the fourth wall and invites the audience into the world of play. He addresses the audience throughout, making them aware of the pretence of the performance and highlighting the underlying allegory of the story. Though it is the hunter and not Ananse who's over-ambition leads ultimately to his downfall, the narrative arch is very familiar to Ananse stories.

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<sup>96</sup> Martin Owusu, *The Legend of Aku Sika and The Story Ananse Told* (Legon: StudyGhana Foundation) 33.

### 2.3.2. *Ananse in the Land of Idiots* (1994)

In *Ananse in the Land of Idiots*, Yaw Asare<sup>97</sup> uses the conventions of *anansegoro* to present a familiar character that he then subverts in order to present his audience with a politicised message. Asare draws his audience into the familiarity of the performative experience of *anansegoro*, even acknowledging Sutherland in Ananse's opening address. Ananse thanks Sutherland for her previous stories about him, saying 'I puff my pipe to that thoughtful daughter of the land'.<sup>98</sup>

In the play, Asare incorporates the familiar elements of *anansegoro*. There is a Chorus of women and maidens, though, as with Owusu's play, they are restricted to singing and dancing rather than communicating with the audience or commenting on the action. As with Owusu, Ananse is again in the role of the storyteller but he is also the protagonist, enabling him to occupy the secondary characterisation of Sutherland's storyteller that takes him in and out of the action and into direct contact with the audience. However, in a significant change from Sutherland's codification of the character, Asare's Kweku Ananse is not harmless.

As Awo Asiedu, Director of the School of Performing Arts, states, 'his Ananse is more ruthless and cruel [...], the trickster character in folk tales does not cause real harm [...] but Asare's does [...] he does take that mould but he goes further'.<sup>99</sup> Asare's Ananse is not an everyman, representative of the people who comically try to get ahead, only to be brought back down. Rather, in Asare's play, Ananse represents the ruling elite and uses his trickery to take advantage of honest people who inhabit the 'Land of Idiots'. Towards the end of the play, Ananse fools his guard into drinking glue so that he will be unable to tell of Ananse's trickery. This dramatic change in the character of Ananse, from a harmless trickster to a ruthless bully, suggests that twenty years after Sutherland had codified the role and function of

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<sup>97</sup> Yaw Asare was Director of the National Theatre of Ghana for five years from 1994-1999, after which he taught at the School of Performing Arts at the University of Ghana until his death in 2002.

<sup>98</sup> Yaw Asare, *Ananse in the Land of Idiots* (Legon: StudyGhana Foundation, 2006) 3.

<sup>99</sup> Interview with Dr Awo Asiedu, Director of the School of Performing Arts, University of Ghana, 2012.

Ananse, playwrights were prepared to extend and subvert those codes. Thus, extending the form of *anansegoro* whilst retaining a direct and identifiable link to its folkloric root.

### **2.3.3. *Ananse's Last* (2014)**

In 2013, the University of Ghana's School of Performing Arts and the National Theatre of Ghana held a nation-wide playwriting competition. In 2014, I was invited by the School to work with the winning writers. Overall, the work represented a diversity of subject matter and genre. However, the second place winner, Michael Osei Agyapong continued the Ananse dramaturgical folk tradition in *Ananse's Last*.

In *Ananse's Last*, Ananse has been condemned to live as a poor farmer on earth as punishment for his former schemes against his divine family. When the play begins he has a young family of his own and spends his time brooding over his revenge. With the help of his family Ananse plots to overthrow his father Nana Nyankopon and install himself as the King of the gods. On the advice of a traditional priestess, Ananse recruits the help of his cousin, Br'er Rabbit (depicted as a freed slave recently returned from America), to plot and enact his revenge: 'I have been scheming all these years, drawing a plan that will put me back where I belong or even higher [...] Brother, I want the highest seat'.<sup>100</sup> Inevitably, he is tricked at the last by his own schemes and returned to his former poverty.

As with the other plays in the *anansegoro* genre, the style of the play is a heightened naturalism. The play does not contain *mboguo* in the written text but the rendering of Ananse as a mischief-maker who is undone by his own schemes is familiar. As the Storyteller states at the beginning of the play:

truth be told Agya Ananse was no more a spider than anyone of us. You could say...mm...how do I put it...that he was more of a spider in disposition rather than form. A man who spun a thousand webs. Smart... or better

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<sup>100</sup> Michael Osei Agyeman, *Ananse's Last* (Unpublished, 2014) 19.

shrewd, cunning maybe. An inventor of lies. A spindler of deceit.<sup>101</sup>

Like Asare's Ananse, Agyapong's Ananse has a streak of cruelty. Even though achieving his aims will 'unbalance the world',<sup>102</sup> his relentless pursuit of power does not resolve in self-realisation but in defeat and a return to plotting revenge.

The Storyteller is present in the form of an Old Man who occupies a temporal and geographical space that is non-specific. He addresses the audience directly, occupying a world that is separate from the play but bridges the audience into the action. His appearance at the beginning and the end of the play, welcoming the audience and then resolving the performance, provides a formulaic bookending for the narrative similar to that noted by Brempong in traditional *anansesem*.

Though the play is only one of several entered into the playwriting competition, and the only one of the three winners that subscribes to the codes and formulas of Sutherland's *anansegoro*, Agyapong's play does illustrate that the current generation of young writers still see Ananse and his stories as narratives that they wish to rework and retell.

#### **2.4. Codification of folklore in Ghanaian theatre: *anansegoro* to *abibigoro***

As well as inspiring subsequent playwrights to copy the form, *anansegoro* also influenced the development of derivative theatrical styles. During the 1980s and 1990s, the work of Mohammed ben Abdallah, a playwright and former Minister of Culture in the Rawlings government, represents perhaps the most important extension of *anansegoro*. As an actor, Abdallah worked with Efua Sutherland in her early experiments and as a playwright his work explicitly draws from *anansegoro*.

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<sup>101</sup> Agyeman, *Ananse's Last* (2014) 7.

<sup>102</sup> Agyeman, *Ananse's Last* (2014) 37.

Dzifa Glikpoe, who performed in many of Abdallah's plays in the 1980s and 1990s as a member of the University of Ghana's theatre company,<sup>103</sup> recalls that one of Abdallah's most striking adaptations of Sutherland's *anansegoro* was his reframing of his work as *abibigoro*. As Glikpoe explains: '*Anansegoro* had to do with Ananse stories [...] What Abdallah did is to tell the story of the black man [...] *Abibigoro*, that's a play about the black race'.<sup>104</sup> Or, as Awo Asiedu puts it: 'while Sutherland seeks a Ghanaian-specific aesthetic in *anansegoro*, Abdallah seeks a wider African aesthetic in *abibigoro*'.<sup>105</sup> In order to tell his stories, Glikpoe suggests that Abdallah developed *anansegoro*: 'Efua [Sutherland] developed *Anansegoro* from the everyday storytelling, and she developed it for stage. Then Abdallah went into history using the same elements'.<sup>106</sup> As an example, Asiedu notes that Abdallah's play *The Fall of Kumbi* 'is based on the history of the fall of Kumbi Saleh, the capital of the old Empire of Ghana'.<sup>107</sup> *Abibigromma* is theatre with an overt political intent, as Asiedu suggests, it is 'theatre that confronts African audiences with their history in order to spur them on to a more productive future'.<sup>108</sup>

Asiedu notes that the key feature of *abibigoro* is the 'open theatricality [combined with] a presentational frame'<sup>109</sup> and Abdallah describes *abibigoro* as 'a tool of the director'. A director himself, Abdallah states: 'I see myself taking any play [...] and doing it in the *abibigoro* style [...] having a story teller come and introduce the play, talk about the author and then the play begins. Then at certain points he cuts into the action and comments on it'.<sup>110</sup> Both Asiedu and James Gibbs note that Abdallah's work is 'indebted to the theatre practice of [...] Bertold Brecht'.<sup>111</sup> However, both also emphasise its connection to Sutherland's *anansegoro* and traditional story telling. As Asiedu suggests, Abdallah's *abibigoro* is 'an expansion of Sutherland's *anansegoro* [that] borrows heavily from traditional story-telling techniques, which

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<sup>103</sup> This company is also called *Abibigromma*. The National Theatre's resident theatre company, *Abibigromma*, was originally made up of members of the *Abibigromma* company formed by Abdallah at the University of Ghana in 1982. The campus based company were invited by the government to take up residence at the National Theatre in 1991 and though most agreed, some did not, preferring to stay at the university. As a result two *Abibigrommas* now exist.

<sup>104</sup> Glikpoe, interview, 2012.

<sup>105</sup> Asiedu, '*Abibigromma*', 371.

<sup>106</sup> Glikpoe, interview, 2012.

<sup>107</sup> Asiedu, '*Abibigromma*', 376.

<sup>108</sup> Asiedu, '*Abibigromma*', 377.

<sup>109</sup> Asiedu, '*Abibigromma*', 374.

<sup>110</sup> Asiedu, '*Abibigromma*', 374.

<sup>111</sup> Asiedu, '*Abibigromma*', 374.



include the use of music, dance, mime, audience participation and one or more storytellers'.<sup>112</sup> Thus, though Abdallah departs from Sutherland's *anansegoro* in key ways (such as the historical and sometimes mythical settings of his plays and the absence of Ananse), he maintains a link with *anansesem* storytelling.

His adherence to the dramaturgical and performance elements present in *anansegoro* is immediately evident in the opening scene of *The Witch Of Mopti* (1989) in the form of a Storyteller and a musical chorus who greet the audience before the story begins. At the beginning of the *Witch of Mopti*, Abdallah signals that his new theatre is both legitimated as Ghanaian theatre by its adherence to the codes of *anansegoro*, but also expands it to articulate the distinctness of *abibigoro*:

ABOTSI  
Some people think we do concert.  
NII ASI  
Some think we are just jokers.  
[...]  
TOGBI  
Dondology! Some say we are dondologists.  
OSABUTEY  
Some even say we do drama and play all sorts of musical instruments.  
KOFI ONNY  
Ebinomm koraa se ye to anansesem. [*Some say we do ananseseem*]  
NII KWEI  
But, the truth of the matter is...  
ALL  
We do all of those things and more!<sup>113</sup>

In this opening passage Abdallah lists all the various skills and performance features that make up his *abibigoro* and the context out of which they have grown. They draw on the traditions of Ghanaian concert party; they draw on it but are not limited to it. They are jokers, fools and comedians. They study 'dondology', the art of Ghanaian drums and drumming. They do dramas, play instruments and tell Ananse stories. In

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<sup>112</sup> Moreover, Abdallah is an Ashanti and, as Asiedu notes, his plays are full of references to Ashanti folklore. Perhaps the most obvious reference is in *The Fall of Kumbi*, where the high priest refers to the Golden Stool of Kumbi, which 'represents their king and the soul of the nation', and which, as Asiedu notes, 'is a direct reference to the legendary priest Okomfo Anokye who, it is said, commanded a golden stool from the heavens through divination and through that established Osei Tutu as a powerful king over the Ashanti'. (Asiedu, '*Abibgromma*', 376-7).

<sup>113</sup> Mohammed ben Abdallah, *The Witch of Mopti* (Accra: Woeli Press, 1988) 4-5.

this passage, Abdallah extends the function of key elements of *anansegoro* but leave the audience in no doubt that they can do more.

An example of how much further Abdallah extends and subverts *anansegoro* is in his earlier play, *The Trial of Mallam Ilya* (1982). Set in the fictional historic African kingdom of Angah, the play deals with the aftermath of the deposing of a dictator, Kuhmran (a thinly veiled representation of Nkrumah) and charts the fortunes of Mallam Ilya whose life intertwines with that of Kuhmran. The play takes the form of a trial staged when Ilya is an old man. Abdallah states that the play is about the end of the Nkrumah regime and it is the new generation holding the old to account. The play reflects the deep frustrations felt by the new generation at the procession of coups in which '[o]ne group of uneasy warriors followed another'.<sup>114</sup>

Unlike in *The Marriage of Anansewa* where the setting reflects the contemporary post-independence Ghana, Abdallah invites his audience to make the simple leap from the fictional Angah to the factual Ghana and read the play as a 'set of figures and personifications to be read against [a] one-to-one table of equivalences'.<sup>115</sup> At the beginning of the play Ilya's interrogator, Malwal, describes Ilya's life in terms that reflect Ghana's transition from colonialism to independence: 'Mallam, you have lived through the periods of glory, humiliation, assimilation, rejection and freedom'. When Kouyate asks Ilya 'For how long shall our people be squeezed through the fingers of one generation of leeches right into the open palms of another?', for the contemporary audience the question would have resonated with questions that they would wish to ask of the ruling regime.

The play moves fluidly from one setting to the next, effectively establishing location through lights and suggestion. Abdallah continues several of the performative conventions developed by Sutherland but also revisits their original function in order to achieve greater communion with the audience, supporting the play's political

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<sup>114</sup> Mohammed ben-Abdallah, *The Trial of Mallam Ilya and Other Plays* (Accra: Woeli Publishing, 2003) 115.

<sup>115</sup> Abdallah, *The Trial of Mallam Ilya*, 115.

urgency. For example, in a key passage, Abdallah uses the character of Ilya's prosecutor, Malwal, to fulfil the traditional role of the storyteller. As with in *The Marriage of Anansewa*, the storyteller in the play acts as both a bridge between the action and the audience, and at points becomes involved himself within the world of the play. However, rather than being an omniscient character gently reminding the audience of the key themes, during Ilya's dramatised reminiscences, Malwal violently shouts 'Cut! Cut!',<sup>116</sup> in a manner that resonates with Brempong's definition of *mboguo*: to make the artifice of the story fall away. By so doing Malwal brings the action abruptly back to the present in order to continue the trial of the old Ilya. At these points the action is moved from the stage to the audience, and in one key passage, again in a return to the original disruptive nature of *mboguo*, the device is used to encourage the audience to question Ilya about the revolution against the old king and his part in it. The storyteller stands and facilitates a dialogue between the audience and the action, the stage instructions state, '*The following questions from the cast in the audience are to stimulate questions from the audience*'.<sup>117</sup>

Though there is no specific chorus in the play, *mboguo* in the form of singing, dancing and ritual underpin the action throughout. In one lengthy passage a masquerade takes place in a village square in which Henry the Navigator, Queen Victoria, Cecil Rhodes and David Livingstone enact 'wildly grotesque' representations of the history of European expansionism in Africa. Though the passage is not contextualised within the dialogue of the play, its purpose is to site the fictionalised country of Angah within a pan-Africanist landscape. Abdallah's extension of *mboguo*, and its ability to disrupt and alter the narrative, enables the warnings articulated within the play, such as Kouyate's, the leader of the masquerade, when he states, 'We live in a crucible where the horrors of the past are smelted with the violence of today to be forged into the monster of tomorrow',<sup>118</sup> to apply as legitimately to the whole of Africa, as they do explicitly to Ghana.

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<sup>116</sup> Abdallah, *The Trial of Mallam Ilya*, 115.

<sup>117</sup> Abdallah, *The Trial of Mallam Ilya*, 101.

<sup>118</sup> Abdallah, *The Trial of Mallam Ilya*, 101.

Abdallah's skill in pushing the boundaries of *anansegoro* in his plays highlights the central position of folklore in Ghanaian playwriting following Sutherland. Though Owusu's play strictly, and in some ways reductively, coheres to the codes of *anansegoro*, both Abdallah and Asare significantly stretch the form, extending Sutherland's techniques and reconnecting with the original folkloric root. By so doing, they acknowledge both the popularity of *anansegoro* and the artistic potency of folklore (in the form of *anansesem*) as a resource for playwrights. All three writers were directors of *Abibigromma*, Abdallah and Owusu at the University of Ghana and Asare at the National Theatre. The status of these playwrights suggests that the utilisation of folklore in Ghanaian playwriting continued at a high level for an extended period and contributed to the development of Ghana's theatre industry. Moreover, the success of Agyeman's 2014 play *Ananse's Last* suggests that the elements developed from *anansesem*, which informed the development of Ghana's distinctive theatre aesthetic and repertoire, remains popular with Ghanaian playwrights.

### **Conclusion: *anansegoro* and copyright**

Having examined the development of Ghana's playwriting industry following independence, the importance of folklore to this development and its continued significance is evident. Here, then, in order to identify what is at stake in the protection of folklore under Ghana's current copyright law, it is important to clarify how playwrights' use of Ghanaian folklore and the law of copyright interact.

Ghanaian folklore was not protected by copyright until 1985 and not protected against use by nationals until the 2005 Act came into force in 2010. As such, Sutherland's development of *anansegoro* in the 1960s and 1970s did not infringe any statutory regulation. However, the continued influence of *anansegoro* on Ghanaian playwrights is where the 2005 Copyright Act becomes potentially problematic.

To explore this further: in *The Marriage of Anansewa*, Ananse appears as George Kweku Ananse who lives in an identifiable post-independence time period. The copyright to the play, and so to that specific rendering of the character, resides first with Sutherland and now, following her death in 1998, with her estate. As discussed, following *The Marriage of Anansewa*, several playwrights wrote stories of Ananse who appeared in different guises and different settings, some real, some fictional. None tell the story of Sutherland's George Kweku Ananse and so none infringe Sutherland's copyright. However, in writing about Ananse they all draw upon the folkloric root, the *anansesem*, of Akan folklore.

Accordingly, it is necessary to consider whether the use of *mboguo*, Ananse or other elements associated with the *anansesem* might potentially trigger liability under the 2005 Act if used today. Is, for example, the scope of the Act limited to folkloric narratives or does it extend to the modes through which the narratives are conveyed? Does outdoor story-telling fall within the ambit of protection, or is it restricted to the codified performance elements present within the story-telling sessions? The impediment to answering this question in a definitive way is associated with outlining the boundaries of the scope of protection in the Act.

The definition of folklore given in the law, as mentioned previously, is:

the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are not know, and any similar work designated under this Act to be works of folklore, (s.76).

WIPO's most recent definition of an "expression of folklore" is: 'productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of a country or by individuals reflecting the traditional artistic expectations of such a community'.<sup>119</sup> Under this definition, *anansesem*

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<sup>119</sup> This is the definition of "expressions of folklore" taken from the 1982 Model Provisions and is noted in WIPO's most current 'Glossary of key terms related to intellectual property and genetic

would appear to qualify as an expression of folklore. Moreover, there is nothing to suggest that ‘characteristic elements of the traditional artistic elements’ does not include performance techniques, character, tropes and even, perhaps, the codified relationship between the Storyteller and the audience.

Further, in an interview given in 2012, Nyadzie gave the following example as to what elements of folklore might be considered to fall under the Act: ‘in music we have the lyrics we have the rhythms and so on and people use these things. We have our traditional rhythms and many composers use these rhythms, these folklore rhythms, to create their own works. We use short stories, proverbs and so on, things belonging to folklore, to create musical works. You are allowed to create out of folklore, but the commercialization of what we called the raw folklore is what the law is against’.<sup>120</sup> Thus, though a collection of storytelling techniques are certainly a less concrete example of folklore than a repeated rhythm, melody or textile pattern, they do fit in to WIPO’s definition as elements that are characteristic of traditional culture and what Nyadzie terms ‘raw folklore’.

The lack of clear boundaries to the scope of protection afforded by the Copyright Act is problematic as it is uncertain how, or whether, non-rights holders will be able to use anything associated with folklore. However, this issue is indicative of the larger problematic associated with protecting folklore through copyright at all. To highlight this, two sections of the 2005 Copyright Act are worth considering. Under s.2 of the 2005 Act, “Concepts excluded from copyright”, the Act states: ‘[c]opyright shall not extend to ideas, concepts, procedures, methods of other things of a similar nature’.<sup>121</sup> Further, s.1(2) states that ‘a work is not eligible for copyright unless (a) it is original in character, (b) it has been fixed in any definite medium’.<sup>122</sup> Taken

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resources, traditional knowledge and traditional cultural expressions’, as the current working definition. It is synonymous with “traditional cultural expressions”. See: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Twenty-Sixth Session, Geneva, February 3 to 7, 2014 .

‘[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_26/wipo\\_grtkf\\_ic\\_26\\_inf\\_8.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_26/wipo_grtkf_ic_26_inf_8.pdf), (accessed 14/1/14), 13.

<sup>120</sup> Nyadzie, interview, 2012.

<sup>121</sup> Ghana Copyright Act, 2005 Act, s.2.

<sup>122</sup> Ghana Copyright Act, 2005, s.1(2).

together, these provisions appear to give some guidance as to the outer-limits of copyright.

However, as noted in Chapter 1, the requirement of fixation is complicated by the fact that one of the characteristic elements of folklore is that it is passed down orally from generation to generation. Consequently, since the 1976 Tunis Agreement, international instruments for the protection of folklore have excluded a fixation requirement. Ben Nyadzie suggested that in Ghana a work of folklore ‘must be fixed’ in order to qualify for protection, however, when it comes to folklore he stated that all Ghanaian folklore is already protected whether fixed or not.<sup>123</sup>

Under s.2 of the 2005 Act, copyright protection does not extend to ideas or what Goldstein and Hugenholtz refer to as ‘other building blocks of literary and expression’.<sup>124</sup> Following the analysis in this chapter, it is possible to characterise folklore in Ghana (or at least those elements associated with *anansegoro*) as ‘building blocks’ for playwrights, used in the construction of new works. As such, an argument could be made that folklore should not fall under copyright at all.

Though Goldstein and Hugenholtz suggest that ‘the Berne Convention nowhere categorically bars protection for ideas’, they do note that ‘the Convention’s requirements of authorship and originality implicitly support such a bar’.<sup>125</sup> However, like fixation the criterion of originality has been removed from the discussions on the protection of folklore at the international level. In 1982, WIPO stated that expressions of folklore ‘do not require originality’ in order to qualify for protection.<sup>126</sup>

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<sup>123</sup> Nyadzie, interview, 2012. He further suggested that in order to address this issue a programme of fixation (recording and transcription) would soon take place across the country under the auspices of the National Folklore Board. When I returned to Ghana in 2014 this programme had not yet begun.

<sup>124</sup> Goldstein and Hugenholtz, *International Copyright*, 216.

<sup>125</sup> Goldstein and Hugenholtz, *International Copyright*, 216.

<sup>126</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 54.

Moreover, though folklore is protected within Ghana's copyright law, it is not protected as a literary and artistic work under s.1 but separately under s.4, and under different terms than conventional copyrightable works. Thus, though copyright ordinarily includes safeguards against over-protection by establishing boundaries to the scope of protection, these safeguards have been gradually eroded when it comes to the protection of folklore. In the case of Ghana's legislation they have not replaced by other, specific exceptions. Thus, the 2005 Act leaves significant ambiguity concerning what the outer limits of protection for folklore are, what falls under the ambit of protection and what, if anything, remains free to use.

As such, anyone who intends to adapt *anansesem* must first clear the rights with the rights holder, in this case the National Folklore Board or Ghana Copyright Office under s.64 and pay the requisite fee. To clarify this further: WIPO defines "derivative works" as 'translations, adaptations, arrangements and similar alterations of pre-existing works which are protected under Article 2(3) of the *Berne Convention* as such without prejudice to the copyright in the pre-existing works'.<sup>127</sup> Further, as WIPO note: 'copyright holders have the exclusive right to prepare derivative works, or adaptations, based on the protected work'.<sup>128</sup> Thus, any work that draws from *anansesem* can be arguably regarded as a derivative work and following the 2005 Copyright Act such works are subject to gaining permission and paying a fee prior to use.

However, there is a further issue, which is brought about by the change in the definition of folklore in Ghana's Copyright Act changed from 'works that were created'<sup>129</sup> under the 1985 Act to 'expressions that are created' in the 2005 Act.<sup>130</sup>

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<sup>127</sup> Berne Convention, Paris Act 1971: 'Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work'. Art. 2(3).

<sup>128</sup> WIPO, 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', Annex 2.

<sup>129</sup> Ghana Copyright Act, 2005: 'folklore means the literary, artistic and scientific *expressions* belonging to the cultural heritage of Ghana which *are* created, preserved and developed by ethnic communities of Ghana', s.76.

<sup>130</sup> Ghana Copyright Act, 1985: 'folklore means all literary, artistic and scientific work belonging to the cultural heritage of Ghana which *were* created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore', s.53.



Gertrude Torkornoo suggests that this means that the 2005 Act ‘makes no distinction between works created by unknown authors in antiquity and modern derivative works of individual and identifiable groups’.<sup>131</sup> Consequently, it is also possible that if the elements in the play that are added by the playwright are deemed not to be original enough, the play could, potentially, be regarded as an expression of folklore and so subject to protection with the rights reverting to the President in trust under s.4.<sup>132</sup> To illustrate the gravity of this situation, Gertrude Torkornoo suggests that the terms of protection set down in Ghana’s copyright law mean that ‘[w]hile persons outside Ghana can produce books, films and theatre using Anansi stories, Ghanaian citizens would be deemed to have infringed if they produced works involving Anansi stories’.<sup>133</sup> Thus, despite the significance of Ananse stories and the performance elements associated with those stories, the development of new ones, or retelling of old ones for future generations of Ghanaian audiences would trigger liability under the current law.

The apparent incongruity of this situation, where a fundamental and long-standing resource has been deemed protected by copyright and so is subject to a monopolistic level of excludability, is further problematised by the role of the state in encouraging artists’ use of folklore following independence. In the following chapter, I explore the political influence on the development of Ghana’s theatre industry and discuss the political economy of folklore. To that end, I analyse how and why the development of *anansegoro* was facilitated and, to a significant extent, institutionalised by the state in pursuit of to ‘the right model for a national indigenous theatre’.<sup>134</sup>

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<sup>131</sup> Tokornoo, ‘Creating Capital from Culture’, 3.

<sup>132</sup> This situation is specifically guarded against in Burkina Faso’s copyright law under Art.89, which states that: ‘Expressions of traditional cultural heritage by known individual authors shall belong to their authors if, in accordance with the term of copyright protection, the expressions are not yet in the public domain. Any person claiming to be the author of an expression of traditional cultural heritage must legally prove that he is the author’. The existence of a specific legal mechanism that guards against appropriation of a work of a known author suggests that such a scenario is possible.

<sup>133</sup> Tokornoo, ‘Creating Capital from Culture’, 13.

<sup>134</sup> Arkhurst, ‘Kodzidan’, 168.

## Chapter 3

### The Political Utility of Folklore in Post-independence Ghana

#### Introduction

The relationship between playwriting, folklore and national identity in Ghana is an intimate one. In the previous chapter, through an examination of plays by Ghanaian writers, I traced the development of Efua Sutherland's *anansegoro* and argued that its influence on the aesthetic and dramaturgy of playwriting in Ghana can still be seen. In this chapter, in order to illustrate how radical a change the 2005 Copyright Act represents in terms of the state's position on artists' free use of folklore, I examine the role and motivations of the state in establishing folklore as a central tenet of Ghana's post-independence creative industries. In order to do so, it is necessary to explore the development of the link between folklore and national identity, a link that retains its potency within Ghana's political landscape.

In February 2014, I interviewed the Deputy Minister for Tourism, Culture and the Creative Arts, Dzifa Gomashie. In a subsequent email exchange she stated that:

[o]ur Creative Arts is [sic] fed by the folklore so its relevance and sustenance is crucial to the development of the sector. Our folklore sets us apart and is our identity therefore it is the foundation on which we build our image.<sup>1</sup>

Gomashie's suggestion that the reason that folklore continues to be important to Ghana's creative arts is due to its status as a signifier of national identity is undisputed. As explored in the previous chapter, Sutherland was motivated to utilise Ghanaian folklore in part because of its connection to a cultural identity that pre-dated colonialism. However, Gomashie's position as a Deputy Minister in the current government highlights a compelling dissonance between cultural policy in Ghana

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<sup>1</sup> Interview with Dzifa Gomashie, Deputy Minister for Tourism, Culture and the Creative Arts, February 2014.

and Ghana's copyright law and gives rise to two significant questions. Firstly, how is the accepted position of folklore as a 'crucial' element in Ghana's creative industry compatible with the seemingly contradictory position of Ghana's 2005 Copyright Act, which prevents the utilisation of folklore by nationals without permission and the payment of a fee? And, secondly, how did folklore come to gain such a significant political agency as a carrier of national culture? The first question essentially constitutes the central research question and, in order to explore it fully, here I focus on the second question.

When the term "folk-lore" was coined in the mid-nineteenth century it connoted an uncultured and uneducated sub-section of society. Writing in 1890, George Gomme suggested that folkloric practices belonged to, and were evidence of, a 'body of individuals, entirely ignorant of the results of science and philosophy to which the advanced portion of the community have attained'.<sup>2</sup> Thus, in the early years of the study of folklore, it was not associated with a national cultural identity but rather with an uncivilised sub-set within a nation. However, in post independence Ghana, folklore took on a specific and potent political agency that became synonymous with national identity and fuelled the establishment of a successful theatre industry.

There are multiple factors, both historical and political, that have contributed to the current contested status of folklore in Ghana as simultaneously a legitimate, long-standing resource for artists and a state owned commodity related to national identity. However, it is important to note that though my focus throughout this thesis is Ghana, it is not unique in using folklore in the construction of a unitary cultural identity capable of underpinning a political claim for independence. Rather, this use is rooted within the geo-political landscape of colonialism and subsequent independence struggles. During the period of European colonial expansion in the late nineteenth century, the 'Scramble for Africa',<sup>3</sup> folklore was regarded (in the African context) as a signifier of an absence of culture. However, this perception has changed

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<sup>2</sup> Gomme, *The Handbook of Folklore*, 3.

<sup>3</sup> The Scramble for Africa was a period of European colonial expansion in Africa, which lasted from 1885-1914. See generally: John Hargreaves, *West Africa Partitioned* (London: Macmillan Press Ltd., 1974) and R. Gavin and J. Betley, *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884/1885* (Lagos: Ibadan University Press).

radically and can be noted in, amongst other areas, copyright discourse. The 2002 WIPO Final Report on the National Experiences with the Legal Protection of Folklore, for example, notes that ‘the vast majority of States regard expressions of folklore as the “property” of the country as a whole’.<sup>4</sup> Further, the copyright academic Agnes Lucas Schloetter suggests that ‘for indigenous communities folklore constitutes the basis of their cultural identity’.<sup>5</sup> Through exploring how folklore came to occupy a specific politico-cultural space in Ghana as part of a national heritage and carrier of a national cultural identity, I examine why the state encouraged artists to utilise folklore and also, conversely, why the provisions set down in the 2005 Copyright Act represent a logical step in the state’s control and promotion of a distinct national identity.

## **Methodology**

In order to explore how folklore has come to occupy its current dual status in Ghana, in section 1, I explore the historical context in which the political utility of folklore altered from the colonial period to African independence movements. By examining how the maintenance of folkloric practices was viewed as implying an absence of history and cultural progress, I explore how those same practices were reclaimed as a means of asserting a cultural identity that in turn underpinned a claim for political autonomy during independence movements.

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<sup>4</sup> WIPO, ‘Final Report on the National Experiences with the Legal Protection of Folklore’, 33.

<sup>5</sup> Lucas-Schloetter, ‘Folklore’, 343. Though I am unable to deal with the links between copyright and colonialism and the legacy of these links, at length in this thesis, they are prescient to the current debate. Collins, Story and Ruth Okediji discuss them at length. In Okediji’s essay ‘The International Relations of Intellectual Property Law’, she frames intellectual property law as ‘central technique’ of colonial legal apparatus as it underpinned that ‘commercial superiority sought by European powers’. She states that ‘from the moment a select group of European countries concluded a multilateral agreement for the protection of industrial property in 1883, non-Western societies, principally in Africa and Asia, were swept under the aegis of the international intellectual property system through the agency of colonial rule’. This, she argues, largely remains the case as the Paris Convention for the Protection of Industrial Property and the Berne Convention; remain integral components’ of the TRIPs Agreement. Moreover, she suggests that ‘what the Paris and Berne Conventions initially accomplished was the establishment of a network of relationships between the European member countries- a relationship that consolidated colonial power by expanding the geographical scope of rights acquired in the governing country to the colonies’. Ruth L. Okediji, ‘The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System’, *Singapore Journal of International and Comparative Law*, Vol. 7 (2003) 316-324.

In section 2, I describe how the change in the political utility of folklore was reflected at the level of international copyright. Through analysing records of UNESCO and WIPO meetings held in the build up to the Stockholm Revisions Conference, I identify how and why copyright protection for folklore first became part of the international copyright agenda.

In section 3, I return my focus to Ghana and discuss how following Ghanaian independence, folklore and theatre were brought together at a policy level in order to promulgate Nkrumah's message of cultural, and so political, unity following independence. I analyse the ways in which Nkrumah used political mechanisms, such as the Arts Council of Ghana and the National Theatre Movement, to position folklore as a carrier of a national cultural heritage and enabled artists, particularly Efua Sutherland, to utilise folklore in order to develop works that expressed a unitary national identity. In section 4, I discuss how the conceptualisation of folklore as a carrier of national culture in Ghana was reinforced in the 1980s under president J.J. Rawlings. This period concretised the political utility of folklore in Ghana and re-established the intimate link between politics and playwriting.

I conclude the chapter by discussing how the historically complex and mutually beneficial relationship between playwriting and politics in Ghana established an understanding of folklore in Ghana as simultaneously a resource over which the state can legitimately assert control, and a free resource for playwrights in the creation of derivative works. This dual understanding is rooted in the construction of folklore as simultaneously politically and culturally significant, particularly at moments of nation building. Though historically, the role of the state has been to facilitate and encourage the use of folklore by Ghanaian artists this has now, due to the incorporation of folklore within a copyright paradigm, changed to *authorising* that use.

### **3.1. The changing agency of folklore**

Folklore has not always been associated with a national identity or a national culture. In his 1961 book *The Long Revolution*, the cultural critic Raymond Williams suggests that '[t]he traditional culture of a society will always tend to correspond to its *contemporary* system of interests'.<sup>6</sup> In this section, I discuss how folkloric practices were conflated with the cultural status of those who maintained them. Though initially the influence of this was limited, as the predominant political interests changed, first towards colonialism and then to independence, the political economy of folklore became increasingly operative. In order to explicate this change, in the following section I discuss the geo-political factors that influenced the dramatic change in the political economy of folklore.

### 3.1.1. The status of “folk-lore” during the colonial period

As noted in the introduction to this thesis, the term ‘folk-lore’ was coined by W. J. Thoms in 1846<sup>7</sup> as a replacement for ‘Popular Antiquities or Popular Literature’,<sup>8</sup> and literally means ‘the learning of the people’.<sup>9</sup> The term was rapidly adopted and, as Alaine Gobin notes in his 1977 paper, the use of the term ‘was no longer questioned after the middle of the nineteenth century’.<sup>10</sup> Gobin also notes that the original definition of ‘folk-lore’ simultaneously ‘designates both the science (lore) and its subject (folk)’.<sup>11</sup> Thus, as the signifier of a field of study, it is unclear whether ‘folklore is the knowledge we have of the people, or on the contrary the people’s knowledge of things’.<sup>12</sup>

The ambiguity of the definition was exacerbated by the explicit way in which cultural status and the maintenance of folkloric practice were linked at the time. George Gomme, first president of the British Folklore Society, suggested that ‘there exists or existed among the least cultured of the inhabitants of all countries of modern Europe, a vast body of curious beliefs, customs and story-narratives which

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<sup>6</sup> Raymond Williams, *The Long Revolution* (London: Chatto & Windus, 1961) 52. Original emphasis  
<sup>526</sup> Gomme, *The Handbook of Folklore*, 2.

<sup>527</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, 2.

<sup>528</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, 2.

<sup>10</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, 2.

<sup>11</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, 2.

<sup>12</sup> Gobin, ‘Study of the various aspects involved in the protection of folklore’, 2.

are handed down by tradition from generation to generation and the origin of which is unknown'.<sup>13</sup> As well as identifying a field of study, also present in this description is the establishment of a relational dynamic between the researcher and the object. As the objects of study were the beliefs, customs, stories, songs and sayings of 'savage and barbarous'<sup>14</sup> peoples, the researcher necessarily belonged to a different, more civilised, stratum.

The study of 'savage and barbarous' peoples was not immediately connected with larger political concerns. Indeed in the mid-nineteenth century the study of folklore was a niche pursuit with little impact beyond a small group of researchers. Jonathan Roper suggests in his paper 'Thoms and the Unachieved Folk-lore of England', that early academic journals and collections of folklore were met with a general 'lack of interest'.<sup>15</sup> However, by 1890, when Gomme's first *Handbook of Folklore* was published, the 'Scramble for Africa' was under way and Gomme notes that imperial expansion had the potential to open up 'an enormous domain of ethnographic knowledge'.<sup>16</sup> By 1913, Charlotte Burne suggested that 'officers of the civil services, missionaries, travellers, settlers, and others whose lot is cast among uncivilized or half-civilized populations abroad' should adopt the methodologies of folkloric study.<sup>17</sup> Burne suggests that a practical application of studying folklore within British colonies would be 'the improved treatment by governing nations of the subject races under their sway'.<sup>18</sup> To support this opinion Burne quotes Sir Richard Temple, Governor of Bombay from 1877-1880, who stated that 'we cannot understand [them] rightly unless we deeply study them, and it must be remembered that close acquaintance and a right understanding beget sympathy, and sympathy begets good government'.<sup>19</sup> Thus, though the study of folklore had begun as a niche pursuit, its core association of folklore with less educated sections of society became far more politically potent as geopolitical concerns changed.

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<sup>13</sup> Gomme, *The Handbook of Folklore*, 2.

<sup>14</sup> Gomme, *The Handbook of Folklore*, 4.

<sup>15</sup> Jonathan Roper, 'Thoms and the Unachieved "Folk-Lore of England"', *Folklore*, Vol.118, No.2 (2007), 204.

<sup>16</sup> Sally Falk Moore, *Anthropology and Africa: Changing Perspectives on a Changing Scene* (Charlottesville: The University Press of Virginia, 1994) 9.

<sup>17</sup> Burne, *The Handbook of Folk-Lore*, v.

<sup>18</sup> Burne, *The Handbook of Folk-Lore*, 3-4.

<sup>19</sup> Burne, *The Handbook of Folk-Lore*, 4.

### 3.1.2. Political economy of folklore during the 'Scramble for Africa' (1885-1914)

As Sir Richard Temple's statement highlights, the maintenance of folkloric practices and traditions in Africa took on a specific set of cultural and political connotations among European imperialists during the late nineteenth century, which reflected the relational dynamic described by Gomme in terms of folklorists and their object of study. Though European nations had established colonies, protectorates and various trading posts in Africa since the fifteenth century, the abolition of the trans-Atlantic slave trade<sup>20</sup> had contributed to a steady decline in European economic interest in Africa.<sup>21</sup> This changed rapidly in late nineteenth century when the Berlin Conference on West Africa held in February 1885, marked the beginning of the Scramble for Africa.<sup>22</sup>

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<sup>20</sup> With the abolition of the British slave trade in 1834 what Philip Curtin describes as the 'classic age of [...] African exploration' (Philip D. Curtin, *The Image of Africa* (London: Macmillan and Co., 1965) 206) had ended in the 1830s and had left behind an 'informal' system of 'merchants, missionaries and consuls' that were no longer economically interesting to the colonial power. Trade with the interior had gradually diminished and was subject to systemic abuses and smuggling (Hargreaves, *West Africa Partitioned*, 1).

<sup>21</sup> In 1884, a year before the Berlin Conference, the British only maintained a small presence on the Guinea Coast. The German Ambassador to Britain reported that 'On the Gold Coast the British occupy two points on its extremities, not allowing any occupation between them by a third party'. (Gavin and Betley, *The Scramble for Africa*, 401). William Aydelotte notes that 'the senior members of the second Gladstone ministry [...] were generally opposed to new colonial adventures' (William Osgood Aydelotte, 'The First German Colony and Its Diplomatic Consequences', *Cambridge Historical Journal*, Vol.5, No.3 (1937) 291). In fact The British Government had come close to abandoning its interests on the Guinea Coast completely. They had only maintained a presence at all because it was feared (as noted twice in correspondence between the Gold Coast and the Colonial Office in 1842 and 1868) that if they did not the French would. (G. E. Metcalfe, *Great Britain and Ghana: Documents of Ghana History 1807-1951* (Legon: University of Ghana, 1964) 188-9 and 323)

<sup>22</sup> Initially Bismark only placed the small South-West African harbour of Angra Pequena, under German protection. According to Aydelotte, Britain had refused to annex Angra Pequena on at least two previous occasions. However, in 1885 the German Chancellor, Bismark, upset the balance of power in Europe by 'suddenly [breaking] away from his long maintained anti-colonial policy, and inaugurated the German colonial empire'. Germany concluded a Treaty of Protection with King Mlapa of Togo' which divided the British protectorates of the Gold Coast and Lagos. Tensions between Britain, Germany and France increased as small incursions were made into West Africa and treaties of protection signed with local chiefs. See: Hargreaves, *West Africa Partitioned*, 214 and Aydelotte, 'The First German Colony and Its Diplomatic Consequences', 291. Throughout the interior of West Africa prior to the 'Scramble for Africa', European presence was negligible and the Tokolor State builder Al Haj described the Europeans as '*dhimmis* or tolerated aliens [inferiors]'. Hargreaves, *West Africa Partitioned*, 13.



At the conference, the major European Powers<sup>23</sup> agreed to recognise Leopold II of Belgium's claim to the Congo in exchange for anti-monopolistic trade concessions throughout the Congo Basin.<sup>24</sup> Though the General Act of the Berlin Conference largely dealt with trade, Article 6 articulated the responsibility of the European powers in 'instructing the natives and bringing home to them the blessings of civilization'.<sup>25</sup> Further, Chapter 6, Articles 34<sup>26</sup> and 35<sup>27</sup> extended this responsibility to any 'new occupations on the coasts of the African continent.' Thus, the Berlin Conference explicitly linked trade and colonial expansion with an obligatory civilising mission.

Hargreaves notes that in 1870 only 10% of the African continent was under European control. By 1890, the figure was 90%.<sup>28</sup> As George Gomme had predicted, imperial expansion opened up a vast domain of ethnographic knowledge into which ventured folklorists, ethnographers and anthropologists.<sup>29</sup> Central to the

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<sup>23</sup> The General Act of The Berlin Conference on West Africa was signed by the representatives of the United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, the United States of America, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and Turkey (Ottoman Empire).

<sup>24</sup> A letter from Lord Granville, Britain's Secretary of State for Foreign Affairs to Baron Ampthill, British Ambassador to Germany, dated 7 August, 1884, states that the main objective of the conference was 'to obtain perfect freedom of commerce and navigation [in the Congo] for all countries'. (Gavin and Betley, *The Scramble for Africa*, 37) This was achieved under Article 2 of the General Act of the Berlin Conference on West Africa, 26 February 1885. 'V. No Power which exercises, or shall exercise, rights of sovereignty in the above-mentioned districts shall be able to concede within them monopolies or privileges of any kind in commercial matters' (Gavin and Betley, *The Scramble for Africa*, 167).

<sup>25</sup> The General Act of the Berlin Conference: 'All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organised for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization', Art. 6.

<sup>26</sup> The General Act of the Berlin Conference: 'Any Power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own', Art. 34.

<sup>27</sup> The General Act of the Berlin Conference: 'The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon'. Art. 35.

<sup>28</sup> Hargreaves, *West Africa Partitioned*, 1.

<sup>29</sup> The anthropologist Sally Falk Moore states that the development of anthropology as a social science underpinned by evolutionary theory, 'coincided with the expanded Anglo-European colonization of Africa'. Though careful to point out that 'evolutionary theory did not represent the source of imperial expansion, nor did the colonial enterprise constitute the source of evolutionary theory', Moore does suggest that 'from the start the anthropological project was defined as the study of "others," of non-

establishment of the colonial apparatus was the positioning of the history of colonised communities within what McClintock describes as an ‘anachronistic space’.<sup>30</sup> As she explains: ‘the stubborn and threatening heterogeneity of the colonies was contained and disciplined not as socially or geographically different from Europe and thus equally valid, but as *temporally* different and thus irrevocably superannuated by history’.<sup>31</sup> As Boateng suggests: ‘modernity is the site of the present, and tradition the site of the past’.<sup>32</sup> Indeed, Hegel suggested that Africa was ‘no Historical part of the world [...] it has no movement or development to exhibit’.<sup>33</sup> It was the lack of ‘movement’ or progress towards a European idea of civilisation that was regarded as being encapsulated in the maintenance of folk culture by African communities. Thus the utility of folklore during the period of European colonial expansion was that it was regarded as proof of an absence of development and so underpinned the perception articulated in the General Act of the Berlin Conference that Africa required European intervention.

During this period of European colonial expansion, Pal Ahluwalia suggests that ‘the tyranny of the web of representations’<sup>34</sup> maintained the status of folklore as analogous with primitive or child like peoples. Images and objects representing African folk culture, driven by what Anne McClintock describes as ‘[t]he middle class Victorian [...] feteshistic compulsion to collect and exhibit’,<sup>35</sup> were displayed at large-scale public events in major European cities in order to promulgate the need for colonialism to the European public. Marian Torganivik suggests that the display of Congolese objects at the Exposition Universelle, in Brussels in 1897 was designed to suggest to the Belgian audiences that ‘these poor savages [...] have no saving order

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European peoples’. Further, Moore states that ‘the Europeans considered those they governed socially, culturally, morally and technically “backward”’; the similarity between this and Gomme’s suggestion that folkloric practice is evidence of ‘savage and barbarous peoples’ is striking (Falk Moore, *Anthropology and Africa*, 9). Thomas Hylland Eriksen and Finn Sivert Nielsen in their *A History of Anthropology* do suggest that too much emphasis has been placed on the link between the development of anthropology as an academic discipline and European colonialism, they do suggest that ‘it may still be maintained that British anthropologists tended to pursue research interests that directly or indirectly legitimised the colonial project’. (Thomas Hylland Eriksen and Finn Sivert Nielsen, *A History of Anthropology* (London: Pluto Press, 2001) 56).

<sup>30</sup> Anne McClintock, *Imperial Leather: race, gender and sexuality in the colonial contest* (London: Routledge, 1995), 40.

<sup>31</sup> McClintock, *Imperial Leather*, 40.

<sup>32</sup> Boateng, *This Copyright Thing Doesn’t Work Here*, 169.

<sup>33</sup> McClintock, *Imperial Leather*, 40-1.

<sup>34</sup> Pal Ahluwalia, ‘Negritude and Nativism’, *The Post-Colonial Studies Reader*, eds., Bill Ashcroft, Gareth Griffiths and Helen Tiffin (London: Routledge, 2006) 230.

<sup>35</sup> McClintock, *Imperial Leather*, 40.

in their lives',<sup>36</sup> and according to Jean-Louis Paudrat, '[t]he most conspicuous effect of the Exposition Universelle [was] the strengthening in public opinion of the idea of France's colonial destiny in Africa'.<sup>37</sup> In Ghana, in a speech given in 1963 Nkrumah underlined the link between representations of African folk culture and the colonial project, stating that anthropologists had 'reinforce[d] the picture of African society as something grotesque, as a curious, mysterious human backwater, which helped to retard social progress in Africa and prolong colonial domination'.<sup>38</sup>

### 3.1.3. Folklore and *Négritude*

The change in the agency of folklore, from characterising an anachronistic space to being regarded as a proof of history, was dramatic and came as the result of a deliberate attempt to redress the dominant colonial narrative. As folklore had taken on a specific political economy in the codification of a cultural hierarchy during the Scramble for Africa, so folklore and cultural representation became a key battleground in the anti-colonial movements that swept Africa in the 1950s and 1960s.

Primarily a Francophone movement, *Négritude* was developed in Paris in the 1930s. Césaire later recalled (in a sentiment that echoes Nkrumah's) that *Négritude* grew out of 'an atmosphere of assimilation in which the Negro people were ashamed of themselves [...] we lived in an atmosphere of rejection, and we developed an inferiority complex'.<sup>39</sup> Pal Ahluwalia suggests that *Négritude* developed from a desire to directly confront the relational dynamic established during colonialism, suggesting that the movement 'was a formative movement for the African, who had been denigrated over centuries and represented as child-like and unable to be a member of the civilized world'.<sup>40</sup> Often conflated with the African Personality and

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<sup>36</sup> Marianna Torgovnick, *Gone Primitive: savage intellects, modern lives* (London: University of Chicago Press, 1990) 81.

<sup>37</sup> Torgovnick, *Gone Primitive*, 77.

<sup>38</sup> Samuel Obeng, *Selected Speeches of Kwame Nkrumah, Vol. 5* (Accra: Afram Publishing, 1997) 128-129.

<sup>39</sup> Aimé Césaire, 'Discourse on Colonialism', trans. Joan Pinkham, *Monthly Review Press*, 1972, 30. Available at <[lwclarke.net/Theory/SourcesPrimary/CesaireDiscourseColonialsim.pdf](http://lwclarke.net/Theory/SourcesPrimary/CesaireDiscourseColonialsim.pdf)>, accessed 21 May 2012.

<sup>40</sup> Ahluwalia, 'Negritude and Nativism', 230.

Pan-Africanism,<sup>41</sup> Kwabena Nketia<sup>42</sup> describes the movement as ‘at once liberating and creative, bringing into focus African alternatives to Western values and institutions that had been opposed upon subject peoples by colonialism’.<sup>43</sup> Though critics of the term *Negritude* suggest that it has acquired ‘a multiplicity of meanings covering so wide a range that it is often difficult to form a precise idea of its particular reference’,<sup>44</sup> as a cultural movement it provided the intellectual framework for subsequent independence movements by intentionally reclaiming and asserting pre-independence history and cultural identity as historically legitimate.

Aime Cesaire, one the architects of the *negritude* movement, stated that it was intended as a direct answer to the charge that Africa was temporally stagnated: ‘we asserted that our Negro heritage was worthy of respect, and that this heritage was not relegated to the past, that its values were values that could still make an important contribution to the world’.<sup>45</sup> As Cesaire notes, the acknowledgement and reclamation of a heritage was key to developing political claims for independent statehood. Accordingly, artists, politicians and thinkers turned to the ‘pre-colonial, oral, and folk forms’<sup>46</sup> to express a political and cultural identity rooted in heritage that could underline ‘the legitimacy of the claims of a nation’.<sup>47</sup> In Ghana, in order to construct symbols of Ghanaian culture that could achieve a national ‘homogenizing effect’,<sup>48</sup> Nkrumah called on artists to actively engage in a ‘re-interpretation and a new assessment of the factors which make up our past’.<sup>49</sup>

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<sup>41</sup> Abiola Irele describes *Negritude* as ‘the equivalent of the French-speaking side of what has come to be known as Pan-Africanism’.(Abiola Irele, ‘What is Negriture?’, *African Literature: an anthology of criticism and theory*, eds., Tejumola Olaniyan and Ato Quayson (Oxford: Blackwell Publishing, 2007) 201) Though Kwame Nkrumah would doubtless contend such an easy comparison, there is an evident link between the two movements.

<sup>42</sup> Nketia helped to create ‘and eventually direct’ the Institute of African Studies and, as July notes, ‘served on a myriad of committees organised by government and centering on the establishment of an arts council for the propagation of African culture in Ghana’ (Robert July, *An African Voice*, 181)

<sup>43</sup> In 1952 he was appointed as a research fellow in the sociology department of the University College, Gold Coast, and began research into ‘African languages, music, dance and folklore’. (Robert July, *An African Voice*, 180).

<sup>44</sup> Irele, ‘What is Negriture?’, 201.

<sup>45</sup> Aime Cesaire, ‘Discourse on Colonialism’, 30.

<sup>46</sup> Adeleko Adeko, ‘My Signifier is More Native than Yours: Issues in Making a Literature African’, *African Literature: an anthology of criticism and theory*, eds., Tejumola Olaniyan and Ato Quayson (Oxford: Blackwell Publishing, 2007) 234.

<sup>47</sup> Frantz Fanon, *The Wretched of the Earth* (London: Penguin, 2001) 167.

<sup>48</sup> Homi K. Bhabha, *The Location of Culture*, (London: Routledge, 1994) 35.

<sup>49</sup> Obeng, *Selected Speeches of Kwame Nkrumah*, 131 .

Thus as part of independence movements in Africa, folklore was reconstituted as a generative, living value system that represented the basis of a culture rather than a proof of its absence. Furthermore, as the cultural claim to national identity was explicitly intended to prefigure a political claim to statehood, the *Negritude* movement placed folkloric culture at the root of the political and cultural identity of the nation state. By the time that states in Africa were beginning to move towards political independence, folklore, as July suggests, was beginning to be used to ‘put forward an African alternative that would assert a valid African civilization, both at home and abroad’.<sup>50</sup> As if to acknowledge this, in his speech given to mark independence, Nkrumah addressed the crowds wearing the traditional dress of the Northern Region and declared: ‘we are going to create our own African personality and identity. It's the only way that we can show the world that we are ready for own battles’.<sup>51</sup>

### **3.2. WIPO and UNESCO and the conflation of folklore with national identity**

*Negritude*, as a movement through which folklore was reclaimed as a means of counter the prevailing colonial narrative, was profoundly influential in terms of informing the cultural policy of newly independent states. However, prior to discussing how this played out in Ghana, what is striking is that the conflation of folklore and national identity was echoed within the context of international copyright. As explored in Chapter 1, the development of copyright protection for folklore has been a protracted process and, despite multiple different strategies, is yet to be satisfactorily resolved. Thus, one of the questions to be considered is why the protection of folklore became the subject of attention within international copyright discourse at all.

#### **3.2.1. Copyright, national identity and folklore**

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<sup>50</sup> July, *An African Voice*, 180.

<sup>51</sup> Excerpt from Kwame Nkrumah's speech at independence, 6 March 1957. Available at: [http://www.bbc.co.uk/worldservice/focusonafrika/news/story/2007/02/070129\\_ghana50\\_independence\\_speech.shtml](http://www.bbc.co.uk/worldservice/focusonafrika/news/story/2007/02/070129_ghana50_independence_speech.shtml). Accessed, 21/09/13.

Since the initial discussions that resulted in Art.15(4) of the 1967 Stockholm Revisions of the Berne Convention, there has been a consistent perception that the protection of folklore is of most significance to states in the global South. Though Ficsor suggests that '[t]he protection of expressions of traditional culture is not supposed to be a "South-North" issue',<sup>52</sup> at the 1999 WIPO Regional Meeting on Copyright in Phuket, Betty Mould-Iddrisu, the then Ghanaian Copyright Administrator, associated the importance of folklore exclusively with developing countries by stating that 'in Europe, folklore forms part of a tradition which is dead'.<sup>53</sup> This claim was shared by WIPO who stated that 'folklore is an important part of the national heritage of every nation', but it is of particular importance to developing nations as 'in those countries, folklore is truly a living and still developing tradition, rather than just a memory of the past'.<sup>54</sup>

The perception that folklore is of particular significance to states in the global South has become part of the dominant discourse concerning copyright protection for folklore. In 2005, the IGC suggested that 'it may not be a surprise that the need for intellectual property protection of expressions of folklore is more strongly perceived in developing countries'.<sup>55</sup> Furthermore, Agnes Lucas-Schloetter suggests that '[t]he first discussions on the subject [of folklore] were held in the 1960s at the *initiative* of the newly independent African countries in their efforts to affirm their cultural and hence political identity'.<sup>56</sup> However, this is not the case. In fact, the negotiations that led eventually to Article 15(4) in the Berne Convention were prompted by a proposal made at the IGC 5<sup>th</sup> session in London in 1960. The U.S representative stated that 'in light of recent independent status of a number of African States and their need to establish viable copyright systems, the proposals should be expanded to take particular account of Africa's problems'.<sup>57</sup> However, though the perception that the

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<sup>52</sup> WIPO, 'Final Report on the National Experiences with the Legal Protection of Folklore', (2002), Available at: [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=2055](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2055). Accessed 10/10/13

<sup>53</sup> Mould-Iddrisu, 'Copyright Protection – An African Perspective – The Ghana Experience', 4.

<sup>54</sup> WIPO, 'The Attempts to Protect Expressions of Folklore and Traditional Knowledge', 2.

<sup>55</sup> WIPO, 'The Protection of Traditional Cultural Expressions/Folklore', (2005), 3-4.

<sup>56</sup> Lewinski, *International Copyright Law and Policy*, 339.

<sup>57</sup> Anne Mira Guha, 'Charles F. Johnson's timeline of the origins of the 1967 Stockholm Protocol for developing countries', *Knowledge Ecology International*. Available at: <http://keionline.org/node.983>. Accessed 6.11.11. This is confirmed by Nyadzie who states that: 'We are following international convention...when experts in copyright came to look at it carefully they began to realize that we are losing some of the works because there is no protection, so we need protection to preserve it'. (Nyadzie, interview, 2012).

need for protection for folklore came from African states is inaccurate, it is important to examine why this perception exists.

With independence,<sup>58</sup> 'Africa's problems' from the African perspective were to do with mass education and trade, as African states wished to quickly raise the standard of education and literacy through the importation of textbooks.<sup>59</sup> In order to address this, there was an urgent need to negotiate copyright concessions on educative materials that former colonies were still importing from Europe. As Adebambo Adewopo suggests, the 'high dollar loss'<sup>60</sup> suffered by the exporting countries in the decades following the end of the European empires was the major contributing factor to the desire to facilitate African countries entry into either the Berne Convention or UNESCO's UCC.<sup>61</sup>

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<sup>58</sup> Kwame Nkrumah notes that 'On the eve of the Second World War, only Liberia, Ethiopia and Egypt were independent. But by the end of 1959, that is, twenty years later, there were nine independent African States: Egypt, Sudan, Morocco, Tunisia, Libya, Liberia, Ethiopia, Ghana and Guinea. In 1960, Nigeria, the Congo, French Togoland, French Cameroons and Somalia achieved independence. They were followed, in 1961, by Sierra Leone, Tanganyika, Uganda and Nyasaland. The independence of Kenya, Northern Rhodesia and Zanzibar cannot longer be delayed' (Kwame Nkrumah, *Africa Must Unite*, (London: Heinemann, 1963) 52).

<sup>59</sup> Charles F. Johnson, 'The Origins of the Stockholm Protocols', *Bulletin of the Copyright Society of the U.S.A.* (1970), Vol., 18 No., 2, 93. Johnson also notes that the same situation was current in India. At the same conference the Indian delegate suggested that developed nations should voluntarily take into account the needs of developing countries for cheap educational materials. This meant acknowledging that 'Our own [India's] exchange resources are very limited' (Johnson, 'The Origins of the Stockholm Protocol' 102), but the need for text books for education was very high. The argument from the Indian delegation that developed countries should waive their copyright found very little traction as the development of 'exchange resources' (economic and cultural) in developing countries came to dominate subsequent conferences. The desire to create protection for folklore was about enabling developing countries to financially exploit their folklore (WIPO/UNESCO, 'Tunis Model Law', 1976, 17) See also: Barnes, *Soviet Light on the Colonies* (Middlesex: Penguin Books, 1944).

<sup>60</sup> Adewopo, 'The Global Intellectual Property System and Sub-Saharan Africa', 760.

<sup>61</sup> As Ricketson and Ginsburg note: 'the Berne Convention was applied to many [...] countries during the period they were colonies or protectorates of European states' (Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 885). At independence, countries that had hitherto been member states of the Berne Union through the 'colonial clause' were given the option to leave the Union or submit a Declaration of Continued Adherence. When given the choice all four Anglophone West African states (Ghana (Gold Coast), Nigeria, Gambia, Sierra Leone) withdrew from the Union but all Francophone West African States remained; though in the case of Togo with a fifteen year hiatus. Ghana acceded to the Paris Act in October 1991, Nigeria (independence 1960) acceded in September 1993, Gambia (independence 1965) acceded March 1993, and Sierra Leone is not a member of the Union. On the francophone side Cote d'Ivoire filed a declaration of continued adherence to the Berne Union in January 1962, Burkina Faso 'which had acceded to the Berne Convention (Brussels Act) as from August 19, 1963, denounced the said convention as from September 20, 1970. Burkina Faso acceded again to the Berne Convention (Paris Act); this accession took effect on January 24, 1976'. Togo (independence 1960) acceded in 1975. Available at: [www.wipo.int/treaties/en/documents/pdf/berne.pdf](http://www.wipo.int/treaties/en/documents/pdf/berne.pdf). Accessed 10/12/2012). As colonies gained independence from European powers, the balance of Union membership significantly altered. Johnson

At the 11th Session of the UNESCO General Conference in 1960, a working group convened to discuss issues of copyright in Africa.<sup>62</sup> Though the clear aim of the African states present was to secure copyright concessions on educative materials, UNESCO's Director General, Vittorino Veronese,<sup>63</sup> stated that '[l]iteracy was not enough; education in Africa should be based on African values and rooted in the national heritage'.<sup>64</sup> This opinion was echoed by the delegates from seven African states (including Ghana), who, as the report notes: 'stressed that there were African values, cultural and historical, which were to be rediscovered as a foundation of their political freedom and through which they could make a positive contribution to world cultural values'.<sup>65</sup> At this meeting a working group was established to 'discuss the cultural activities of tropical Africa' and the Director of UNESCO's Department of Cultural Activities stated that there was 'a need for the newly independent states of Africa to develop national consciousness to rediscover their national heritage'.<sup>66</sup> Thus, it was at this meeting, and at the prompting of Veronese, that folklore became the subject of international copyright protection.

Following the conference, the Congolese delegate invited UNESCO to 'convene a conference on copyright on the African continent'.<sup>67</sup> Ricketson and Ginsburg note that the 'Permanent Committee of the Berne Union ('BUPC') had also expressed an interest in [helping to formulate appropriate principles for the drafting of copyright laws in Africa] and the seminar was thus jointly organised by both UNESCO and

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notes that 'by the time of the Stockholm Conference, twenty-four members of the Union (with a total membership of fifty-seven) could be regarded as developing countries'. Between the Brussels Revisions of 1948 and the Stockholm Revision Conference of 1967 there had been seventeen new accessions to the Union. Of the fifty-eight member states only forty-two were bound by the Brussels text. Though the newly independent states wished to join the UCC and enjoy 'the much greater latitude which the Convention gives' the African states' needed to either change the "Berne safeguard clause", which prevented state's defecting to the UCC from Berne (of which there was very little chance as the UCC was so new), or focus upon the impending Berne revisions in which African delegates hoped to gain concessions for the use of copyrighted material in developing countries. (Johnson, 'The Origins of the Stockholm Protocol', 93).

<sup>62</sup> UNESCO, 'Report of the 11th Session of the UNESCO General Conference', (Geneva, 1960), 233. Available at: <http://unesdoc.unesco.org/images/0011/001145/114583e.pdf>. Accessed 12/12/11.

<sup>63</sup> UNESCO, 'Report of the 11th Session of the UNESCO General Conference', 233.

<sup>64</sup> UNESCO, 'Report of the 11th Session of the UNESCO General Conference', 233.

<sup>65</sup> UNESCO, 'Report of the 11th Session of the UNESCO General Conference', 233.

<sup>66</sup> Johnson, 'The Origins of the Stockholm Protocols', 97.

<sup>67</sup> UNESCO, 'Report of the 11th Session of the UNESCO General Conference', 233.



[WIPO]'.<sup>68</sup> Accordingly, UNESCO and WIPO convened The African Study Meeting of Copyright in Brazzaville in 1963 with the intention of discussing the development of copyright in Africa and representatives from twenty-three African states were in attendance. In the opening address of the Brazzaville meeting, WIPO's delegate, Professor Ulmer, suggested that the 'regulation of copyright at the national level was the major task facing the African States', suggesting that this was 'especially true with regard to Africa's folklore'.<sup>69</sup> It was at this meeting that a recommendation relating to folklore was first adopted which eventually led to the inclusion of Art.15 (4) in the Berne Convention.<sup>70</sup>

Thus, just as *negritude* had sought to reclaim folklore within a politico-cultural context, at the level of international copyright, the conflation of folklore with 'cultural values' and the need to reclaim and assert those values, underpinned international efforts to develop protection for folklore. Hence folklore took on a dual status as both a resource from which artists could explore and express national identity, and simultaneously as a set of cultural values that were already developed and central to the state's identity.

In the following section, I discuss how the status of folklore as analogous with national identity became and has retained its importance in Ghana, and explore how this exposes an incongruity in the state's position wherein the use of folklore by playwrights is historically encouraged and celebrated but contemporaneously restricted.

### **3.3. Folklore and the development of Ghana's post independence theatre industry**

Ghana gained its independence from Britain on 12 March 1957, with Kwame Nkrumah as Prime Minister. Its geographical boundaries had been settled only a year

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<sup>68</sup>Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 888.

<sup>69</sup>Johnson, 'The Origins of the Stockholm Protocols', 105.

<sup>70</sup>Johnson, 'The Origins of the Stockholm Protocols', 105.

earlier when Togoland, which had been a British Protectorate since its capture from Germany in 1914,<sup>71</sup> voted to become part of Ghana in 1956. The protracted establishment of the British Colony of the Gold Coast brought together diverse tribal communities, each with a distinct cultural and legal system.<sup>72</sup> The Ghanaian academic, Samuel Asante, suggests that the ‘legal systems applicable to the various communities and ethnic groups have little in common’.<sup>73</sup> Further, each group had a traditional system of chiefs and sub-chiefs, each of whom, according to Kwesi Twum-Barima, was the ‘embodiment of his people’s culture’.<sup>74</sup> At independence, as today, there were sixty-five distinct ethnic groups in Ghana and thirty-four separate languages were spoken.<sup>75</sup>

The challenge of such a diversity of cultural identities at the point of political independence is highlighted by the postcolonial theorist Frantz Fanon’s suggestion that ‘[t]o fight for national culture means in the first place to fight for the liberation of the nation’.<sup>76</sup> However, at the beginning of Nkrumah’s presidency, with the nation liberated, it was impossible to say what a national culture could or should look or sound like. As Kwame Gyekye suggests, the issue faced by Nkrumah at

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<sup>71</sup> Following the Treaty of Versailles in June 1919, German Togoland was divided into French Togo in the East and British Togoland to the West. Togo remained a French colony until its independence in 1960.

<sup>72</sup> The Gold Coast was declared a British colony on July 25, 1874 when ‘it was given its own colonial executive and legislative council body and a Supreme Court’ (Joseph B. Akamba and Isidore Kwadwo Tufour, ‘The Future of Customary Law in Ghana’, *The Future of African Customary Law*, eds., Jeanmarie Fenrich, Paulo Galizzi, Tracy E. Higgins, (Cambridge: Cambridge University Press, 2012) 204). A British Charter, providing for the Government of Her Majesty’s Settlements on the Gold Coast and of Lagos, and constituting those Settlements into a separate Colony to be called the Gold Coast Colony read: ‘Now know ye that we do by these our Letters Patent, under the Great Seal aforesaid, declare our pleasure to be that our said Letters Patent of the 19<sup>th</sup> day of February, 1866 [provision for the establishment of government of settlements on West African Coast], our said supplementary commission of the 8<sup>th</sup> day of November, 1872 [permission for Commander-in-Chief of settlements to grant royal pardon to offenders], and our said commission of the 25<sup>th</sup> day of July, 1873 [appointment of Governor of West African Settlements], shall be, and they are hereby revoked so far as regards our said settlements on the Gold Coast and of Lagos, or any part or parts thereof; and we do further declare our pleasure to be that those settlements shall constitute, and they are hereby erected into a separate colony under the title of the Gold Coast Colony’. (Joseph Casely-Hayford, *Gold Coast Native Institutions*, (London: Sweet and Maxwell, 1903), 369-371) Following a series of wars with the Ashanti Empire to the north, the Ashanti Region and Northern Regions were annexed by Britain in 1901 and became part of the Gold Coast Colony.

<sup>73</sup> Samuel Asante, ‘Interests in Land in the Customary Law of Ghana – A New Appraisal’, *The Yale Law Journal*, Vol. 74, No. 5, (Apr., 1965) 849.

<sup>74</sup> K. Twum-Barima, *The Cultural Basis for Our National Development* (Accra: Ghana Academy of Arts and Sciences, 1985) vii.

<sup>75</sup> For a list of Ghanaian languages and ethnographic map of the country see Appendix F.

<sup>76</sup> Frantz Fanon, “National Culture,” *The Post-Colonial Studies Reader*, eds., Bill Ashcroft, Gareth Griffiths and Helen Tiffin, (London: Routledge, 2006) 120.

independence was how to effectively ‘weld the constituent ethnic groups into a new, certainly larger, form of sociopolitical association [...], how to solder the component parts together to make a whole.’<sup>77</sup> Robert July suggests that Ghana’s new political leaders grew aware of ‘the importance of cultural awareness in generating [...] a single coherent, cohesive new nation from the disparate peoples that made up the Gold Coast colony’.<sup>78</sup> One of the strategies employed by Nkrumah was to develop and utilise Ghana’s theatre industry and, through a variety of mechanisms, encourage playwrights to utilise Ghanaian folklore.

### **3.3.1. The National Theatre Movement: The role of the state in establishing Ghana’s theatre industry and encouraging the use of folklore**

Throughout Nkrumah’s career as Ghana’s political leader, from his election as Leader of Government Business in 1951 to the military coup that toppled his presidency in 1966, he consistently demonstrated that he viewed theatre as a means through which the creation and dissemination of expressions of a modern national identity could be achieved. As his premiership progressed, Nkrumah increasingly emphasised the role of theatre within Ghana’s cultural landscape and supported the development of the theatre industry but within defined parameters. Consequently, the utilisation of Ghanaian folklore by playwrights became both increasingly frequent and necessary.

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<sup>77</sup> Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oxford: Oxford University Press, 1997) 77. Moreover, at independence there was a genuine threat of cessation. Though Nkrumah had successfully engaged the British government in negotiations towards full independence, he was increasingly faced by the threat of potential secession from chiefs who felt little affiliation with the new government that purported to represent them. The period immediately preceding independence was marked by the rise of the National Liberation Movement (NLM), which centred principally in the Ashanti Region with some support in the Northern Territories. The NLM ‘attacked the conception of a single one-nation Ghana and sought to block the scheduled transition to independence’. Writing in 1961, the academic Rupert Emerson, in his assessment of the complexities of post-independence nation building, suggested that ‘Tribalism may still be seen as the single most serious obstacle to African nation-building’. (Rupert Emerson, ‘Crucial Problems in Nation Building’, *The Journal of Negro Education*, Vol. 30, 1961, 200-1) This threat derived from the fact that as well as supporting the political authority of the chiefs, the British administration had also codified the chief’s status as the embodiment of traditional culture. By so doing, Nkrumah argued, they had entrenched ‘the greatest focal point of disintegration within our new state’ (Kwame Nkrumah, *Africa Must Unite*, 64).

<sup>78</sup> July, *An African Voice*, 13.

During the early 1950s the most popular form of theatrical entertainment in Ghana was the Concert Party, which as previously noted was made up of small, itinerant groups heavily influenced by American vaudeville and performed topical skits and songs. The Axim Trio were one of the most popular Concert Party troupes in Ghana at the time and in 1951 they were performing two plays back to back, one called *Kwame Nkrumah is our saviour* and the other called *The D.C. and his Good Friend*. The latter ‘lampooned chiefs as dim-witted and unprincipled agents of the colonial establishment’ and, as Rathbone notes, ‘Nkrumah’s first public social engagement after his triumph in the 1951 election and his release from prison was to attend one of these performances’.<sup>79</sup>

Though Concert Party performances did not routinely incorporate elements of Ghanaian folklore, Nkrumah’s appreciation of the potency of theatre as a means of communicating a political message is in evidence. In 1955, as Leader of Government Business, Nkrumah began to develop a cultural policy in which the link between theatre, folklore and national identity was explicit. The catalyst for this was, as the Ghanaian theatre academic Kofi Agovi notes, ‘a growing concern with the viability of Ghana’s cultural heritage in the face of distressing social changes’.<sup>80</sup> In order to address this, Nkrumah appointed ‘a ten-man Government Committee’, one of the responsibilities of which was to ‘examine how best a national theatre movement could be developed’.<sup>81</sup> Thus, for Nkrumah, there was a clear link between cultural heritage and the development of modern cultural institutions. The Committee’s report states that ‘although the main responsibility for reviving their dying culture lay with the people themselves, the Government must set the ball rolling’.<sup>82</sup> Following the Committee’s report, an Interim Committee for an Arts Council was established and charged to ‘formulate and carry out a practical policy for a National theatre

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<sup>79</sup> Richard Rathbone, *Nkrumah and the Chiefs: The Politics of Chieftaincy in Ghana 1951-60* (Oxford: James Curry, 2000), 37. John Collins notes that The Axim Trio also performed plays called *Nkrumah will Never Die* and *Kwame Nkrumah is a Mighty Man*. These last two being part of the Trio’s repertoire until they dissolved in the mid 1950s. Collins notes that another play ‘taking a political stand’ was *Kwame Nkrumah is Greater Than Before*, which the Axim Trio staged in 1950 and ‘then donated part of its proceeds to [Nkrumah’s] Party fund’ (John Collins, ‘Comic Opera in Ghana’, *African Arts, University of California and Los Angeles*, No. 2, Jan 1976, 52 Available at: [http://www.academia.edu/4162626/JOHN\\_COLLINS\\_AFRICAN\\_ARTS\\_UCLA\\_1976\\_Comic\\_opera\\_in\\_Ghana#](http://www.academia.edu/4162626/JOHN_COLLINS_AFRICAN_ARTS_UCLA_1976_Comic_opera_in_Ghana#). Accessed 30/10/13).

<sup>80</sup> Agovi, ‘The Origin of Literary Theatre in Colonial Ghana’, 3.

<sup>81</sup> Agovi, ‘The Origin of Literary Theatre in Colonial Ghana’, 3.

<sup>82</sup> Agovi, ‘The Origin of Literary Theatre in Colonial Ghana’, 3.

Movement'.<sup>83</sup> In 1958, just a year after independence, the Arts Council of Ghana was established with a mandate to address the issue of 'reviving' Ghana's cultural heritage.

The 'National Theatre Movement' was a cultural policy document designed to develop theatre in Ghana and, as a policy document, it can be said to represent the perspective of the state. The state's desire that folklore should be utilised in the development of Ghana's theatre industry is unambiguous. Agovi notes that the National Theatre Movement 'urged that traditional forms of drama should constitute the basis for a Ghana National Theatre'.<sup>84</sup> The scope of the policy was much broader than just theatre, suggesting that folklore could inform various aspects of Ghana's culture and tourism industries. July suggests that there were also plans for:

a national orchestra, the embellishment of hotels with art objects that might have sales appeal to tourists, cultural festivals, lectures and demonstrations in connection with the national museum in Accra, public programs featuring concerts, dance recitals, puppet shows, and lectures, as well as classes in such various activities as playwriting and drumming, art or drama, traditional dancing and craft.<sup>85</sup>

As such, the National Theatre Movement signalled the intent of the Nkrumah regime that the free utilisation of folklore by Ghanaian artists had the potential to both develop Ghana's creative industries and add to Ghana's economy.

Moreover, Nkrumah's utilisation of the performing arts was not restricted to the development of Ghana's domestic creative industries; he also used cultural activities to further his political aims on the international stage. Albert Opoku, first Director of the Ghana Dance Ensemble, recalled that

as head of state, Nkrumah continued to utilise the performing arts. It was he who arranged for performances of dance groups from various parts of the country as part of the independence day celebrations in Accra, it was

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<sup>83</sup> Agovi, 'The Origin of Literary Theatre in Colonial Ghana', 3.

<sup>84</sup> Agovi, 'The Origin of Literary Theatre in Colonial Ghana', 3.

<sup>85</sup> July notes that responsibility for the encouragement of artists and definition of folklore fell to the Arts Council and its successor, the Institute of Arts and Culture. (July, *An African Voice*, 190).

Nkrumah who dispatched performers abroad on repeated international tours as the “peaceful arm of his global politics and diplomacy”.<sup>86</sup>

Thus, as well as developing Ghana’s creative industries, Nkrumah’s policy was to use Ghana’s performing arts to articulate and spread a particular image of Ghana at home and abroad.

The employment of cultural industries along these lines is not unique to Ghana. Nor is the utilisation of folklore to articulate a contemporary national identity. The Folklorist, Regina Bendix, suggests that ‘[t]he most powerful modern political movement, nationalism, builds on the essential notions inherent in authenticity, and folklore in the guise of native cultural discovery and rediscovery has served nationalist movements since the Romantic era’.<sup>87</sup> Though not unique to Ghana, the effect in Ghana of Nkrumah’s cultural policy was the rapid develop of institutions that embedded and perpetuated the role of folklore as a resource for artists.<sup>88</sup> The intended result, as Bendix suggests, was the development and promulgation of ‘[t]extualized expressive culture’ such as songs and tales underpinned by ‘the rhetoric of authenticity’ that communicated ‘the inevitability of national unity’.<sup>89</sup>

As Ghana’s theatre industry was developed from virtually nothing following independence, Nkrumah’s cultural policy was particularly pervasive. Agovi suggests that the institutions that were created were done so with ‘a mandate to refashion indigenous Ghanaian traditions to suit our modern theatre through creative experimentation’.<sup>90</sup> Accordingly, Nkrumah quickly began to develop and implement a cultural policy and infrastructure that Agovi suggests was designed to ‘bring into existence a theatre that will derive its vitality and authenticity from roots firmly

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<sup>86</sup> Albert Opoku ‘The Ghana Dance Ensemble’, quoted in Robert July, *An African Voice: the role of the humanities in African independence*, (1987), 185.

<sup>87</sup> Regina Bendix, *In Search of Authenticity: The Formation of Folklore Studies* (Wisconsin: University of Wisconsin Press, 1997), 7.

<sup>88</sup> Robert July notes that: ‘under Nkrumah, independent Ghana soon bristled with agencies concerned with formulating a national cultural policy- an arts council, youth organizations and broadcasting facilities, ministries of education and culture, and eventually an Institute of African Studies based in the university at Legon’ (July, *An African Voice*, 181).

<sup>89</sup> Bendix, *In Search of Authenticity*, 20.

<sup>90</sup> Agovi, ‘The Origin of Literary Theatre in Colonial Ghana, 3.

planted in the true traditions of the people'.<sup>91</sup> Thus Nkrumah's early experience of theatre as a potent political medium in the 1950s had, within a decade, become associated at a policy level with the equally potent resource of folklore.

### **3.3.2. Nkrumah and Sutherland: Sutherland's role in establishing folklore as a central pillar of Ghanaian playwriting post independence**

Despite the country's ethnic plurality,<sup>92</sup> Ghana has a strikingly singular expression of modern theatre. As explored in the previous chapter even plays written very recently retain the elements of folklore (the traditional songs and dances and a narrator facilitates interaction between the players and the audience) associated with *anansesem* and Sutherland's *anansegoro*.<sup>93</sup> In this section, I illustrate how a significant factor in Ghana's theatrical aesthetic was the facilitation of Sutherland's work by the state, and often Nkrumah personally. That the relationship between politics and theatre following independence was mutually beneficial is evidenced both by the way in which the theatre industry in Ghana developed as a result of Nkrumah's cultural policies, but also by Sutherland's role in unambiguously associating playwriting with political nationalism. Thus, in this section, I analyse how Sutherland's use of folklore (specifically Akan folklore) following independence compounded its role as a natural resource for playwrights with a significant cultural and political economy.

There was a significant synergy between Sutherland and Nkrumah at independence in their aims for Ghanaian theatre and the speed with which they went about achieving them. Sutherland had returned to Ghana in 1957, having studied in England, and immediately began to consider ways in which she could contribute to the literary life of the new nation. In an interview with Robert July she later recalled

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<sup>91</sup> Agovi, 'The Origin of Literary Theatre in Colonial Ghana', 3.

<sup>92</sup> Please see Appendix F.

<sup>93</sup> As well as Agyeman's *Ananse's Last* discussed in Chapter 2, this trend is also evident in two of the three Ghanaian plays published this century: Efo Kodjo Mawugbe's *In the Chest of a Woman* (Kumasi: Isaac Books & Stationary Service, 2008), and Asiedu Yirenki's *Dasebre* (Accra: Paramount Printing and Publishing Works, 2003).

that '[i]t wasn't until 1957 I said, oh, I see, Independence [...] Let's get on with this business of writing for ourselves'.<sup>94</sup> July suggests, that for Sutherland 'political independence suggested cultural autonomy',<sup>95</sup> and she quickly turned to theatre, having previously written short stories, to explore new ways of expressing Ghanaian culture. In 1957, Sutherland established the Experimental Theatre Players who took up residence in a hut on the beach loaned by the Sea Scouts.

In 1959 the Experimental Players became the Ghana Drama Studio Players and in 1960, with £8,500 raised from the Rockefeller Foundation, the American "Fund for Tomorrow"<sup>96</sup> and 'assistance from the Ghana government to make up the needed balance',<sup>97</sup> Sutherland and her company 'moved out of the shed and into the Drama Studio'.<sup>98</sup> The Ghana Drama Studio was built on wasteland on the corner of Liberia Road and Independence Avenue in the heart of Accra, a site that is now occupied by the National Theatre of Ghana.

In 1961, Nkrumah personally attended the inaugural performance of Sutherland's Ghana Drama Studio and prior to the performance addressed the audience.<sup>99</sup> Robert July notes that his speech articulated

the desire that a network of theaters be established throughout the land, the hope for a renaissance of the arts in Africa [and] most of all, Nkrumah's

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<sup>94</sup> July, 'Here, Then, is Efua', 161.

<sup>95</sup> July, *An African Voice*, 74.

<sup>96</sup> Peter Carpenter noted that 'her work in the small wooden rehearsal hut above the seashore in Accra where the drum rhythms of her group with the beat of the surf beneath them, attracted the attention not only of the Arts Council of Ghana but also of. From these two philanthropic bodies and from the Council, the Experimental Theatre received money grants. The greater part of this money, plus a Government grant, was devoted to building the Ghana Drama Studio, Ghana's first professional theatre, which cost (without equipment or seating) (Anthony Graham-White "Drama" *European Language Writing in Sub-Saharan Africa, Volume 2*, eds. Albert S. Gerard and Gyorgy M. Vajda (Amsterdam: John Benjamins Publishing Company, 1986) 811-812) .

<sup>97</sup> July notes that Nkrumah took a keen interest in the work of the Drama Studio: 'Sutherland had written to him describing what she was trying to achieve and requested assistance with construction costs'. July, *An African Voice*, 76. James Gibbs suggests that the Drama Studio was also 'partly financed by the CIA' James Gibbs, "Introduction" *Nkyin-Kyin: Essays on the Ghanaian Theatre*, ed. James Gibbs (Amsterdam: Editions Rodolphi, 2009) xx.

<sup>98</sup> July, 'Here, Then, is Efua', 163.

<sup>99</sup> Nkrumah also turned up unannounced during the construction of the Drama Studio and 'expressed his delight with the zeal and dedication of the group'. July, *An African Voice*, 76.



recurrent dream of pan-African unity, aided in this instance by the universal language of art.<sup>100</sup>

That Nkrumah was in attendance at all gives a clear indication of the political economy of theatre in Ghana at the time. Moreover, that he vocally supported the development of more theatres throughout Ghana as a means of promulgating expressions of cultural unity demonstrates how central theatre was to Nkrumah as part of his on-going 'systematic effort to achieve cultural decolonization'.<sup>101</sup>

As noted in the previous chapter, Sutherland drew on the stories and storytelling structures of the traditional story-telling art she encountered in the Akan village of Ekumfi Atwia in Ghana's Central Region. Her use of Ghana's folk traditions again demonstrates a synchronicity with the cultural and political aims of Nkrumah. Nkrumah believed that unity and progress in Ghana, and throughout Africa, would only be realised if political leaders went 'to the people, live among them [and] learn from them'.<sup>102</sup> Equally, Efua Sutherland regarded the rural populations in Ghana as those who had 'minded the culture' through the years of colonialism.<sup>103</sup> Thus, in the early days of independence, there was simultaneously a political and cultural desire to construct expressions of a unitary national identity by accessing 'the knowledge of the people'.<sup>104</sup>

As discussed, in her artistic process, Sutherland positioned herself as a researcher and interpreter of southern Ghanaian folkloric practice and stories, which she then merged with the western literary tradition of written play texts. Adams notes that Sutherland did not aim to reproduce folkloric practice but rather sought to 'replace it with a carefully considered reinterpretation of ritual structures to promote the essence of a future ideal'.<sup>105</sup> In Nkrumah's newly independent Ghana, Sutherland's use of folklore as a resource for the presentation of an idiosyncratically Ghanaian

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<sup>100</sup> July, *An African Voice* 74.

<sup>101</sup> Felix Morrisseau-Leroy, "African National Theatre: For Whom?", *Okyeame*, 4.1 (1968): 91-95.

<sup>102</sup> Nkrumah, *Africa Must Unite*, 55.

<sup>103</sup> Gibbs, *Ghanaian Theatre: A Bibliography*, 31.

<sup>104</sup> Gobin, 'Study of the various aspects involved in the protection of folklore', 2.

<sup>105</sup> Adams and Sutherland Addy, "Introduction" *The Legacy of Efua Sutherland*, 12.

‘future ideal’ is evident in her early plays *Foriwa* (1962) and *Edufa* (1962), both of which compliment Nkrumah’s political agenda.

To illustrate this point: Sutherland’s 1962 play, *Foriwa*, is, according to Rotimi, her attempt to ‘visualise the ideal of a new nation’.<sup>106</sup> In it she highlights ‘such patriotic motifs as inter-ethnic mutuality, and a positive cleavage with the insularity and petty prejudices of the past’.<sup>107</sup> The play tells the story of Foriwa, the daughter of the queen mother of Kyerefaso, a small, traditional Ghanaian village, ‘sunk in stagnation and decrepitude’.<sup>108</sup> The dramatic tension of the play arrives in the form of the university educated Labaran, ‘an *otani*, a northerner in a southern Ghanaian town’.<sup>109</sup> Foriwa falls in love with Labaran and together their progressive values reinvigorate the village. As Rotimi suggests, the play can be read as Sutherland’s response to the need to bring together multiple ethnic identities into a single national identity. In the play, she confronts intra-national divisions directly and strikes a triumphantly nationalist note when Labaran states: ‘[w]ho is a stranger, anywhere, in these times, in whose veins the blood of this land flows?’.<sup>110</sup> For Sutherland, as for Nkrumah, (and in sharp contrast to colonial era writers explored in the previous chapter) ‘this land’ was a defined cultural space with identifiable values and expressions.

By no means all Ghana’s playwrights subscribed to Sutherland’s methodologies or Nkrumah’s vision of the function of theatre in Ghana.<sup>111</sup> Perhaps the most prominent example was Joe de Graft who worked with Sutherland at both the Drama Studio and at the University of Ghana. de Graft’s most famous play *Through a Film Darkly*, which was first performed in 1962 and revised in 1966, explores a darker side of the prevailing nationalist political environment.<sup>112</sup> With the play, de Graft suggests that within Ghanaian society at independence there were deeply complex, problematic

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<sup>106</sup> Rotimi, ‘The Attainment of Discovery’ 18.

<sup>107</sup> Rotimi, ‘The Attainment of Discovery’, 18.

<sup>108</sup> Rotimi, ‘The Attainment of Discovery’, 20.

<sup>109</sup> Rotimi, ‘The Attainment of Discovery’, 20.

<sup>110</sup> Biodum Jeyifo, ‘When *Anansegoro* Begins to Grow: Reading Efua Sutherland three Decades on’ *The Legacy of Efua Sutherland: Pan-African Cultural Activism* eds. Anne Adams and, Esi Sutherland-Addy (Banbury: Ayebia Clarke Publishing, 2007) 33.

<sup>111</sup> This is not restricted to the playwriting community. In his 1960 novel *Fragments*, Ayi Kwei Armah undertakes a biting critique of Ghana’s cultural policy. Ayi Kwei Armah, *Fragments* (London: Heinemann, 1969).

<sup>112</sup> J. C. De Graft, *Through A Film Darkly*, (London: Oxford University Press, 1970).

and potentially violent elements present within the new nation. As such the play represents an oppositional voice that seeks to question the political regime, rather than explore a common national ideal. Agovi suggests that de Graft was regarded as being ‘completely at odds with the ideology of the [National Theatre] Movement’.<sup>113</sup> By contrast, so politically successful were Sutherland’s endeavours that in 1965 Nkrumah established the Traditional and Experimental Theatre Division in the Ministry of Art and Culture with a remit to ‘focus its lens on work already begun on the exploration of the dramatic possibilities of our folklore and the development of our traditional folk drama’.<sup>114</sup> Writing at the time, Felix Morrisseau-Leroy, head of the Division, stated that ‘[t]he playwrights, actors and producers of Ghana are agreed that traditional forms of drama should constitute the basis of a National Theatre’.<sup>115</sup> Though this opinion does not seem to have been unanimously held, Morrisseau-Leroy’s statement underlines the fact that at the level of government, playwrights’ continued use of folklore was central to the development of Ghana’s theatre industry.

Nkrumah’s keen interest in theatre was evidenced again in February 1965 when he established his own theatre company: the Osagyefo Players. The company were founded ‘by direct order of the President’, and Nkrumah said of them: ‘I look upon this Drama group to be the intellectual centre for artistic stimulus and driving force behind the theatre movement in Ghana and the cultural revival of Africa’.<sup>116</sup> That Nkrumah founded his own theatre company is illustrative of how important theatre had been and continued to be in developing and communicating expressions of cultural identity.

However, Nkrumah’s encouragement of the utilisation of folklore extended beyond theatre and filtered into various aspects of Ghanaian society. As an example of this, Kwabena Nketia suggested in an interview given in 2002 that:

We were very anxious to preserve, to collect and document [folklore] but that is not enough. Even while we were documenting and preserving, there was

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<sup>113</sup> Agovi, ‘The Origin of Literary Theatre in Colonial Ghana’, 20.

<sup>114</sup> Gibbs, *Ghanaian Theatre: A Bibliography*, 23.

<sup>115</sup> Gibbs, *Ghanaian Theatre: A Bibliography*, 23.

<sup>116</sup> Gibbs, *Ghanaian Theatre: A Bibliography*, 21.

the challenge to use some of the materials. There was all the new political aspirations and the need to change protocols, to change the state – all the forms of ceremony and so forth – so the relation between research and its application came to us quite forcibly at the time of independence.<sup>117</sup>

Nketia suggests that there was also ‘a deliberate attempt [made] to recontextualise [traditional] music in the new state’.<sup>118</sup> Moreover, during the independence celebrations, he recalls that:

we brought performing groups from parts of the country to perform at the stadium [...] They only had ten minutes, so before they were ready they were off again, but it was symbolic. [...] For these people who came to perform, it was bringing them from the periphery to the centre, so politically there was also the sense of making them feel part of the new nation<sup>119</sup>

Thus, for Nkrumah, artists’ and academics’ engagement with and development of folklore was a key element in Ghana’s political progress directly post-independence. It was this belief, coupled with the development of institutions that supported it, that embedded folklore as a central resource for Ghana’s playwrights. Through Sutherland’s position within the University of Ghana discussed in Chapter 2, this use of folklore, and its utility as a means through which to explore and express national identity has been preserved and remains operative.

By the end of the Nkrumah’s presidency in 1966,<sup>120</sup> folklore in Ghana had been firmly reconstituted with a specific status as a state facilitated resource from which artists could create derivative works that reflected specific cultural policies. Moreover the synergy between Nkrumah’s political needs and Sutherland’s skills as a playwright and researcher led to the development of a theatre industry in which the use and reuse of Ghanaian folklore was an essential element.

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<sup>117</sup> Trevor Wiggins and J. H. Kwabena Nketia, ‘An Interview with J. H. Kwabena Nketia: Perspectives on Tradition and Modernity’, 61.

<sup>118</sup> Wiggins and Nketia, ‘An Interview with J. H. Kwabena Nketia’, 66.

<sup>119</sup> Wiggins and Nketia, ‘An Interview with J. H. Kwabena Nketia’, 66.

<sup>120</sup> In February 1966, while on a diplomatic trip to Hanoi, Nkrumah was deposed by a military coup. Increasing tensions between Nkrumah and the West, particularly America had led to a doubling of CIA agents in Accra. At home, with concern about being mobilised for a campaign in Rhodesia, and increasing cut backs, the military grew restless. Two days national holiday was declared and the National Liberation Council came to power. Nkrumah accepted an offer for hospitality from Sekou Toure, President of Guinea and a fellow Pan-Africanist. He named Nkrumah joint Head of State of Guinea, a position he held until his death in 1972. For a list of Ghana’s Heads of State and their political affiliation see Appendix G.

### 3.4. Political utility of folklore in Rawlings' Ghana (1981-1991)

By the time that Nkrumah's presidency ended in 1966, the status of folklore as a resource that artists could (and perhaps should) freely access had been established. As explored, Nkrumah established institutions that perpetuated the status of folklore within Ghana's creative industries. However, a key reason that this status has persisted, and one of the reasons why the 2005 Copyright Act appears so counter intuitive with regard to the state's long standing and consistent policy on folklore, is that the relationship between folklore, playwriting and national identity was reaffirmed during the 1980s and 1990s.

Following a series of military coups and short-lived civilian regimes that followed the overthrow of Nkrumah, Ghana again faced the task of defining and articulating a unifying national identity. In a radio statement, broadcast shortly after Jerry Rawlings' return to power at the end of 1981,<sup>121</sup> he said that 'this is not a coup. I ask for nothing less than a revolution, something that would transform the social and economic order of this country'.<sup>122</sup> The definition of this moment as a popular revolution rather than a military coup carried with it the implication of a new politics emerging in Ghana that significantly broke from the recent past. After several intervening leaders had denounced Nkrumah, Rawlings reclaimed him as a national hero and father of the nation thereby drawing a link between himself and Nkrumah's construction of Ghanaian national identity and, like Nkrumah before him, Rawlings turned to theatre.

Rawlings found a willing partner in the playwright Mohammed ben-Abdallah, whose theatre work was discussed in the previous chapter, to compliment the new Ghanaian politics. For Abdallah, working a generation after independence, folklore's status as an accepted generative resource for artists is evident. As a young 'drama organizer'

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<sup>121</sup> Following an unsuccessful coup attempt in May 1979, J.J. Rawlings escaped from prison and led a successful coup against Lieutenant-General Akuffo in June of the same year. In September, elections were held and Rawlings handed power to Dr Hilla Limann. Dissatisfied with the Limann regime, Rawlings staged another coup in December 1981. Rawlings remained in power, first as head of a military government and then as elected president, until 2000. See: Paul Nugent, *Big Men, Small Boys and Politics in Ghana* (London: Pinter, 1995)

<sup>122</sup> Nugent, *Big Men, Small Boys and Politics in Ghana*, 15.

working in Kumasi in the 1960s, Abdallah had advised ‘all the teachers I met [to] do plays out of our folklore, Ananse stories and so on and so forth’”.<sup>123</sup> From helping ‘here and there’<sup>124</sup> on Rawlings’ speeches, Abdallah moved into political office Secretary for Culture and Tourism in 1984,<sup>125</sup> and so was in office when the 1985 Copyright Act came into force, which included a provision for the protection of folklore under section 5.<sup>126</sup>

Abdallah implemented several programmes that sought to develop Ghana’s theatrical institutions in a manner reminiscent of Nkrumahist cultural policy. In 1986 as Sandra Greene notes:

Rawlings supported the founding of The National Commission on Culture, an agency that was designed, in part, to seek foreign donations to revive the arts. Money was obtained from China to build the National Theatre.<sup>127</sup>

Once built, the National Theatre became home to three national companies: the National Dance Ensemble, the National Symphony Orchestra and the National Theatre of Ghana Players (*Abibigromma*), which had been brought from the University.

As well as developing institutions, Abdallah echoed Nkrumah’s desire that those institutions should be directly involved in developing the national culture and promulgating an image of Ghana’s national identity abroad. The 1992 PNDC law 259, which established the National Theatre, outlined its major objectives, which included:

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<sup>123</sup> Anastasia Agbeyega and James Gibbs, “Mohammed Ben-Abdallah: On Plays and Playwriting,” *Fontomfrom: Contemporary Ghanaian Literature, Theater and Film*, eds., Kofi Anyidoho and James Gibbs (Atlanta: Matutu, 2000), 62. This practice has a long history, Gibbs notes, in an updated version of his *Bibliography*, that J.E. Casely Hayford’s daughter, Gladys, born in 1904, occasionally taught at her mother’s school, the Girls’ Training School in Freetown, ‘where, with her mother, she “converted folk-lore-Nancie stories into first class plays”’.

<sup>124</sup> Agbeyega and Gibbs, “Mohammed ben-Abdallah”, 64.

<sup>125</sup> During the 1980s Rawlings gave ministerial positions to a succession of playwrights in his military regime: Ama Ata Aidoo, Asiedu Yirenkyi and Mohammed ben-Abdallah all served in the Rawlings government.

<sup>126</sup> Ghana Copyright Act 1985: ‘Works of Ghanaian folklore are hereby protected by copyright’ s.5(1).

<sup>127</sup> Sandra E. Greene, ‘Developing the Arts for Development: Perspectives on Ghana’, *Africa Notes* (1998) [http://www.einaudi.cornell.edu/files/content/848/Developing\\_the\\_Arts\\_for\\_Development.pdf](http://www.einaudi.cornell.edu/files/content/848/Developing_the_Arts_for_Development.pdf). Accessed 5/7/2013.

the promotion and development of the performing arts in Ghana; the development and promotion of a strongly integrated national culture and the formulation of an effective export promotion programme of works.<sup>128</sup>

Moreover, the role of folklore within the development of Ghanaian culture was also in evidence. In 1991 saw the first Pan-African Historical Theatre Festival (PANAFEST) organised by Abdallah ‘under the theme ‘The Re-emergence of African Civilisation’.<sup>129</sup> These policy points and programmes, reminiscent of Nkrumah’s 1963 speech in which he called for researchers and artists to ‘stimulate the birth of a particularly African literature,’<sup>130</sup> mark the high point of the relationship between the Rawlings administration and the theatre industry. The emphasis on the development and promotion of a ‘national culture’ and an ‘export programme of work’, suggests that by this point the government saw Ghanaian theatre, with a codified folkloric root, as a form through which a robust national identity could be expressed and promoted.

The similarities between Rawlings’ and Nkrumah’s regimes in terms of cultural policy are compelling. Both presidents shared a need for expressions of a national identity and both facilitated playwrights to provide them. Moreover, both administrations emphasised through their cultural policy, the role of folklore as both a significant body of shared cultural practices and expressions and a resource for playwrights in the creation of derivative works. Through supporting playwrights who shared the state’s aspirations and creating institutions that evidenced that support, the state’s positioning of folklore as a central element of Ghana’s creative theatre industry during these periods was unambiguous.

Moreover, resonances of this position are retained in Ghana’s political discourse today. For example Dzifa Gomashie describes the current role of the Ministry of Culture, Tourism and Creative Arts concerning folklore as follows:

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<sup>128</sup> See: National Theatre of Ghana Homepage. Available at: <http://www.nationaltheatre.com.gh>. Accessed 5/7/2013.

<sup>129</sup> Sutherland Philips, ‘Chronology’, 241.

<sup>130</sup> Obeng, *Selected Speeches of Kwame Nkrumah*, 128.

We envisage that the Ministry will lead, with its agencies including the National Theatre, in the crusade to promote, protect and produce, for the benefit of Ghanaians and the world, authentic and unique Cultural and Creative Arts programmes that speak to our very existence.

Gomashie's suggestion, though consistent with the state's historic position on the use of folklore, is inconsistent with the current copyright law, which places restrictions on artists' utilisation of folklore. Thus, though the ministry's agencies, such as the National Theatre, could restage works from the Ghanaian canon, developing new works that subscribe to Ghana's theatrical aesthetic is more problematic.

The incongruity of this situation is further highlighted by proposals to build a second National Theatre in Kumasi, in the Ashanti Region. In an interview given in 2013, Ghana's president, John Mahama announced the plans and stated that 'the creative art is a major income earner for some countries. In the United Kingdom for instance, the industry is worth in excess of 36 billion pounds. If we put our investment in the industry it could be one of the major sectors'.<sup>131</sup> As Mahama acknowledges, in economic terms, playwrights and other creative artists contribute to the vitality and growth of Ghana's cultural industries and, historically, they have done so through the utilisation of folklore. The current investment in Kumasi's National Theatre is based on the economic and cultural gains that the state has made from the work of Ghana's playwrights, musicians and artists who utilised folklore.

## **Conclusion**

The trajectory of the construction of folklore as a signifier of a national identity has been a long one that has its roots in a contested site of ownership, identity and anachronistic concepts of cultural hierarchy. Moreover, folklore has occupied two cultural extremes, from being regarded as proof of an absence of culture to being reclaimed as the foundation of national identity and repository of national cultural values. Moreover, developments at the level of international copyright, constructed folklore as an important resource for newly independent states, through which they

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<sup>131</sup> 'Government to build a second national theatre in Kumasi'. Available at: <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=281661>. Accessed 19/2/14.



could develop education programmes that reflected their cultural values. Thus, as states in Africa were beginning to gain their political independence, folklore became associated with national identity over which the state could exert control. The process of this reclamation in which folklore was simultaneously regarded as a carrier of national identity and a resource from which new cultural expressions could be made, has contributed to the current conflict between copyright law and cultural practice.

To explore this further: at the same time as Nkrumah and Rawlings were promoting the use of folklore by national artists, they were also asserting their right to do so. The copyright academic, David Lange, suggests that ‘authorizing speech, historically, has been the work of the state’.<sup>132</sup> This, he explains, is due to the state’s ability to grant licenses and enact statutes, allowing one group to speak or print, and not another. Throughout the Nkrumah and Rawlings presidencies the state proactively encouraged and facilitated the use of aspects of Ghanaian folklore, establishing what Scott terms a ‘formalization and ritualization, characterized by reference to the past’.<sup>133</sup> This clearly resonates with the development of both *anansegoro* and then *abibigoro* which both share and draw their characterisation as authentic forms of ‘African theatre’<sup>134</sup> from an ‘implied continuity with the past’.<sup>135</sup> Thus, from the perspective of the state, the success of Ghana’s theatre industry contributed to the understanding of folklore as an important cultural heritage with a significant political utility. As such, rather than being anomalous, in fact, the protection of folklore against use by nationals in the 2005 Act can be read as a next, logical step in the state’s managing of its cultural resources.

David Scott suggests that post-independence nation building consists of developing a ‘pluralistic consensus’.<sup>136</sup> However, in Ghana, expressions of national identity were

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<sup>132</sup> David Lange, ‘At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millenium’, *Law and Contemporary Problems*, Vol. 55, No. 2, (Spring, 1992), 144.

<sup>133</sup> Eric Hobsbawm and Terence Ranger, ‘Introduction’, *The Invention of Tradition*, eds., Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1983), 4.

<sup>134</sup> Kennedy, *In Search of African Theatre*, 145.

<sup>135</sup> Hobsbawm and Ranger, *The Invention of Tradition*, 1.

<sup>136</sup> David Scott, ‘Fanonian Futures?’, in *Refashioning Futures: Criticism after Postcoloniality* (Princeton: Princeton University Press) 192.

not so much the result of a consensus as a construction informed by a specific political need at a specific moment. Following independence, and again in the 1980s, mechanisms of cultural policy were employed to direct Ghanaian artists towards a specific creative practice that produced derivative works based on folklore. The growth of Ghana's theatre industry and specifically the development of *Anansegoro* and *Abibigoro* is illustrative of this policy. Despite the state's encouragement of artists to utilise Ghanaian folklore, in 2012 Abraham Henry Lemaire, the then Acting Director of the National Folklore Board, warned that 'the [National Folklore] Board would begin prosecuting [those] that engaged in illicit use of the country's folklore materials'.<sup>137</sup>

In the following chapter, with reference to original interviews undertaken for this research, I discuss how the conflicting positions on the use of folklore in Ghana are represented in current discourse. In order to highlight the stakes of this debate, I explore why the 2005 Copyright Act has the potential to significantly disincentivise current playwrights and other creative artists from engaging with Ghanaian folklore, why this disenfranchises them and, finally, why this is problematic in terms of both continued cultural practice in Ghana and the function of copyright as a mechanism for incentivising creativity.

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<sup>137</sup> 'National Folklore is Sacred', (posted August, 2010). Available at: <http://ghanadistricts.com/news/?read=37130>. Accessed: 5/9/2012.

## Chapter 4

### The Debate in Ghana: ‘the lawyers’ and ‘the artists’

#### Introduction

The status of folklore in Ghana today is highly contested. The imposition of the 2005 Copyright Act and the consequent restrictions on cultural practitioners is, where it is known, giving rise to debates on the rights of the state, the state’s obligations under international law and the position of folklore within cultural practice. The 1985 Copyright Act protected works of folklore against exploitation by foreigners under s.46,<sup>1</sup> a situation that John Collins, Professor of Music at the University of Ghana and a former member of the National Folklore Board, describes as ‘very sensible’.<sup>2</sup> Under the 2005 Act the necessity to seek permission and pay a fee for the use of Ghanaian folklore was extended to Ghanaian nationals, a development that John Collins, refers to as a ‘folklore tax’.<sup>3</sup> Conversely, the law’s supporters highlight folklore’s ‘commercial value’.<sup>4</sup>

Collins recalls that when the amendments to the 1985 Copyright Act were initially suggested in 1997, there was a split in opinion between ‘the lawyers’ on the National Folklore Board, who supported the amendments and the ‘artists’ on the Board who opposed them; it was, he suggests, ‘literally that simple’.<sup>5</sup> Throughout this chapter I do not seek to suggest that one position is more valid than the other but rather explore the motivations behind these positions. Though Collins positions the two sides as diametrically opposed, in fact they share a great deal of common ground. Both sides acknowledge the benefits of documenting and preserving folklore and

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<sup>1</sup> Ghana Copyright Act, 2005: ‘No person shall without the permission in writing of the Secretary import into Ghana, sell, offer or expose for sale or distribution in Ghana any copies of the following works made outside Ghana – (a) works of Ghanaian folklore; or (b) translations, adaptations, or arrangements of Ghanaian folklore’. s.44(1).

<sup>2</sup> Interview with John Collins, Professor of Music, University of Ghana, September, 2012

<sup>3</sup> Collins, ‘The Folkloric Tax Problem in Ghana’, 4.

<sup>4</sup> Nyadzie, interview, 2012.

<sup>5</sup> Collins, interview, 2012.

folkloric practice in Ghana. Additionally, both cite the benefit of protecting national folklore against unregulated exploitation by foreigners, as provided for under the 1985 Act, as a means of raising revenue and in terms of protecting national identity abroad. Significantly, neither side views traditional folkloric practice as sacrosanct, but rather focus their debate on whether Ghanaian artists should be able to access and make use of folklore as a resource in the creation of derivative works. However, for the purposes of this chapter, Collins's observation of a split between 'the artists and the lawyers' is useful because, by referencing an actual event, he exposes two conflicting views on what the function of folklore as a cultural resource is in Ghana.

Within this debate the view held by the artists is that folklore is a resource that they have a right to freely make use of in line with established cultural practice. This is a claim that is historically supported by the state's post-independence position when it sanctioned, encouraged and funded the free use of national folklore as a resource in the creation of, amongst other things, new play texts. The state's position, as discussed in the previous chapters, has moulded subsequent artistic practice and pedagogy in Ghana. By contrast, the view held by the lawyers is that folklore is a state owned commodity from which it has the right to raise revenue through regulating exploitation, and that this regulation should be applied equally to nationals and non-nationals. This stance is informed by developments in copyright at the international level and is, I suggest, compounded by the experience of raising significant revenue from foreigners' exploitation of Ghanaian folklore under the 1985 Act. Through exploring the motivations behind these positions and then analysing how the debate is currently unfolding in Ghana, I argue that the current terms of protection for folklore set out in the 2005 Copyright Act disrupts the relationship between playwrights and folklore and so has the potential to disenfranchise the current generation of playwrights by preventing them from contributing to the established canon of works.

As mentioned in the Introduction to this thesis, though the Law came into force in 2010, Nyadzie states that 'I haven't heard of anybody who has been prosecuted

under folklore yet'.<sup>6</sup> In 2014, Dorothy Habadah, Legal Officer at the Ghana Copyright Office stated that 'there have still been no cases relating to folklore'.<sup>7</sup> As there have been no cases, and so no case law exists, in this chapter I draw on original interviews undertaken for this research. In order to provide a balanced account of both sides of the debate I refer throughout this chapter to interviews with individuals from both sides of the debate. During the course of researching this thesis I undertook two research trips to Ghana, one in 2012 and one in 2014. During these trips I was able to interview figures in the legal sector who regard the 2005 amendments as part of a larger strategy of protecting and regulating the use of folklore,<sup>8</sup> and individuals in the cultural sector who were able to explicate the historical relationship between folklore and playwriting in Ghana, and some of whom have lobbied against the amendments.<sup>9</sup>

## Methodology

In section one, I draw together the analysis from the previous two chapters in order to explicate what Collins refers to as the 'artists' position' (1). In the following section I analyse the lawyers' position in this dialectic (2.1). Initially, I interrogate the claim made by Nyadzie and noted by a number of people interviewed during this research that the extension of the obligation to pay for the utilisation of folklore to nationals is reflective of Ghana's obligations under international copyright law. Through a discussion of national treatment, the principle of non-discrimination and minimum standards (2.2), I outline what Ghana's obligations are in terms of protection for folklore. I then go on to discuss two factors specific to Ghana (the development of property rights in colonial Ghana and the generating of revenue from foreigners' use of folklore), which, I suggest, informed the 'lawyers'' view of folklore as a state commodity.

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<sup>6</sup> Nyadzie, interview, 2012.

<sup>7</sup> Interview with Dorothy Habadah, Legal Officer at the Ghana Copyright Office, February 2014

<sup>8</sup> Ben Nyadzie, Senior Folklore Officer at the Ghana Copyright Office; Dorothy Habadah, Legal Officer at the Ghana Copyright Office.

<sup>9</sup> John Collins, Professor of Music at the University of Ghana and former member of the National Folklore Board; Carlos Sakyi, Chairman of the Ghana Music Rights Organization (GAMRO); Dzifa Glikpoe, Former Director of the National Theatre of Ghana Players (Abibigromma).

In section 3, I analyse the suggestion that the 2005 Copyright Act has significant potential to disincentivise artists in Ghana from using and reusing folklore. By discussing John Collins' claim that s.44 is effectively a 'folklore tax', I explore why this is the case in Ghana and go on to compare the situation in Ghana with other jurisdictions in the region. Ultimately, I argue that Ghana's current copyright law puts Ghanaian artists at a significant disadvantage compared with their regional contemporaries.

#### **4.1.The Artists' position**

As explored in the previous chapters, the artists' opposition to the amendments to the protection of folklore in the 2005 Copyright Act is based on an understanding of the development of a cultural practice, which is rooted in Ghana's post independence nation building. During this time playwrights, amongst other artists, 'creatively use[d] and re-cycle[d] their own traditional cultural resources'<sup>10</sup> as a basis for their plays. This practice was supported and facilitated by the state as part of a larger strategy aimed at constructing a pan-national identity that was distinct from the identity of the former colonial power.

In light of this, in the years following independence in 1957 there was an unprecedented increase in the volume of plays being written, performed and published in Ghana. Prior to 1957 playwriting did not occupy a significant space in the cultural landscape of colonial Ghana.<sup>11</sup> In contrast, Peter Carpenter notes that by 1962 several major developments had occurred in Ghana's theatre industry including the building of Efua Sutherland's Ghana Drama Studio (to which the Arts Council of Ghana donated £3000), and productions of nine new plays at the Arts Centre in Accra,<sup>12</sup> at least four of which were subsequently published.<sup>13</sup> The volume of plays may not appear significant, but it demonstrates that in five years, from virtually a standing start, playwrights with financial backing and political support were part of a

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<sup>10</sup> Collins, 'The Folkloric Copyright Tax Problem in Ghana', 3.

<sup>11</sup> See: Catherine Cole, *Ghana's Concert Party Theatre*.

<sup>12</sup> Gibbs, *Ghanaian Theatre: A Bibliography*, 17.

<sup>13</sup> Efua Sutherland, *Foriwa*, (Accra-Tema: Ghana Publishing Corporation, 1971); Efua Sutherland, *Edufa* (Accra: Sedco, 1966); Joe de Graft, *Through A film Darkly* (London: Oxford University Press, 1970); Joe de Graft, *Sons and Daughters* (London: Oxford University Press, 1979).

growing theatre industry. The increase in output was accompanied by dozens of articles and reviews concerning the state and future of Ghanaian theatre including plans to build a National Theatre.<sup>14</sup> The rapid growth in playwriting was the result of a combination of two key factors: playwrights' desire to reflect upon independence, and the state's need to define a unitary national identity that could accommodate a multi-lingual and multi-cultural population. Moreover, the state needed to utilise art forms capable of communicating that identity in a form that could engage with both a domestic population that were still largely illiterate and an international community accustomed to theatre appearing in published texts.<sup>15</sup>

The impetus to draw on national folklore in the construction of a national identity is related to the political situation at independence. Robert July suggests that 'the early years of independence were politically trying. Opposition to the government tended to be regional, ethnic, and potentially secessionist, serious concerns to those committed to national unity'.<sup>16</sup> To address this, as noted in the previous chapter, Nkrumah encouraged political leaders to return to and learn from the people. Equally, the impetus for Sutherland's work came from both her genuine desire to artistically engage with independence and a political agenda that complemented and facilitated that desire. Sutherland began to experiment with the development of an idiosyncratically Ghanaian theatrical aesthetic through her research in Atwia. What became *anansegoro* was a fusion between the western literary tradition of written play texts and a formalised, codified folkloric aesthetic developed from traditional village storytelling. Both the popular success of Sutherland's work and her position at the University of Ghana established Akan folklore as a resource upon which subsequent playwrights drew as part of their creative process.

The artists' conviction that they have a right to freely use folklore is compounded by the dual role of the first generation of post independence playwrights as both theatre practitioners and educators in the University of Ghana's Institute of African Studies.

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<sup>14</sup> Gibbs, *Ghanaian Theatre: A Bibliography*, 17.

<sup>15</sup> Nkrumah, *Africa Must Unite*, 45. Nkrumah quotes Leonard Barnes who, writing in 1939, suggests that 'at our present rate of progress it will be 700 years before the natives of even the Gold Coast can read and write'. Also see Barnes, *A Soviet Light on the Colonies*.

<sup>16</sup> July, *An African Voice*, 167.

As mentioned in Chapter 2, in 1963, the Ghana Drama Studio established by Sutherland was incorporated into the Institute of African Studies in which she took up a research position in the new School of Music and Drama. At the opening of the Institute Nkrumah spoke of his hope that it would ‘serve the needs of the people by helping to develop new forms of dance and drama, of music and creative writing, that are at the same time closely related to our Ghanaian traditions’.<sup>17</sup> Sutherland’s work formed the basis of the teaching model that produced subsequent generations of playwrights. The plays of the 1980s and 1990s maintain a stylistic link to Sutherland’s work and the folkloric practice that informed it, including Mohammed ben Abdallah’s *The Alien King* (1972) and *The Witch of Mopti* (1988), both of which are examples of his *Abibigoro*, an aesthetic form that retains many elements of *Anansegoro*. Additionally, though theatre in Ghana today is no longer as popular as it was post independence, the legacy of that time is still evident in plays written this century, such as Michael Osei Agyapong’s *Ananse’s Last* (2014).

Though the influence of a single playwright having such a significant and sustained impact on theatre in Ghana may seem over-stated, this position is evidenced by interviews undertaken with playwrights in Ghana. Two of Ghana’s new generation of playwrights, Nii OkaiKoi Okai and Nii Quartey suggested that their work focuses on contemporary social issues rather than retelling folkloric tales. However, they continue to utilise elements developed from folklore by Sutherland in the staging of their plays. Both, for example, routinely incorporate *mboguo*, the music and dialogue that punctuates the action and disrupts the narrative, into the performance of their plays.<sup>18</sup> As such, though contemporary playwrights do not necessarily draw a direct lineage from Sutherland to their own work, there remains an underlying influence that manifests in playwrights’ consistent return to Ghanaian folklore.

The ten year period of theatrical creativity that followed independence not only codified the way in which playwrights used folklore but, facilitated by political patronage linked to wider political motivations, also constructed the cultural status of folklore as a resource with significant cultural and political economy. Furthermore, it

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<sup>17</sup> Obeng, *Selected Speeches of Kwame Nkrumah*, 135.

<sup>18</sup> Nii Quartey and Nii OkaiKoi Okai, interview, February 2014.



institutionalised this function of folklore within Ghana's most important training and performance establishments. Though Nyadzie suggests that 'sometime ago people misunderstood the provisions on folklore and [now] they feel that it should be free because they feel that people create out of it',<sup>19</sup> this ignores the role that the state played in creating this understanding of the function of folklore. In actuality the state was supportive of playwrights' use of folklore as it delivered a politically desirable product capable of developing and communicating a unitary cultural identity. It was the combined effort of the state and the playwrights that institutionalised this cultural practice and thus facilitated its perpetuation through subsequent generations.

#### **4.2. The lawyer's position**

In this section I analyse the position of the lawyers in this dialectic, who Collins suggests were in favour of amendments in the 2005 Copyright Act, which extends the obligation to gain permission and pay a fee for commercial use of Ghanaian folklore to nationals. Unlike the artists' position outlined above which is based exclusively on an understanding between the state and playwrights at a national level, the lawyers' perspective, that folklore is a state commodity, is influenced by developments in international copyright law.

A key debate that has emerged in Ghana in the wake of the 2005 amendments is what Carlos Sakyi refers to as 'the Berne argument'.<sup>20</sup> He suggests that one of the major justifications for extension of restrictions on the use of folklore to nationals is that the legislators 'talk about the Berne Convention where there should be equal treatment of foreign work and national work'.<sup>21</sup> Indeed, this position was also articulated by Nyadzie, who suggests that: 'in copyright there should not be any discrimination the kind of treatment you give to your nationals you give the same treatment to foreigners'.<sup>22</sup> Logically, therefore, if the state requires that foreigners pay to use national folklore then under the founding principles of the Berne Convention that obligation must be extended to nationals to avoid discrimination; or,

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<sup>19</sup> Nyadzie, interview, 2012.

<sup>20</sup> Sakyi, interview, 2012.

<sup>21</sup> Sakyi, interview, 2012.

<sup>22</sup> Nyadzie, interview, 2012.

as Collins suggests ‘if you apply it to the goose you apply it to the gander’.<sup>23</sup> During the course of the interviews undertaken in Ghana, the ‘Berne argument’ was raised several times and described in various ways as the reason for extending the pecuniary obligation to utilise folklore to Ghanaian nationals. As interviewees from either side of the debate consistently provided this reasoning, it is necessary here to explicate exactly what the ‘Berne argument’ is and what Ghana’s obligations under international copyright law are.

#### **4.2.1. The ‘Berne Argument’**

In 2012, Collins described how the provisions set down in the 2005 Act concerning the restrictions on the use of folklore were largely due to the then Ghanaian Copyright Administrator, Betty Mould-Idrissu:

Betty Mould [Idrissu] was one of the brains behind this law. She was head of the copyright Administration and therefore associated with the folkloric board, which I was associated with in the 90s, when these laws were first worked out by the lawyers and opposed by the artistic members. So when [President] Mills got in [in 2008] she was able to get this law through because it was her baby. She wouldn’t listen to me on this. They would use arguments like ‘the law of equity’.<sup>24</sup>

By the ‘law of equity’, Collins means that there is a perception that Ghana has an obligation to treat foreigners and nationals equally under copyright law. This position was reiterated by Ben Nyadzie who in 2012 suggested that the obligations in the 2005 Act are there because ‘in copyright there should not be any discrimination, the kind of treatment you give to your nationals you give the same treatment to foreigners [...] there should not be any discrimination’.<sup>25</sup> Referring to the protection of folklore specifically, in a paper written in 2002 Arthur Amagatcher suggested that ‘if folklore is to be treated under copyright law, then logically there can be no discrimination against nationals of other countries who are parties to the TRIPS Agreement or the various UNESCO/WIPO administered treaties’.<sup>26</sup> Moreover, in February 2014, Nyadzie was even more explicit, suggesting that if a state ‘is a member of the Berne Convention it cannot allow nationals to [utilise folklore] and

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<sup>23</sup> Collins, interview, 2012.

<sup>24</sup> Collins, interview, 2012.

<sup>25</sup> Nyadzie, interview, 2012.

<sup>26</sup> Amagatcher, ‘Protection of folklore by Copyright’, 36.

ask foreigners to pay’.<sup>27</sup> These arguments clearly suggest that the provisions for the utilisation of folklore in the act derive from the fact that if Ghana wishes to charge foreigners for use of its folklore it is obligated under the Berne Convention to treat nationals in the same way. In this section, I consider three principles of international copyright law: the principle of non-discrimination, minimum standards and national treatment and whether these principles confirm the position articulated by the ‘lawyers’.

#### **4.2.2 What are the principles of non-discrimination, national treatment and *substantive minima*?**

The three principles of non-discrimination, national treatment and minimum standards are intertwined in international copyright law and, fundamentally, work together to deliver substantive parity of protection for rights holders. The basis for this is what Ricketson and Ginsburg refer to as the ‘human-centred notion of authorship’, which they suggest is ‘presently enshrined in the Berne Convention and embodies a fundamental human right, namely that of the creator over the work he or she creates’.<sup>28</sup> As well as the human-centred reasons for ensuring that authors are able to exercise rights over their work, another significant reason for according authors protection under copyright laws are ‘arguments based on incentive and promotion of the public interest’.<sup>29</sup> Thus, through working together to ensure the protection of authors’ rights, non-discrimination, national treatment and minimum standards are also concerned with ensuring that artists are incentivised to create new works.

As Lewinski suggests, international treaties in general are based upon the principle of formal reciprocity; this she explains means that ‘[e]very contracting party agrees to assume the treaty obligations because the other contracting parties do the same’.<sup>30</sup> In copyright, non-discrimination is the principle under which states agree to treat

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<sup>27</sup> Nyadzie, interview, 2014.

<sup>28</sup> Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 370.

<sup>29</sup> Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 370.

<sup>30</sup> Silke von Lewinski ‘Intellectual Property, Nationality and Non-discrimination’. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_6.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_6.pdf), 2. Accessed: 22/3/14.

foreign copyright holders in the same manner as they do their nationals. Thus, authors within the Berne Union are ‘able to benefit everywhere from their natural property’ and are not discriminated against for not being nationals of the country in which protection is sought. The mechanism by which this is achieved is national treatment (sometimes known as ‘mutual recognition’),<sup>31</sup> which is ‘a rule of non-discrimination’<sup>32</sup> and was developed as a means of guaranteeing that ‘authors’ rights were also recognized in foreign countries’.<sup>33</sup>

National treatment was incorporated into the original 1886 Berne Convention<sup>34</sup> and, according to WIPO, forms ‘the cornerstone of international IP law’.<sup>35</sup> WIPO describes how national treatment works in the following terms:

Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals.<sup>36</sup>

As such, the beneficiaries of national treatment are either nationals of one of the

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<sup>31</sup> WIPO, ‘Submission by the African Group: Objectives, Principles and Elements of an International Instrument, or Instruments, on Intellectual Property in Relation to Genetic Resources and on the Protection of Traditional Knowledge and Folklore’ (Geneva, 2004) 3. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_6/wipo\\_grtkf\\_ic\\_6\\_12.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_12.pdf). Accessed 3/4/14

<sup>32</sup> Goldstein and Hugenholtz, *International Copyright*, 99.

<sup>33</sup> Lewinski ‘Intellectual Property, Nationality and Non-discrimination’, 2.

<sup>34</sup> Both the Berne Convention and the UCC ‘integrated the principle of *lex loci protectionis*’ or the ‘principle of the country of protection’ as opposed to ‘the principle of the country of origin’ (or mutual reciprocity). Lewinski, *International Copyright Law and Policy*, 7.

<sup>35</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’ (Geneva, 2005) 16. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_8/wipo\\_grtkf\\_ic\\_8\\_6.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_6.pdf). Accessed 9/4/14. The Berne Convention (Article 5) provides that ‘(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention,’ and that ‘protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.’ The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that each WTO Member “shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property” (Art.3). Another related mechanism for affording access to a national system is ‘assimilation’ to an eligible nationality by virtue of residence. For example, the Berne Convention (Art.3(2)) provides that authors who are not nationals of one of the countries of the [Berne] Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.’ According to commentary on the Convention, this paragraph ‘covers the special case of stateless persons and refugees.’ (See also Article 3 of the Paris Convention for a similar ‘assimilation’ mechanism).

<sup>36</sup> See: ‘Treaties and Contracting Parties: Berne Convention’. Available at: [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html), accessed 22/02/14.

countries of the Berne Union, or those who have their habitual residence in one of the countries of the Union.<sup>37</sup> Article 5(1) of the Berne Convention provides that, with respect to protected works outside their country of origin: '[a]uthors shall enjoy [...] the rights which th[e] respective laws [of Berne Union members] do now or may hereafter grant to their nationals'.<sup>38</sup> As such, under the principle, authors' rights are guaranteed now and in the future in all countries of the Union. Moreover, as Ricketson and Ginsberg suggest, national treatment is not subject to formalities but, like copyright, is automatically applied to every eligible work created by a citizen of a member of the Union.<sup>39</sup>

The advantage of national treatment as a mechanism, as Bruneis notes, is that 'national courts have only to apply their own laws'.<sup>40</sup> Ricketson and Ginsburg point out that Article 5(3) of the Berne Convention makes explicit that the protection of works within their country of origin is 'governed by domestic law, with no requirement that the 'rights specially granted' by the Convention also be accorded to these works'.<sup>41</sup> Thus, if an author from one country seeks to enforce protection for their work in a second states, then the domestic copyright laws of the second country will apply, not the terms set down in the Berne Convention. The only exception to national treatment is 'the duration of protection where the rule of comparison of terms applies'.<sup>42</sup>

Originally, Lewinski notes that minimum standards (substantive minima) were established as a 'second pillar' of protection in international copyright law in order to establish some uniformity of protection.<sup>43</sup> Lewinski suggests that the principle of

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<sup>37</sup> It also applies to authors who are not nationals of one of these countries, for their works first published in one of those countries (or simultaneously in a country outside the Union and a country of the Union). Lewinski 'Intellectual Property, Nationality and Non-discrimination'. 2.

<sup>38</sup> Robert Brauneis, 'National Treatment in Copyright and Related Rights: How Much Work Does it Do?', *GW Law Faculty Publications & Other Works*, (2013), 810. Available at: [http://scholarship.law.gwu.edu/faculty\\_publications/810](http://scholarship.law.gwu.edu/faculty_publications/810). Accessed 5/5/14.

<sup>39</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 309-310.

<sup>40</sup> Brauneis, 'National Treatment in Copyright and Related Rights: How Much Work Does it Do?' 810

<sup>41</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 310.

<sup>42</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 303.

<sup>43</sup> Ricketson and Ginsburg suggest that the phrase 'rights especially granted', though not defined in the Convention, refers to the 'corpus of authors rights' (articulated in articles 6bis, 8,9,11,11bis,11ter,12,13,14, and 14ter, as well as article 5.2 which concerns a lack of formalities and article 7 which concerns duration of protection). Taken together these articles have the effect of

minimum standards was added in order to ‘guarantee to foreign works a certain level of protection laid down in the [Berne Convention], irrespective of the national law of the country for which protection was sought’.<sup>44</sup> Accordingly, where there were differing terms of protection between two states then the default protection is that mandated by the Berne Convention. Thus, though in most matters national treatment requires that the domestic law of the country in which protection is sought be applied, as Ricketson and Ginsberg suggest, in terms of the duration of copyright (for example if one state offers life plus fifty years and another allows for life plus seventy years) the principle of minimum standards apply. Accordingly, copyrightable works are protected for no less than life plus fifty years following the death of the author in all the countries of the Berne Union.<sup>45</sup>

As well as national treatment being provided under the Berne Convention, Brauneis notes that the five major international treaties concerning copyright and related rights (Berne, Rome, TRIPs, WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) all contain ‘the obligation of national treatment’.<sup>46</sup> Ghana became a signatory to the TRIPs Agreement in 1995.<sup>47</sup>

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establishing a ‘minimum level of protection that is uniformly available to authors in all countries of the Union other than the [country of origin] of their works’. However, in practice, Ricketson and Ginsburg suggest, this corpus of rights ‘almost always overlap’ with those accorded by the application of national treatment as states will ‘usually accord the same rights to its own nationals, and will therefore usually grant identical protection both to its own authors and to Union authors’. (Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 311).

<sup>44</sup> Silke von Lewinski, *International Copyright Law and Policy*, 100.

<sup>45</sup> Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 310.

<sup>46</sup> Brauneis, ‘National Treatment in Copyright and Related Rights’, 811.

<sup>47</sup> See: ‘Ghana Copyright and Related Rights’. Available at: [http://www.wipo.int/wipolex/en/results.jsp?countries=GH&cat\\_id=11](http://www.wipo.int/wipolex/en/results.jsp?countries=GH&cat_id=11). Accessed 10/5/14. Ricketson and Ginsburg describe the TRIPs Agreement as the ‘steel in the spine’ of international copyright law. In 1995, WIPO and the TRIPs Agreement negotiators signed a formal ‘agreement of co-operation’, which, according to Ricketson and Ginsburg, ‘can be seen as implicitly recognizing the different roles played by the two organizations: WIPO as the source of technical expertise and deliberation, with WTO as the forum in which issues of enforcement and compliance can be explored’ (Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 162.) As early as May 1990 during the negotiations for the TRIPs Agreement, a group of fourteen developing countries including Nigeria, Egypt and Tanzania, put forward The “African” G-14 Proposal which emphasised ‘the need for the TRIPs Agreement to respect and safeguard national legal systems traditions of intellectual property’ (Adewopo, ‘The Global Intellectual Property System and Sub-Saharan Africa’, 758). African countries accounted for over half of the TRIPs signatories from developing countries. At an international level the implementation of TRIPs in 1995 crystallised a new global copyright regime, which was bound to the 1971 Paris Revisions of the Berne Convention and effectively made the UCC obsolete. Currently there are 153 members and, with the exception of Liberia which holds observer status, all other West African countries are signatories. Ricketson and Ginsburg suggest that the TRIPs agreement seeks to ‘build upon and clarify’ the standards laid down in the Berne Convention and, as a trade oriented

As a signatory to the Berne Convention and the TRIPs Agreement, the argument put forward by Nyadzie, Amagatcher and Mould-Iddrissu that international copyright law obligate Ghana to treat foreigners and nationals equally appears to make sense. On its face, the principle of national treatment applied to the situation in Ghana would suggest that Ghana's copyright regime has an obligation to guarantee parity of protection for foreigners and nationals with regards to use of folklore.

As Ghana's copyright law protects the national rights holder in folklore (the president) then it must also protect the rights of foreign IP holders and that protection must comply with the minimum standards of protection set down in the Berne Convention. Moreover, in terms of non-discrimination, if Ghanaian law prevents any use of folklore without the express permission of the President's agency (the National Folklore Board) by foreigners, then, according to Nyadzie's argument, it must also protect those rights against nationals. However, before that conclusion can be confirmed, there are two significant points that must be investigated. Firstly, what are the minimum standards set down in Berne for the protection of folklore? And, secondly, is folklore as a category of protected work covered by the principle of national treatment?

#### **4.2.3. How national treatment applies to the protection of folklore**

As established in the previous section, the principle of national treatment extends to

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agreement, it 'seeks to eliminate the barriers to trade that may be caused by insufficient protection of intellectual property rights in different countries' (Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 154). May L Harris notes that '[i]f a country wants to become a member of the 153-member (August 2009) World Trade Organisation and become active in world trade, it must also sign the other leading international agreement regulating copyright, the 1994 TRIPs Agreement'. (May L Harris, 'TRIPs: Historical Overview and Basic Principles', *Journal of Contemporary Legal* Vol.12, (2001-2002), 456). Through its association with the WTO, the TRIPs Agreement, in the view of Michael Birnhack, puts an unequivocal emphasis on trade and intellectual property as commodities. Writing in 2006 he suggests that: 'old copyright law was a delicate balance of the interests and rights of authors (past present and future), and the interests and rights of users and the public in general [whereas TRIPs and the new global copyright order] goes hand in hand with the ongoing commodification of information and the dramatic expansion of copyright law'. Further, he suggests that 'these two processes, the commodification of information and the expansion of copyright, work to reinforce each other (Michael Birnhack, 'Global Copyright, Local Speech', *Cadzo Arts and Entertainment Law Journal*, Vol., 24 (2006), 492).

works protected under the Berne Convention. Ricketson and Ginsburg note that this refers to works ‘enumerated in article 2(1), as well as those dealt with in the other paragraphs of article 2’.<sup>48</sup> Article 2(1) sets down protection for “literary and artistic works”, which

include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.<sup>49</sup>

Ricketson and Ginsburg note that the words ‘such as’, which precede the enumeration ‘indicate that it is not an exhaustive list’,<sup>50</sup> and that ‘articles 2 and 2bis<sup>51</sup> leave considerable discretion to Union countries to determine what shall be protected under the head of literary and artistic works’.<sup>52</sup>

However, they also note that the list of works enumerated in article 2(1) ‘is extensive and comprises the principal categories of works historically recognised under the vast majority of national copyright laws’.<sup>53</sup> Therefore, though there may be slight variances between jurisdictions concerning what qualifies as a literary and artistic work, national treatment only extends as far as those works that are conventionally understood to be copyrightable. They add that the ‘mandatory nature of this

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<sup>48</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 408-9

<sup>49</sup> Berne Convention, Paris Act 1971, Art.2(1).

<sup>50</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 409.

<sup>51</sup> Berne Convention, Paris Act 1971: (1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11 (1) of this Convention, when such use is justified by the informatory purpose.

(3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs. Art.2bis.

<sup>52</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 312.

<sup>53</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 408.



requirement has always been strongly maintained, and not disputed by any Union member'.<sup>54</sup>

The parameters drawn by Ricketson and Ginsberg would appear to suggest that folklore is excluded from the list of works to which national treatment applies. However, Paul Goldstein and Bernt Hugenholtz argue that national treatment extends to :

examples of “literary and artistic works” listed in Article 2(1), but also to any subject matter coming within the provision’s inclusive phrase, “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression,” whether the class of subject matter was known at the time of the 1971 Paris Revision or first came into existence at some later time.<sup>55</sup>

As an example of this, they cite computer programmes, which, though originally were considered beyond the scope of the Berne Convention and copyright law, are now ‘protected as “literary works” within the meaning of the Berne Convention.’<sup>56</sup> Thus, if folklore, or expressions of folklore, can be said to have been considered as a ‘production in the literary, artistic and scientific domain’ at the time of the 1971 Paris Revisions, then it is possible to make the case that folklore, as with computer programmes, can be considered to be included under Art.2(1), even though not it is specifically enumerated, and consequently subject to national treatment.

However, as discussed in Chapter 1, when the Indian delegation first raised the question of providing protection for folklore as part of the 1967 Stockholm Revisions of the Berne Convention, the Working Group concluded that the insertion of a new article was more appropriate. As such, in 1967 folklore was not considered by the member states of the Berne Union to fit comfortably amongst works historically recognised as productions in the literary, artistic or scientific domain. This was also the case in the Paris Revisions of 1971 when the provision for the protection of anonymous or pseudonymous works was retained. As such, I would argue that folklore is *not* included as a listed work under Art.2(1) and Ricketson and Ginsburg

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<sup>54</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 409.

<sup>55</sup> Goldstein and Hugenholtz, *International Copyright*, 104.

<sup>56</sup> Goldstein and Hugenholtz, *International Copyright*, 104-105.

suggest that ‘an unlisted work’s potential status in theory as a ‘literary or artistic work’ for the purposes of article 2(1) has meant very little, if anything, in practice’.<sup>57</sup> Indeed, they point out that ‘even though article 2(1)’s broad language reaches “every production ... whatever may be the mode or form of its expression”, and even though the ensuing list is illustrative, not limitative, ‘enumeration’ remains the only sure guarantee of protection under the Convention’.<sup>58</sup> As such, though folklore is the apparent subject of Art.15(4), the fact that it is not enumerated in Art.2(1) and was not considered to be a production in the literary, artistic or scientific domain by the Paris Revisions conference, is a significant impediment to the argument that folklore is a category to which the principle of national treatment applies.

However, as previously discussed, WIPO continues to pursue the establishment of international standards of protection of folklore through copyright. Thus, it remains possible that the ultimate conclusion to these negotiations will be the inclusion of folklore as an enumerated work, which would then establish associated obligations of national treatment. Moreover, it is arguable that folklore is already on the trajectory towards enumeration. As Ricketson and Ginsburg observe, the admission of a new category to the list of protected works has usually been preceded by a long negotiation.<sup>59</sup> Prior to a new works inclusion ‘some kind of conditional or lesser level of Conventional protection has been first accorded before ‘list’ status has been achieved at a later revision’.<sup>60</sup> Thus, as the negotiations to include folklore as a protected category noted in Chapter 1 demonstrate, having gone through a series of formative stages for protection, folklore could at some time in the future progress to ‘list’ status. As such, though it clearly possible that national treatment may at some time extend to folklore, it is difficult to conclude that it does at this time under the requirements set down in the Berne Convention. As Ricketson and Ginsburg observe: ‘[t]he only mechanism provided by the Convention to achieve uniformity among Union members on [national treatment] is by a revision conference which amends article 2 so as to include the work in question’.<sup>61</sup>

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<sup>57</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 409.

<sup>58</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 410.

<sup>59</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 410.

<sup>60</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 409.

<sup>61</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 410.

Though the question of whether folklore is an enumerated work is significant in terms of the Berne Convention, in terms of the TRIPs Agreement, Goldstein and Hugenholtz point out that Art. 3(1) of TRIPs ‘ties its national treatment obligation to “the protection of intellectual property”’,<sup>62</sup> rather than to a list of enumerated works. Though they acknowledge that TRIPs Art. 3(1)<sup>63</sup> does not require member states to treat foreigners and nationals identically, ‘it does require that their treatment be “no less favourable”’.<sup>64</sup> The definition of the object of national treatment as ‘intellectual property’ rather than ‘literary and artistic works’ is, Goldstein and Hugenholtz suggest, ‘more likely to encompass borderline literary and artistic works than is the Berne Convention’.<sup>65</sup> However, they suggest that the language of the TRIPs Agreement and the Berne Convention ‘fails definitively to resolve a chronic quandary: whether new classes of subject matter fall within the national treatment obligation’.<sup>66</sup> Accordingly, though folklore, as a borderline literary and artistic work, may trigger obligations to observe national treatment to member states under TRIPs, this is far from settled.

Though folklore as category of copyrightable works is not clearly subject to national treatment under either the Berne Convention or the TRIPs Agreement, it is perhaps possible to argue that there is space within the definitions of enumerated works to allow for folklore. Though folklore is not a listed work under the Berne Convention, Ricketson and Ginsburg suggest that the ‘enumeration of work in article 2(1) does not conclude matters’.<sup>67</sup> This, they argue, is because none of the enumerated terms in the Berne Convention are defined. As such, the meanings of the terms such as ‘books’ and ‘drawings’ ‘are left to be determined by national law’.<sup>68</sup> Though they suggest that substantial divergence between states is unlikely as ‘states usually enter

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<sup>62</sup> Goldstein and Hugenholtz, *International Copyright*, 105.

<sup>63</sup> Agreement on Trade-Related Aspects of Intellectual Property: ‘Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS’. Art.3(1).

<sup>64</sup> Goldstein and Hugenholtz, *International Copyright*, 106.

<sup>65</sup> Goldstein and Hugenholtz, *International Copyright*, 106.

<sup>66</sup> Goldstein and Hugenholtz, *International Copyright*, 106.

<sup>67</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 411.

<sup>68</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 411.

international arrangements only if they share a common set of assumptions about the goals that they wish to achieve with their treaty partners',<sup>69</sup> it can be argued that across Africa there is at least a general agreement that folklore should be protected.

To explore this further: in his essay 'Protection of African Folklore by Copyright Law: Questions that are raised in Practice', the French copyright academic Laurier Yvon Ngombe presents a hypothetical scenario in order to demonstrate how the principle of national treatment protects folklore against misuse by non-nationals:

a person living in Gabon reproduces on Gabonese territory a folkloric song from Burkina Faso, and that exploitation of this work is not authorized. The competent Gabonese authority (or in case of inertia of the Gabonese authority, the Burkinabe authority) would be able to lay the matter before a Gabonese court. As Burkina Faso and Gabon include works of folklore among protected works, the question of whether the work in dispute is protected or not will not be raised regardless of the applicable law [...] in the case of infringement of copyright in folklore that occurs in a country where the protection of folklore is not secured under copyright law...we may first cite article 15(4) of the Berne Convention, which refers to the country of origin. Applying this rule, in a case of infringement even in a country that does not protect works of folklore, protection would be assured'.<sup>70</sup>

As suggested, this would not be the case. Even though both countries are members of OAPI and signatories to the Bangui Agreement, currently, the Burkinabe authorities would only have the ability to prosecute the Gabonese artist if they were to try to sell or expose for sale copies of the work in Burkina Faso under the terms set down in Burkina Faso's own copyright law. They would not be able to call upon Art.15(4) of the Berne Convention and protection would not be assured in a country that does not provide protection for folklore.

However, though Ngombe's suggestion that protection would be assured 'even in a country that does not protect works of folklore' is not supported, a further point to be considered is put forward by Ricketson and Ginsburg who suggests that 'if Union country A decides that a new category of work [such as folklore] is a literary or artistic work entitled to protection under its own law, *it is bound* to accord the same

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<sup>69</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 411.

<sup>70</sup> Laurier Yvon Ngombe, Protection of African Folklore by Copyright Law: Questions that are raised in Practice, *Journal Copyright Society of the U.S.A.*, Vol.51 (2003-2004) 442.

protection to authors from other Union countries under the principle of national treatment, with all the consequences that this entails with respect to such matters as duration and scope of rights. However, this can only be a unilateral national judgement, and there is no onus on other Union countries to adopt a similar position'.<sup>71</sup> To illustrate this point: The U.S.A includes sound recordings as a category of literary and artistic work but they are not listed under Art.2(1) of the Berne Convention.<sup>72</sup> Consequently, the U.S.A must afford protection for non-nationals under the same terms as those it extends to its nationals. Therefore, if a state decides to list folklore as a new category of literary or artistic work then it would be compelled to treat foreign rights holders of folklore similarly. What is important is whether folklore is listed as a literary or artistic work. As noted previously, under Ghana's 2005 Copyright Act folklore is not listed under s.1 'works eligible for copyright', but separately under s.4(1). As such, in Ghana, folklore is not protected as a literary or artistic work but as a separate category to which the obligations of national treatment do not automatically apply. In the West African sub-region, this is also true of Burkina Faso,<sup>73</sup> Cote d'Ivoire,<sup>74</sup> Niger,<sup>75</sup> Nigeria<sup>76</sup> and The Gambia.<sup>77</sup>

Brauneis suggests that only 'specifically listed or enumerated works must be protected by Berne Union members, and are subject to obligations regarding the absence of formalities, substantive minimums, and national treatment'.<sup>78</sup> Folklore could be said to fall under enumerated works if, for example, a collection is published. Then the rights associated with that collection are protected and the author would receive protection for a minimum of life plus fifty years. If the work is published anonymously, as noted in Chapter 1, the term of protection is fifty years from the

<sup>71</sup> Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 410.

<sup>72</sup> Goldstein and Hugenholtz discuss whether the inclusion of sound recordings as an enumerated work with in the U.S. Copyright Act (U.S. Copyright Act, 1976, s.102(a)(7)) obligates the U.S. to extend protection to nationals of other countries even though such works are not listed in Art. 2(1) of the Berne Convention. (Goldstein and Hugenholtz, *International Copyright*, 101-102).

<sup>73</sup> Burkina Faso, 2012: 'The following shall also be protected as works: - [...] expressions of folklore', (Art. 7).

<sup>74</sup> Cote d'Ivoire, 1996, s.12.

<sup>75</sup> Niger, Decree No. 93-027 of March 30, 1993 on Copyright, Related Rights and Expressions of Folklore: 'The following shall also be protected as works (ii) works and expressions of folklore (iii) collections of works, expressions of folklore [which] owing to the selection and arrangement of their components, are original', Art.5(1)(3).

<sup>76</sup> Nigeria Copyright Act, 1999, s.28.

<sup>77</sup> The Gambia Copyright Act, 2004, s.8.

<sup>78</sup> Brauneis, 'National Treatment in Copyright and Related Rights', 810.

date of publication. The same would apply to folklore that has been written or recorded as part of an archiving process. However, this is not straightforward. In order to publish such a collection in Ghana, the editor would have to clear the rights with the National Folklore Office and pay a fee. Under the Berne Convention, such a work would be protected under Art.2(5),<sup>79</sup> without prejudice to the copyright that already resides in folklore. Protection would extend to the versions of the folkloric tale published in that collection and not to the underlying myth, the copyright in which, in Ghana, would still reside with the President.

Though securing remedies for states that feel that their national folklore has been subject to illicit use, has been part of copyright discourse since the Bolivian Request of 1971, under international law there is currently no recourse available to states. The level of confusion surrounding how national and international laws interrelate when it comes to the copyright protection of folklore has not been lost on WIPO. At the eighth session of the IGC in 2005 delegates noted that it ‘may be helpful for the Committee to clarify how legal obligations, standards, principles or objectives articulated at the international level can and should interact with national laws and other measures applied at the domestic level’.<sup>80</sup> Though, as yet, little progress has been made in this area.

Thus, in Ghana, the argument that the reason for extending the pecuniary obligation to access folklore is due to its obligations under international law is, in practical terms, unfounded. However, that does not discount the fact that Ghana has the right to choose whether it treats foreigners and nationals similarly. Though there is nothing that compels Ghana to apply the principle of non-discrimination to folklore, equally, there is nothing in terms of copyright law that prevents them. However, it is

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<sup>79</sup> Berne Convention, Paris Act, 1971: ‘Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections’, Art.5.

<sup>80</sup> WIPO, ‘Practical Means of Giving Effect to the International Dimension of the Committee’s Work’, 10 .

important to acknowledge that the extension of the pecuniary obligation to access folklore to nationals is a choice rather than an obligation.

#### **4.2.4. Further factors that contribute to the view of folklore as state property in Ghana**

As well as the perception that international law obliges Ghana's copyright law to charge nationals to utilise Ghanaian folklore, there are other significant contributory factors specific to Ghana that have influenced the understanding of folklore as revenue generating commodity that perhaps explain the motivations behind the current terms of protection for folklore set down in the 2005 Act. I discuss two such factors here, one of which relates to the raising of revenue through foreigners' use of folklore in the 1990s and one that is rooted in Ghana's colonial experience.<sup>81</sup>

When the changes to the 1985 Copyright Act were first proposed in 1997, Sakyi suggests that a group of artists and concerned members of the creative industries formed The Committee on Misgivings of Music Industry Practitioners (CMMIP).<sup>82</sup> The CMMIP lobbied against the amendments and managed to hold up the law coming into force until 2010. Their concerns were that the proposed law would prohibit Ghanaian artists who routinely made use of Ghanaian folklore from continuing to do so and so disrupt both individual creative practice and the wider cultural economy in Ghana. However, in a repost in 2001, Amagatcher argued that the CMMIP were 'already used to individual ownership of property. It therefore seems anachronistic to apply the theory of communal ownership to something that

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<sup>81</sup> As explored in the previous chapters, the impact of colonialism on the political and cultural agency of folklore in Ghana was profound. Though I am unable to discuss at length the conflict between traditional communities and the modern states of which they are now a part in terms of folklore, there are interesting parallels between the conflicting claims on folklore that are currently present in Ghana and the differing colonial and indigenous views of property. The use of land and property rights as a means to critique intellectual property rights is not unusual. See, for example, Michael Brown, 'Why Property and Democracy are not Always Allies'.

<sup>82</sup> The CMMIP formed in the wake of proposed amendments to the 1985 Copyright Act by prominent Ghanaian musicians including Collins and Carlos Sakyi. The Committee was concerned with three amendments particularly: a proposal to outlaw non state appointed collecting organisations, amendments to the regulation of works in the public domain by the state, and the extension of the pecuniary obligation to access Ghanaian folklore to Ghanaian nationals. (Sakyi interview, 2012).

they have been using all along as of right for their creative activities'.<sup>83</sup> At the time Amagatcher was head of the Ghana Copyright Office and his line of argument suggests that rather than being concerned with contemporary cultural practice and artists' continued ability to utilise folklore (or even with the rights of traditional communities to regulate such use), in the view of the Copyright Office, folklore was already seen as a commodity with associated property rights.

That Amagatcher's argument draws parallels between folklore as a communally held body of expressions and the change in status of land rights from the pre-colonial system of customary law to Ghana's contemporary legal system is worth considering. Amagatcher's argument is that 'in the course of the last century Ghanaian courts have recognised this usufructary title [which has] ripened into a full blown freehold – leaving the vestiges of communal ownership only in the form of the allodial or supreme title'.<sup>84</sup> Essentially the living generation were stewards who held property in trust for the following generation and were obliged to do so by the knowledge that the previous generation had done the same for them. This obligation, as well as taboos attending the offence of the ancestors, meant that property, including Amagatcher suggests literary and artistic works, was, in effect, owned by the previous and following generation rather than the present one. As such, property could not be sold but simply maintained and passed on. The introduction of English law during the colonial period promoted the notion of individual property rights and these rights, as opposed to communal rights, were protected.<sup>85</sup> However, with the influence of colonialism and the introduction of the common law system,

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<sup>83</sup> Amagatcher 'Protection of Folklore by Copyright', 38.

<sup>84</sup> Amagatcher 'Protection of Folklore by Copyright', 38.

<sup>85</sup> The nineteenth century Ghanaian lawyer John Mensah Sarbah, who wrote extensively on Ghanaian customary law, states that originally customary law and English law were in binary opposition: In English law, individual property is the rule, but [...] In this country joint property is the rule, and must [in customary law] be presumed to exist in every case until the contrary is proved. If an individual holds property in severalty – that is, as sole owner and possessor – it will in the next generation relapse into a state of joint tenancy. (Mensah Sarbah, *Fanti Customary Law*, (London: Frank Cass and Co., 1968, 61-2).

Ghana's dual system of law, officially a combination of customary law and English common law recognises private ownership of property and 'has been applied by the courts since the implementation of the Supreme Court Ordinance of 1876'. (Joseph B. Akamba and Isidore Kwadwo Tufour, 'The Future of Customary Law in Ghana', *The Future of African Customary Law*, eds., Jeanmarie Fenrich, Paulo Galizzi, Tracy E. Higgins, (Cambridge: Cambridge University Press, 2012), 204) Prior to this even the ruling classes did not own property but held it in trust for the people, as Irene Sinitsina describes: 'Stool property was simultaneously the property of an ethnic group and of the ruling family'. (Irene Sinitsina, 'African Legal Tradition: J.M. Sarbah, J.B. Danquah, N.A. Ollennu', *Journal of African Law* Vol. 44, (1987), 49).



Amagatcher suggests that attitudes to property have radically altered.<sup>86</sup> It is against this background, he suggests, ‘that we must view the reaction of the Committee on Misgivings of Music Industry Practitioners (CMMIP)’.<sup>87</sup> Drawing a direct parallel between land ownership and creative works, Amagatcher claims that traditionally ‘Ghanaians did not see the creation of literary, musical or artistic work as generating any property rights’<sup>88</sup> as their ‘notions of property were very basic’.<sup>89</sup> Now, however, just as individual ownership of property is the accepted norm, so the same is true of literary and artistic works and, by extension, folklore.

Aside from the status of property rights,<sup>90</sup> which remains a problematic issue between the state and traditional rulers in Ghana,<sup>91</sup> Amagatcher’s argument that the CMMIP based its opposition to the amendments on folklore on an out-dated understanding of property, crystallises the difference between the two sides in this dialectic. Through framing the argument in these terms, Amagatcher clearly views folklore as individually held property and thus something that either belongs in the public domain or can be protected against exploitation. As folklore had already been subject to copyright protection in Ghana for nearly twenty years when Amagatcher made his argument, the conceptualisation of folklore as private property from the perspective of the ‘lawyers’ was already well established. Story notes that ‘courts everywhere treat copyright as private property’.<sup>92</sup>

Amagatcher’s argument suggests that by 2001 there was a perception in Ghana that folklore was a valuable commodity and that its value was not contingent on

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<sup>86</sup> For an in-depth analysis of the transition of land rights in Ghana see Kathryn Firmin-Sellers, *The Transformation of Property Rights in the Gold Coast* (Cambridge: Cambridge University Press, 1996). For a first-hand account of the status of property rights in nineteenth century West Africa see Mary Kingsley, *West African Studies* (London: Frank Cass & Co. Ltd) Chapter 18.

<sup>87</sup> Amagatcher, ‘Protection of Folklore by Copyright’, 38.

<sup>88</sup> Amagatcher, ‘Protection of Folklore by Copyright’, 38.

<sup>89</sup> Amagatcher, ‘Protection of Folklore by Copyright’, 38.

<sup>90</sup> Alan Story presents several objections to the comparison of copyright with land rights many of which are applicable to Amagatcher’s argument on folklore. For example, Story points out that ‘physical property is scarce. There is only so much of it for us to use. Expressions and ideas, by contrast, are not scarce’. (Story, *An Alternative Primer on national and international copyright law in the global South*, 14).

<sup>91</sup> Interview with Nii Amarkai, King Maker of the Ga Nation, conducted September 2012. Also see Richard Rathbone, *Nkrumah and the Chiefs: The Politics of Chieftaincy in Ghana, 1951-1960*, (Oxford: James Currey, 2000).

<sup>92</sup> Story, *An Alternative Primer on national and international copyright law in the global South*, 13.

reworking by an artist. Amagatcher's position is not anomalous but is reflected in interviews undertaken for this research. In 2012 Nyadzie described Ghanaian folklore as 'just like a gold mine. A gold mine may be sited within a community [but] it belongs to the whole nation'.<sup>93</sup> As such, Nyadzie holds that the nation has the right to gain financially from the exploitation of folklore as state resource. Moreover, in 2012 Abraham Henry Lemaire, Acting Head of the National Folklore Board suggested that 'just like any other raw material, folklore [is] an economic asset for developing countries'.<sup>94</sup>

Though this view of folklore appears reductive, as it ignores both the function of folklore within Ghana as a resource which the state encouraged artists to use and the associated development of the creative industries, a significant factor that informed this position and continues to contribute to it, is the state's experience of raising substantial revenue from foreigners' use of folklore in the 1990s. As mentioned previously, the 1985 Copyright Act only protected against the use of Ghanaian folklore by foreigners and was, according to Collins, a mechanism employed 'to protect against the first world plundering the third world'.<sup>95</sup> The aim of the 1985 Act regarding folklore was to prevent the free use of Ghanaian folklore by non-nationals without the need for acknowledgment or compensation. Collins recalls that the law originally had the affect of raising 'a few thousand dollars from JVC who were making films on African music, and then [...] a couple of NGOs who felt guilty'.<sup>96</sup> However, by the late 1990s, it had also raised approximately \$70,000 in royalties from the musician Paul Simon.

Simon released his album *The Rhythm of the Saints* in 1990 as a follow up to the hugely successful *Graceland*. Track nine, *Spirit Voices*, took the rhythm and melody from the Ghanaian High-Life song *Yaa Amponsah*. *Yaa Amponsah* is a song about a beautiful dancer that was recorded by Kwame Asare and the Kumasi Trio in 1928 and which, at the time of recording *Spirit Voices*, Simon believed to be in

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<sup>93</sup> Ben Nyadzie, interview, 2012.

<sup>94</sup> 'National Folklore is Sacred', <http://ghanadistricts.com/news/?read=37130>. Posted 26 August 2010. Accessed: 5/9/2012.

<sup>95</sup> Collins, interview, 2012.

<sup>96</sup> Collins, interview, 2012.

copyright. As a result he contacted the Ghanaian Embassy in New York who advised him to send the initial \$16,000 royalty payment to the Ghana Copyright Office.<sup>97</sup> The Office came under the National Commission on Culture whose Director was Mohammed ben Abdallah. Abdallah organised a committee of experts to investigate whether the song did in fact belong to Asare. The committee found that there had been known versions of the song that predated Asare's recording by at least ten years. As the composer of the original version of the song was unknown, it was decided that *Yaa Amponsah* was a work of folklore and so the money provided by Simon, and all subsequent royalties, reverted to the state as the rights holder.<sup>98</sup>

Furthermore, Collins notes that the monies raised directly supported the running of the National Folklore Board.<sup>99</sup> This has arguably led to a funding model that now requires revenue to be raised from the use of folklore in order to maintain the competent authority. As Ben Nyadzie suggests:

we have to promote the folklore, we have to preserve it and we need money to do all these things [...] it means that if somebody wants to use it then they have to pay and what they pay will be set aside for that community [and] part of it will be used for the Folklore Office for administrative purposes.<sup>100</sup>

Accordingly, a significant reason behind extending the obligation to pay for the use of folklore to Ghanaian nationals is based on both the realisation of the economic potential of folklore in the case of Simon, and the need for money to continue to be raised in order to fund the operations of the folklore board. Though, as mentioned, this fails to acknowledge the historic importance of folklore within Ghana's politico-cultural landscape, it does acknowledge, and seek to profit from the fact, that folklore is routinely used in Ghana. In 2012, Lemaire made clear that the National Folklore Board expected to increase the level of revenue raised from use of folklore in Ghana. He stated that though 'hundreds of organisation used folklore materials in the country [...] only ten of such organisations had registered with the NFB and paid royalties'.<sup>101</sup> Moreover, despite the efforts of the National Folklore Board to carry out its mandate, even when pursued 'some commercial entities refused to adhere to

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<sup>97</sup> Collins, interview, 2012.

<sup>98</sup> Collins, interview, 2012.

<sup>99</sup> Collins, interview, 2012.

<sup>100</sup> Nyadzie, interview, 2012.

<sup>101</sup> 'National Folklore is Sacred'.

the law and continued to engage in illicit use of folklore materials, thereby depriving the state of substantial revenue'.<sup>102</sup> Thus, though the utilisation of folklore was at one time regarded as virtually mandatory for playwrights, its use under the same terms is now viewed as a criminal act that deprives the state of its rightful revenue.

#### **4.3. Why the act has the potential to disincentive to artists**

Notwithstanding the position articulated by what Collins refers to as 'the lawyers', that Ghanaian folklore is protectable property, one of the key functions of copyright noted earlier is to incentivise creative activity through guaranteeing artists' rights. As such, the question of whether Ghana's copyright legislation incentivises artists, is central to the current debate. In his 2003 paper, 'The Folkloric Tax Problem in Ghana', Collins asks '[c]an copyright kill rather than foster creativity?'.<sup>103</sup> He argues that the terms of protection for folklore in the 2005 Copyright Act have the potential to industrialise and so sterilise creativity as it disenfranchises multiple small creators. In the ten years since his paper, this issue has become central to the debate surrounding the copyrighting of folklore in Ghana as creative industries have come to recognise the potential impact of the implementation of the law.

Though the legislation will not bring a halt to the creative industries in Ghana, as previously discussed, the ability of playwrights to draw upon and rework folklore was a key factor in the development of Ghana's theatre industry. However, the continued use of Ghanaian folklore could potentially become so problematic that, according to Sakyi 'it will discourage the younger folks from using their own folklore [...]. They'll say 'let's use something from the UK or the US' [...]. Then the folklore here will die'.<sup>104</sup> Though this scenario may seem hyperbolic, Collins suggests that it is already taking place. In his 2003 paper he recalls that:

'[o]n one occasion I met a very angry argument at the Copyright Administration office between its officers and a young musician who was releasing a cassette of his local Ga music. He was infuriated as he had been taught these songs by his own grandfather in his family house and could not

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<sup>102</sup> 'National Folklore is Sacred'.

<sup>103</sup> Collins, 'The Folkloric Tax Problem in Ghana', 3.

<sup>104</sup> Sakyi, interview, 2012.

see why he had to be vetted by and pay the state for what he considered to be family and ancestral information'.<sup>105</sup>

The movement towards the commoditisation of folklore in Ghana, through the implementation of the 2005 Act, does have the potential to stifle certain important types of creative endeavour due to an increase in production costs. Fundamentally, as Sakyi suggests, the Folklore Office 'are asking for money upfront from people who don't have it'.<sup>106</sup> This factor is key to unpacking why the 2005 Copyright Act has the potential to disencentivise creative artists in Ghana from creating works that utilise Ghanaian folklore.

The absence of a specific exception that allows for the borrowing of folklore for the creation of a new work, and which would relieve artists from having to pay a fee in advance to use folklore, is a crucial factor for artists' working in Ghana's contemporary market. In 1985, UNESCO produced the *Desirability of Adopting an International Instrument on the Safeguarding of Folklore*. In the report UNESCO notes that 'the levy of a fee for the use of an expression of folklore might act as a curb upon the cultural development of Member States'.<sup>107</sup> Sakyi highlights the complex nature of the current system from the perspective of the artist who, in line with Ghanaian cultural practice, wishes to create a derivative work from folklore, suggesting that '[i]f you have to seek permission [...] you have to pay some money, you don't know how much [because] it's not been fixed yet [...] but you have to pay something [then] it's all going to add to your cost of production'.<sup>108</sup> Sakyi's argument highlights the realities of the Ghana's fragile cultural economy where small increases in the cost of production can have a major impact. As Sakyi explains:

There is an influx of foreign pirated material all over town selling very cheap [so] how will the local legitimate market survive? [...] You come out with an album, you want to sell it for maybe £2 you have a difficulty because someone will tell you 'I just got the whole of Bob Marley's collection, 15, 20 albums for 20p, so why would I buy yours for even a pound? It doesn't make

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<sup>105</sup> Collins, 'The Folkloric Tax Problem in Ghana', 3.

<sup>106</sup> Sakyi, interview, 2012.

<sup>107</sup> UNESCO, *Desirability of Adopting an International Instrument on the Safeguarding of Folklore*, Annex I, 2.

<sup>108</sup> Sakyi, interview, 2012.

sense [to increase production costs], it creates disaffection for artists and it kills the market.<sup>109</sup>

Though the pressures of competing in Ghana's cultural market are more immediate for musicians due to scale of the industry, the effects of the law have the potential to be no less damaging to playwriting in Ghana. The fact that the law exists has not, as yet, altered cultural tastes in Ghana where plays such as *Ananse's Last*, which follow Sutherland's *anansegoro* aesthetic, are still popular. For playwrights trying to access that market, who are still trained in Sutherland's pedagogy, folklore remains a resource for their work. However, as Sakyi explains, there is a real potential that the law will halt this practice:

We're going to stop Ghanaians from writing about Kweku Ananse [...] because they all need permission; they all need to pay some money. It's virtually impossible to get a publisher to publish a book in Ghana because of the cost [...] if they have to pay money before they even get these things out; it's virtually impossible to get them out anyway; it's very difficult to sell them, now you want to add an additional burden? It doesn't make sense.

The uncertainty surrounding how much will be charged for the use of folklore articulated by Sakyi, could be a significant disincentive to new playwrights to follow Ghana's theatrical tradition. Each play written is, in principle, subject to a process that, according to Nyadzie, determines the proportion of folklore in a work, and so the size of the fee required. Nyadzie explains the process that is employed in relation to music:

When you talk about music in Africa [...] the rhythm can be folklore but the music can be copyright. So it means the Folklore Board must differentiate between the folklore and the copyright. So you have one work and there's folklore in it and there's copyright in it as well, so the people who compose the songs must be recognized as the composer [...] but the musical composition in its entirety is both folklore and copyright [...] so when you approach the folklore board you explain to them that 'this is what I am picking from folklore' [...] the drum rhythms are folklore, but the songs that will accompany them are my own songs [...] based on this you will pay for the folklore you are using.<sup>110</sup>

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<sup>109</sup> Sakyi, interview, 2012.

<sup>110</sup> Nyadzie, interview, 2012.

This scenario is consistent with one described by WIPO in the 2002 Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore. In the Report, WIPO suggests that ‘a painting may depict an old myth or legend – the myth and legend are part of the underlying intangible “folklore,” [...] while the painting itself is a tangible expression of that folklore.’<sup>111</sup> If the myth or legend depicted is subject to copyright protection and as long as permissions have been obtained, the artist will own the copyright to the painting without prejudice to the copyright that already subsists in the folklore. When applied to the situation in Ghana, a fee will correspond to the quantity of folklore that the artist intends to use.

However, Nyadzie’s assertion that the Folklore Office will ‘look at the quantum of the folklore that you want to put into your creativity and then they charge you accordingly’<sup>112</sup> is problematic on two levels. Firstly, it assumes that artists will be able to articulate what proportion of their work will draw from folklore prior to creating that work. Secondly, it fails to accommodate what Collins describes as ‘the problem of oral copyright’.<sup>113</sup> As Collins explains: ‘In the West, song composer royalties are divided so that 50 per cent is paid for the lyrics and 50 per cent for the music or melody. In African music rhythm is so important that royalties should be broken down into three components: lyrics (33 per cent), melody (33 per cent) and rhythm (33 per cent). This issue becomes even more complex when one considers that African music is usually polyrhythmic, i.e. uses multiple rhythms and cross melodies’.<sup>114</sup> Collins suggests that rhythms and melodies in one song may derive from multiple ethnic groups and so may be subject to different levels of copyright protection.

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<sup>111</sup> WIPO, Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore (Geneva, 2002) 7. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_4/wipo\\_grtkf\\_ic\\_4\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_3.pdf). Accessed 2/4/14. Also see Palethorpe and Verhulst, “Report on the International Protection of Expressions of Folklore Under Intellectual Property Law” (Study Commissioned by the European Commission), October 2000, pp. 6 to 13.

<sup>112</sup> Nyadzie, interview, 2012.

<sup>113</sup> John Collins, ‘The Problem of Oral Copyright’, *Music and Copyright*, ed. Simon Frith (Edinburgh: Edinburgh University Press, 1993), 147.

<sup>114</sup> Collins, ‘The Problem of Oral Copyright’ (1993), 149.

Though Collins describes this article as ‘provocative’,<sup>115</sup> what his argument suggests is that the Copyright Office’s position that fees will be levied based on the amount of folklore in a derivative work could prove to be a very complex task. In terms of theatre in Ghana, as the dramaturgical and performance elements of *anansegoro* are often present in the written text, fees could potentially be levied in advance on plays that do not contain explicit folkloric characters or stories but simply adhere to the repeated and familiar performance codes of Ghanaian theatre, like those of Nii OkaiKoi Okai and Nii Quartey noted in section 4.1.

This situation is further problematised by the requirement to pay prior to use. Nyadzie suggests that the reason for this is that payment in advance is more reliable:

[the artist] will pay prior to recording the song because if you ask the person to pay after he has sold the song he may not come back. So when you come and you are given the permission, then you pay. If you pay and you don’t use it nobody cares but if you say to the person ‘go and sell and bring the money’, the person will not come back.<sup>116</sup>

Nyadzie’s argument speaks to specific issues of enforcement in Ghana, however beyond that it ignores the economic environment in which Ghanaian artists work. Rather than nobody caring if the artist pays and ultimately does not use the folklore, the artist has made an unnecessary financial loss prior to even beginning to make the work. Instead of risk accruing such a loss, it is more likely in an environment where money is scarce, that artists will simply choose not to utilise folklore.

It is here that the potential disincentivising factor of the law is most apparent. Rather than enabling, or at least allowing, artists to utilise folklore, Ghana’s Copyright Act presents artists with strong reasons not to. Not only could this lead to artists abandoning Ghanaian folklore as a resource, and so problematising cultural practice, it also, from a legal perspective, demonstrates an important area in which Ghana is diverging from the recommendations set down in regional agreements and sub-regional norms.

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<sup>115</sup> Collins, interview, 2014.

<sup>116</sup> Nyadzie, interview, 2012.



#### 4.3.1. Payment requirements in Regional Instruments

The concept of requiring payment for the utilisation of folklore by nationals is not unique to Ghana. In the 1976 Tunis Model Law protection of folklore is provided for under s.6(2): '[w]orks of national folklore are protected by all means in accordance with subsection (1), without limitation in time'.<sup>117</sup> The commentary to s.6 states that '[a]ny user of a work of folklore must, as a general rule obtain authorization from the competent authority'.<sup>118</sup> Also, as noted in Chapter 1, the *Tunis Model Law* introduces the requirement to pay a fee, however it is explicit that '[t]he user shall pay to the competent authority ... percent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore'.<sup>119</sup> Therefore, from the mid 1970s, African states have been encouraged to include in their legislation a provision for requiring permission to utilise folklore. However, this has been qualified by the requirement that payment is based on profit generated rather than a fee prior to use.

Moreover, as noted in Chapter 1, the 1982 Model Provisions allow for the 'borrowing of expressions of folklore for creating an original work of an author or authors'.<sup>120</sup> The commentary on the Model Provisions is explicit in allowing the free use of folklore by authors, stating that:

the utilisation requires no authorization [when] expressions of folklore are borrowed for creating an original work of an author. This important exception serves the purpose of allowing the free development of individual creativity inspired by folklore. The Model Provisions should and do not hinder in any way the birth of original works based on expressions of folklore.<sup>121</sup>

By allowing for the free development of individual creativity inspired by folklore, the Model Provisions represent a clear acknowledgement from WIPO and UNESCO at the time that works derived from folklore form an important part of Africa's

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<sup>117</sup> WIPO/UNESCO, 'Tunis Model Law', s.6(2).

<sup>118</sup> WIPO/UNESCO, 'Tunis Model Law', s.6 commentary.

<sup>119</sup> WIPO/UNESCO, 'Tunis Model Law', s.17.

<sup>120</sup> WIPO/UNESCO, 'Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Use and Prejudicial Actions', (1985), s.4(1(iii)).

<sup>121</sup> WIPO/UNESCO, 'Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Use and Prejudicial Actions', (1985), 20.

cultural economy and their status as model laws suggest that WIPO and UNESCO expected African states to allow artists access to folklore under national law.<sup>122</sup>

Both of these strategies are employed in statutes at the sub-regional, West African level. In the sub-region, there is no uniform requirement for nationals to pay to access national folklore, nor a uniform requirement to pay in advance of use. As mentioned in Chapter 1, Cote d'Ivoire's copyright code states that '[a]uthorization [to utilise folklore] shall be granted against payment of a royalty'.<sup>123</sup> Burkina Faso allows for the free use of national folklore in the creation of 'works derived from expressions of traditional cultural heritage which are part of national heritage such as adaptations, translations, transcriptions, collections with or without agreement', and stipulates that such works must be declared to the collective management organisation only after their creation.<sup>124</sup> The Gambia allows, in the case of nationals, for 'the borrowing of expressions of folklore for creating an original work of an author provided that the extent of such utilisation is compatible with fair practice'.<sup>125</sup> This provision is replicated in Nigeria's Copyright Law,<sup>126</sup> which, though it requires nationals to seek authorisation to utilise folklore,<sup>127</sup> makes no mention of a requirement to pay either prior or post use. Thus, within the sub-region only Ghana sets down in law the requirement for nationals who intend to use folklore to pay a fee in advance of use without also setting down specific exceptions.<sup>128</sup>

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<sup>122</sup> The requirement to pay to utilise national folklore is also present in the two African regional agreements, the Bangui Agreement and the Swakopmund Protocol. See Chapter 1, sections 3.1.1 and 3.1.2 for details.

<sup>123</sup> Cote d'Ivoire, 1996, s.8.

<sup>124</sup> Burkina Faso, 2012: 'The creation of works derived from expressions of traditional cultural heritage which are part of national heritage such as adaptations, translations, transcriptions, collections with or without agreement, and other alterations shall be free of charge for the people of Burkina Faso. Such creation shall be subject to authorization from the collective management organization for foreigners. The creation, after its production, shall be declared to the collective management organization', Art. 92.

<sup>125</sup> The Gambia Copyright Act 2004, s.2(c).

<sup>126</sup> Nigeria Copyright Act 1999, s.28(2(d)).

<sup>127</sup> Nigeria Copyright Act, 1999: 'The right to authorise acts referred to in subsection (1) of this section shall vest in the Nigerian Copyright Commission', s.28(4).

<sup>128</sup> Ghana Copyright Act, 2005: 'A person who *intends* to use folklore for any purpose other than as permitted under section 19 of this Act, shall apply to the Board for permission in the prescribed form and the person shall pay a fee that the Board may determine' s.64(1).

The lack of harmony across the region, suggests that ways in which states in the region legislate is dependent on how each state views of the status of folklore within the cultural economy: as a commodity or a resource. As Nyadzie suggests: '[m]aybe a country will say 'oh no, I want my people to create out of the folklore so that they can earn income, so I will not charge them anything, another country will say 'no, what nationals will pay will be the same thing that foreigners will pay'.<sup>129</sup> However, the lack of consistency between Ghana and its neighbouring states means that artists in Ghana are unable to utilise Ghanaian folklore whereas artists in states throughout the region have greater freedom. Moreover, as noted, Ghanaian artists are placed at a further disadvantage by the fact that often folklore is maintained by traditional communities that straddle national borders. Thus, artists from the same ethnic group who share the same folklore are subject very different regulatory regimes, one that permits the borrowing of folklore and one that does not.

## Conclusion

The current situation in Ghana, and the corresponding debates, is the result of two parties, the 'artists' and the 'lawyers', who hold very different positions on the function and utility of folklore and are expressing two very different agendas. Though Collins suggests that the legislation 'evolved as a type of aberration',<sup>130</sup> in fact its evolution has been very logical; it has simply been disconnected from artistic practice in Ghana. Though the amendments to the 1985 Copyright Act go further than recommendations set down in model laws and other jurisdictions, it is clear that the 2005 Act has been influenced by a combination of the developments in the protection of folklore at the international level and the experience of raising revenue from foreigners' use of Ghanaian folklore.

As explored in Chapter 1, the continuing attempts to develop copyright protection for folklore, particularly in the global South, has highlighted a duality concerning whether the point of protecting folklore through copyright is to preserve it or exploit its commercial value. Though at the international level this remains unresolved, in

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<sup>129</sup> Nyadzie, interview, 2012.

<sup>130</sup> Collins, interview, 2012.

Ghana, the balance has tipped firmly towards exploitation. Though the law may prove to effectively enable the preservation of folklore by restricting all commercial use, it reflects the state's desire to establish a new and potentially profitable revenue stream. The fact that payment is required in advance speaks both to specific issues of enforcement, but also to a continuing trend of regarding Ghanaian folklore as a profitable commodity in its own right. The fact that for the state the economic potential of folklore lies in its status as desirable resource is, at least domestically, due to the success of the creative industries post independence. As such, the change in the state's position appears paradoxical as until relatively recently the state actively encouraged the free use of folklore by Ghanaian artists.

Moreover, though the argument that Ghana is obligated to charge nationals under international law has gained traction and, from interviews undertaken for this research, appears to be commonly shared between both sides in the current divide, such an argument is difficult to support. However, what is clear is that Ghana's experience of raising revenue from the use of folklore coupled with the belief that folklore should no longer be considered to be communally held, makes charging nationals to utilise folklore a logical step.

Accordingly, Collins's assessment that the provisions set down in the Act represent a 'folk-tax' is accurate in as much as the state has enabled itself to raise revenue from an established cultural practice in which artists continue to engage. Furthermore, as Sakyi suggests, it is a tax that will add to the production costs of legitimate artists in a complex market place. Though several nations require users of folklore to seek permission and pay a fee to the regulatory authority, in Ghana the requirement to pay prior to use means that the law has the potential to disincentivise Ghanaian artists from utilising folklore as the associated cost would prevent them from remaining economically competitive. Moreover, as there has yet to be a prosecution under the law it is uncertain how the courts will implement the legislation in cases where national folklore is being used in the creation of derivative works. However, the penalty for infringing copyright in folklore is 'a fine [...], term of imprisonment [...]

or both.’<sup>131</sup> As Carlos Sakyi suggests ‘The law means now that when a Ghanaian uses something that belongs to us, something that is our heritage without permission from the Board you can even go to jail’.<sup>132</sup> Though the threat of imprisonment is a concern, Sakyi’s point is that Ghanaians face serious sanctions for continuing a practice that is long established within the cultural economy.

In the conclusion to this thesis, I discuss how the current law could be amended in order to accommodate cultural practice in Ghana. However, I also discuss whether the analysis in this thesis leads to the conclusion that the protection of folklore through a copyright paradigm is too problematic and that the fundamental differences between the object of protection and the mechanism are too large to be reconciled.

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<sup>131</sup> Ghana Copyright Act 2005, s.44(2).

<sup>132</sup> Sakyi, interview, 2012.

## Chapter 5

### Conclusion

Yes, Ananse!  
The king of our folklore that anchors  
The muse  
Of our tales best ever told...  
Kwaku Ananse!

‘Where is Ananse?’ - Nii OkaiKoi Okai (2014)

#### 5.1. Copyright, folklore and playwriting in Ghana

Throughout this thesis I have examined the interface between folklore, playwriting and copyright in Ghana. What this analysis has revealed is that the interplay between the three areas is complex and subject to competing political, legal and cultural factors that have altered over time. Though the division lines in Ghana between ‘the artists’ and ‘the lawyers’ - those who oppose the law and those who are in favour of it - appear stark, in fact there is a broad spectrum of opinion about the level to which folklore should be protected and how that protection should occur. What is common is that the protection of folklore against use by foreigners (particularly from richer nations) is considered to be appropriate. However, there appears to be little shared understanding of what the parameters of this debate are,<sup>1</sup> where Ghana sits within sub-regional norms and Ghana’s obligations under international law.

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<sup>1</sup> During the course of my research in Ghana it was suggested by both John Collins and Carlos Sakyi, Chairman of GAMRO, that the law applied to the use of any folklore, Ghanaian or not, within Ghana and that one of the main targets of the 2005 Act in terms of revenue generation was churches. They suggested that churches would be obliged to pay for the use of hymns whose authors are unknown. However, it is clear from a reading of both Acts that the law only applies to works or expressions of Ghanaian folklore as defined by the law and not any expressions of folklore whether or not they are exposed for sale in Ghana.

As explored throughout this thesis, copyright protection for folklore in Ghana has two historical roots: firstly, Ghana (as with other African states) has been encouraged by WIPO and UNESCO to protect folklore within their domestic copyright laws. Secondly, the experience of raising revenue from foreigners' use of Ghanaian folklore is significant in terms of the informing the terms of protection set down in the 2005 Copyright Act. In other words, as the state had already begun to realise the revenue potential of folklore, the 2005 Act was a logical way of extending that revenue potential to the market in which folklore is most regularly used.

By using copyright law to frame Ghanaian folklore as a commodity over which it can exercise property rights,<sup>2</sup> the state has sought to develop a revenue stream that exploits habitual artistic practice across Ghana's cultural industries. Moreover, by requiring a fee prior to use, the state's income is not dependent on the economic success of the derivative work, and the protection of folklore in perpetuity means that the revenue stream is inexhaustible as long as Ghanaian artists continue to create from Ghana's folklore. It is for this reason that Carlos Sakyi is unequivocal that the motivation behind the law is about 'finding ways to tax people, finding ways to raise money'.<sup>3</sup>

However, there is a complexity to the current situation that goes beyond charging Ghanaian's to access folklore. Nyadzije, for example, is correct to suggest that 'we cannot say that [folklore] belongs to all of us and nobody protects it [...]. Even though it belongs to all of us some people should be appointed to be responsible for the protection, then we will be able to preserve it and it will be there for us always'.<sup>4</sup> Though the legislation in Ghana appears to be more focussed on exploitation than preservation, Nyadzije's position that the growing perception of folklore as a valuable cultural asset requires a coherent administrative and legal structure to manage it is logical.

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<sup>2</sup> Ghana is not unique in taking this position. In 2002 WIPO noted that 'the vast majority of States regard expressions of folklore as the "property" of the country as a whole'. (WIPO, 'Final Report on the National Experiences with the Legal Protection of Folklore', 33).

<sup>3</sup> Sakyi, interview, 2012.

<sup>4</sup> Nyadzije, interview, 2012.

Moreover, there is a compelling counter argument that suggests that the value of folklore has historically been ignored and left vulnerable to illicit exploitation by companies and individuals who have then used copyright to secure rights in the resulting work. As WIPO's IGC highlights: '[o]ral Indigenous and traditional stories and poetry have been written down, translated and published by non-Indigenous or non-traditional persons, raising issues about the rights and interests of the communities providing this material as against copyright owned and exercised by those recording, translating and publishing it'.<sup>5</sup> This situation is clearly problematic and underlines why the development of a binding international instrument capable of providing mechanisms of arbitration, appropriate remedies and uniform minimum standards of protection has remained on the international agenda for over fifty years.

Nevertheless, the desire to provide protection for folklore because the economic and moral benefits are flowing to the wrong recipients is a different argument to the one that currently being had in Ghana. Indeed, the IGC's description of a non-Indigenous or non-traditional person publishing materials provided by a traditional community could be used to describe Sutherland's work in Atwia. The argument in Ghana is that Sutherland's work (and the work of her peers and students) was actively supported by the state. Both the popular success of the resulting work and the development of institutions that supported and perpetuated that work, contributed to the development of Ghana's current theatre industry. As such, though the state's decision to charge nationals to utilise folklore is legally valid and possibly even logical in terms of the state seeking to increase protection over what it regards as its cultural property, it fundamentally fails to take into account both the economic and cultural contribution of playwrights.

As explored, playwriting in Ghana following independence contributed to the innovation of Ghanaian folklore. The development of *anansegoro* from *anansesem*

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<sup>5</sup> WIPO, Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore (Geneva, 2002) 11. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_4/wipo\\_grtkf\\_ic\\_4\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_3.pdf). Accessed 2/4/14.



was both popular and influential. Plays that retain the elements of *anansegoro* continue to be popular with audiences in Ghana and, periodically, reach international audiences. Moreover, subsequent playwrights innovated upon the themes and elements of *anansegoro*, updating them for new audiences. Perhaps the most striking example of this being Abdallah's *abibigoro*, which retained elements of the theatrical style and the storytelling experience, but abandoned the folkloric narratives of Ananse. This innovation has been achieved by the nurturing of a delicate ecology that was originally developed through a partnership between Sutherland and the villagers of Atwia who participated in her programme. With the added investment of the state all three components, arguably, benefited. The state gained in terms of popular expressions of national identity to which Akan folklore was visibly linked, and Ghana's theatre industry developed. Boatema Boateng suggests that intellectual property laws 'manage a tension between two competing views: one, that cultural production can and should be privately owned, and the other, that public access to such production is necessary for continued creativity and innovation'.<sup>6</sup> Thus, though Nyadzie views the 2005 Copyright Act as an essential way of safeguarding folklore's 'social, economic, educational and commercial value',<sup>7</sup> this position ignores the fact that one of the major reasons that folklore is perceived as culturally valuable is its unencumbered use by artists following independence.

At its sixth session in 2008, the IGC articulated the need to

strike an appropriate balance between the rights and interests of communities, users and the broader public. This includes, [...] striking balances between, for example, the protection of TCEs/EoF, on the one hand, and artistic and intellectual freedom, the preservation of cultural heritage, the customary use and transmission of TCEs/EoF, promotion of cultural diversity, the stimulation of individual creativity, access to and use of TCEs/EoF and freedom of expression, on the other.<sup>8</sup>

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<sup>6</sup> Boateng, *This Copyright Thing Doesn't Work Here*, 8.

<sup>7</sup> Nyadzie interview, 2012.

<sup>8</sup> WIPO, 'The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Overview of Policy Objectives and Core Principles' (Geneva, 2004) 8. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_7/wipo\\_grtkf\\_ic\\_7\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.pdf). Accessed 8/4/14.

The problem, as Carlos Sakyi suggests, is that the contribution of creative works to national development has ‘not been quantified in Ghana yet’.<sup>9</sup> Thus, there is a fundamental imbalance to the current debate that emphasises the economic value of folklore to the state whilst ignoring the associated values (economic, cultural and political) of derivative works created and sold in Ghana. It is here that Ghana’s current copyright law needs to be reassessed in order to accommodate established cultural practice. Without a specific exception that allows national artists to draw upon folklore for the creation of a new work, as other jurisdictions do, or charging a fee based on royalties, Ghana’s current copyright law fails to balance these multiple interest. As such, it exacerbates a tension between the protection and economic exploitation of folklore on one hand and the ability of playwrights to contribute to the cultural economy by maintaining established cultural practice on the other.

Moreover, in Ghana, there is an on-going uncertainty regarding how and whether the law will be enforced. In 2012, Ben Nyadzie suggested that the folklore board ‘had been dissolved and we are putting measures in place to re-establish it’.<sup>10</sup> In 2014, he suggested that the Board might be inaugurated by the end of the year.<sup>11</sup> Until the Board is inaugurated it is unclear exactly how the law will be administered. According to Nyadzie, the Board’s discretion could extend to not charging at all for the use of folklore by Ghanaian artists in the creation of derivative works.<sup>12</sup> Notwithstanding these areas of uncertainty, perhaps the clearest conclusion to be drawn is that those who potentially stand to lose most from the current terms of protection of folklore in Ghana are those artists for whom the use and reuse of folklore forms a central element of their cultural practice and the means by which they reflect the values and history of Ghana’s creative industries. Though the use of folklore by playwrights was originally associated with a desire at the political level to reclaim and celebrate a history and civilisation that had been denied by colonialism, the current copyright law has the potential to deny playwrights the ability to contribute to the continued development of theatre in Ghana.

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<sup>9</sup> Sakyi, interview, 2012.

<sup>10</sup> Nyadzie, interview, 2012.

<sup>11</sup> Nyadzie, interview, 2014.

<sup>12</sup> Nyadzie, interview, 2014.

Despite the fact that the law has the potential to significantly disrupt established cultural practice in Ghana, one notable aspect of the current situation is that amongst playwrights, cultural institutions and academics in Ghana knowledge of the law is very limited. Aside from the individuals who were involved in lobbying against the changes to Ghana's copyright law such as Collins and Sakyi, there is a general lack of knowledge within the artistic and academic communities concerning the 2005 Copyright Act and its potential impact upon the creative industries. Of the playwrights and theatre makers that I interviewed, none had any knowledge of the restrictions on the use of folklore. Some felt that the law was ridiculous, asking 'where was the president [when the work was made]?'<sup>13</sup> Many felt that it would never be enforced or that it would not apply to them. This was echoed at two seminars at the Institute of African Studies and the School of Performing Arts at which I was invited to deliver a research paper. At both, there was a general surprise that the law required nationals to gain permission and pay to access and use folklore. In response to my research paper the Director of the Institute of African Studies, Professor Akosua Adomako Ampofo suggested that there was a strong possibility that law would not be enforced as 'Ghanaians have a habit of ignoring laws'.<sup>14</sup> John Collins suggests that if a case ever did come to court 'they would convert it into a silly law. It becomes silly, it goes to court and it becomes so obviously silly that it [gets] jammed up'.<sup>15</sup> In 2012, Lemaire suggested that little was known of either the law or the National Folklore Board,<sup>16</sup> and Nyadzie acknowledges that education on the law is problematic but is positive that 'where there is a problem, there is a solution'.<sup>17</sup> However, it is clear that if the law is to be successfully enforced, a significant level of promulgation and education is necessary. Perhaps it will only be at that stage that a serious examination of the law will take place in Ghana.

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<sup>13</sup> Interview with Collins Seymah Smith, Director of Act For Change, conducted September 2012

<sup>14</sup> Audience response to research paper delivered at the Institute of African Studies Weekly Seminar Series, 13/02/2014. Recording of session made and kept by the author.

<sup>15</sup> Collins, interview, 2012.

<sup>16</sup> 'National Folklore Board Organises Workshop for Artists'. Available at: <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=233413>. Accessed: 2/4/14. In the article Lemaire states that Ghana is a signatory to 'the Convention on Traditional Knowledge and Folklore' (presumably the Swakopmund Protocol) and consequently 'the country could earn some revenue from the commercial usage of folklore'.

<sup>17</sup> Nyadzie, interview, 2014.

From a legal standpoint, it is difficult to challenge Ghana's current position on the protection of folklore. If, as the Ghanaian delegate to the IGC suggested at the twenty-sixth session, Ghana is most concerned with preventing misappropriation of folklore, and copyright is the most effective means of achieving that aim, then extending the regulation of use of folklore to nationals is, arguably, appropriate. Moreover, it is logical, if the state wishes to sanction each use of folklore by nationals, that Ghanaians should be required to state their intent to make use of folklore in advance. By doing so, Ghana is not contravening any international law or agreement. However, as Doris Long suggests, copyright is concerned with striking an appropriate balance between protection and access. Currently, Ghana's copyright protection of folklore is so biased towards protection that it risks making access to folklore so problematic that Ghanaian artists simply turn to other sources.

The reason that the current protection of folklore in Ghana is so problematic is that though the creative industries in Ghana will not disappear, what is at stake is that folklore's place at the heart of Ghana's creative industries, its relevance to Ghana's artists and audiences, and their key role in reusing and reinterpreting Ghanaian folklore for each generation, is at risk of diminishing. Furthermore, as explored in Chapter 2, the skill with which playwrights utilise elements of *anansesem* has come to be regarded as a bar by which the skill of a playwright is judged. This has contributed to the development of a theatrical aesthetic that itself has been used, reused, re-explored and reinterpreted by generations of playwrights following independence. As such, the use and reuse of folklore has become so embedded within Ghana's playwriting culture that its absence would result in a very different type of theatre being created in Ghana, one in which the element that draws a direct lineage from Ghana's most successful writers is absent.

The proven benefits to both the cultural and political landscape in Ghana brought about by artists utilising Ghanaian folklore suggests that enabling the continuation of such use, as other states do, is as important as securing the rights of the traditional community. Though there are competing arguments as to what the level of protection for folklore should be in Ghana, in other jurisdictions within the sub-region, this

benefit to the state made by national artists' utilisation of folklore is acknowledged and even encouraged by the inclusion of specific exceptions to protection that allow the borrowing of expressions of folklore or base the requirement for payment on a royalty. Ghana is the only state that does not, in some way, allow for the reuse of folklore by its nationals and, as such, it is the only state in which the state as rights holder has a monopoly over folklore. Thus, it is the only state within the region in which artists have no incentive to create from their own folklore but are, as Sakyi suggests: 'they'll say let's use something from the UK or the US, and in the process we will promoting [the culture of] the UK and the US'.<sup>18</sup>

## **5.2. Beyond Ghana: the consistent incompatibilities between folklore and copyright**

Throughout this thesis I have restricted my analysis primarily to the historic reliance of Ghanaian playwrights on Ghanaian folklore. My argument, that the state appears to be disregarding the historic importance of playwright's access to folklore in favour of regulatory control and potential profit, with the possible effect of disenfranchising and disincentivising playwrights, is necessarily narrow in its focus. However, as a case study, the situation in Ghana highlights several areas of tension that speak to issues beyond Ghana's borders. Outside of this narrow context, this research has also asked question concerning the wider international copyright regime and the efficacy of protecting folklore through a copyright paradigm. The conclusion to be drawn here is that the development of satisfactory protection for folklore through copyright - what Doris Long refers to as 'nuanced protection'<sup>19</sup> - is an immensely complex task. The successful conclusion of this task (at either the international or national level) has been consistently confounded by basic incompatibilities between the object of protection and the mechanism. Though Boateng suggests that there is an 'uneasy fit between folklore and intellectual property law',<sup>20</sup> what the development of the copyright protection for folklore at the international level suggest is that copyright and folklore may not fit together at all.

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<sup>18</sup> Sakyi, interview, 2012.

<sup>19</sup> Long, 'Traditional Knowledge and the Fight for the Public Domain', 319.

<sup>20</sup> Boateng, *This Copyright Thing Doesn't Work Here*, 2.

There are three major areas that continue to impede the development of balanced protection for folklore. Firstly, there remain several basic elements of copyright law that are incompatible with folklore. As Molly Torsen suggests, these include: ‘the originality requirement, the fixation requirement, the term of copyright, the concept of the public domain, the focus on sole authors, the types of things allowed by fair use, and its domestic applicability’.<sup>21</sup> Though, as discussed in Chapter 1, significant effort has been put into overcoming these issues by the IGC particularly, the solutions can result in an unbalanced protection regime in which restrictions on the right to utilise folklore exceed those of other copyrighted works. For example, though the originality requirement has been deemed unnecessary for works of folklore to qualify for copyright protection, in Ghana this has had the unforeseen effect of potentially enabling the state to designate contemporary works as works of folklore rather than affording the authors of derivative works ‘thin’ copyright protection.

Secondly, there is the issue born out of the colonial and postcolonial context which remains largely unaddressed and unresolved concerning what the rights of the traditional, originating communities are when, within a postcolonial paradigm, the state traditionally places significant emphasis on folklore as the root of a national identity. As suggested in Chapter 3, Ghana’s territorial boundaries were only finalised in 1956, whereas the traditional community from which an expression of folklore derives may be centuries old. As a great deal of Africa’s land borders are the result of European colonialism, this situation is consistent across the continent. However, currently in all jurisdictions analysed in this thesis, it is the state and not the community that is able to authorise use and collect and distribute revenue. Indeed, Ghana’s copyright law, unlike others,<sup>22</sup> does not require that the moral rights of the community be observed. This situation raises significant questions that any balanced copyright regime would need to address, such as who the rights holder is, how and by whom the rights are administered, to where any proceeds raised from the use of folklore flow back, and in some cases how folklore is defined. However, it is

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<sup>21</sup> Jane Anderson and Molly Torsen, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (Geneva: WIPO, 2010) 202.

<sup>22</sup> The Gambia does require this under s.8(2)(a) and s.8(3). As does Nigeria under Nigeria Copyright Act, Second schedule s.2(1)(a).

possible that copyright is ill equipped to deliver a solution as the territorial nature of copyright is unable to accommodate the fact that folklore, at least within the African context, is maintained by traditional groups that straddle national boundaries. Thus, due to both the historic drawing of national divides through traditional ethnic groups coupled with the increasingly easy flow of traditional expressions across these borders and beyond, any truly satisfactory solution would have to be effective at a national level and harmonised at the international level. However, there is the additional question of how the use of folklore associated with a specific ethnic group by members of that community in the diaspora, scattered across multiple jurisdictions, is authorised and regulated in a manner that is consistent with the originating community. The issue of how to accommodate extra-territorial use in a balanced manner that is satisfactory to all parties appears beyond the competency of copyright.<sup>23</sup>

The third factor that continues to impede the copyright protection of folklore, and perhaps the most difficult issue to overcome, remains the satisfactory definition of what the object of protection is. Any workable solution will require the establishment of clear, settled, agreed boundaries of the scope of protection, as currently (as explored in Chapter 2) it is extremely difficult to say exactly what falls under the ambit of protection and what (if anything) is free to use. Traditionally, copyright has employed several mechanisms to delimit the scope of protection, such as fixation, term of protection and exceptions. However, either these mechanisms are not applicable to folklore or they are not consistently applied across jurisdictions. Thus, in Ghana for example, there is little clarity for users as to what they may and may not do beyond the fact that any intention to use folklore for commercial purposes will be subject to permissions and a fee. Thus, if a solution is to be found to the protection of folklore through copyright, addressing which elements of ‘the knowledge of the people’ are suitable for copyright protection is a necessary task.

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<sup>23</sup> As Ricketson and Ginsburg suggest, in the case of a work of folklore, ‘the work may have been created as part of a collective enterprise which makes it cumbersome to identify individual contributors’. Ricketson and Ginsberg, *International Copyright and Neighbouring Rights*, 367. This is made more difficult by the fact that as Boateng notes in the case of Ghanaian textiles: ‘Individuals not only make claims over their own designs but also acknowledge the creativity of other individuals, sometimes long after the latter have died’. (Boateng, *This Copyright Thing Doesn’t Work Here*, 167) Thus, a protected work may not only have been originally the work of multiple contemporaneous authors but also subsequent generations.

The issues described above suggest that there are fundamental areas of incompatibility between folklore and copyright and this conclusion is attested to by the length of time it has taken to this point to develop a satisfactory multi-lateral instrument. As discussed in Chapter 1, the development of protection for folklore was first discussed in the late 1950s. Over six decades later, though significant progress has been made, serious questions about how and whether folklore should be protected through copyright remain. To put this into some context: Goldstein and Hugenholtz discuss how initially computer programmes were considered to be beyond the scope of the Berne Convention prompting WIPO to produce the *sui generis* “Model Provisions for the Protection of Computer Software”. However, by the 1990s, as many of the Union’s ‘more economically significant’<sup>24</sup> members had included computer programmes under their copyright legislations and their protection was provided for in the E.C. Software Directive, the TRIPs Agreement and the WIPO Copyright Treaty. What this example illustrates, Goldstein and Hugenholtz suggest, is that ‘patience is a virtue’, stating that ‘it required *at least a decade’s experience* with the marketplace for lawmakers to reach consensus on the intellectual property status of [...] computer programs’.<sup>25</sup> As Goldstein and Hugenholtz consider the development of protection for computer programmes under copyright to have been protracted, that attempts to develop protection for folklore have taken over six times as long and are still ongoing suggests fundamental structural incompatibilities between the mechanism of protection and the proposed object of protection.

Perhaps the best way of illustrating the current uncertainties concerning how folklore and copyright interact is to revisit the text of The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2 (2014). Though the Draft Articles are the result of nearly fifteen years dedicated work, they are far from finished and demonstrate that key areas of how copyright can accommodate, protect and regulate the use of folklore remain unclear at the international level. The Draft Articles contain twelve articles, each of which contains several options and alternatives. As a result, there

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<sup>24</sup> Goldstein and Hugenholtz, *International Copyright*, 104.

<sup>25</sup> Goldstein and Hugenholtz, *International Copyright*, 104-105.



remains uncertainty over fundamental questions, such as what balance any resulting instrument will strike between protection and access, who owns the rights to folklore and what the status of derivative works will be. To illustrate this, on the first page the Draft Articles set out the objectives of the instrument, included in which are:

1. To provide Indigenous [Peoples] and [local communities] [and nations] / [beneficiaries] with the [legal and practical/appropriate] means, [including effective and accessible enforcement measures/sanctions, remedies and exercise of rights], to:

[...]

- a. [prevent] the [misappropriation and misuse/offensive and derogatory use] of their traditional cultural expressions [and adaptations thereof]; and
- b. control ways in which their traditional cultural expressions [and adaptations thereof] are used beyond the traditional and customary context [and promote the equitable sharing of benefits arising from their use], as necessary.

[...]

3. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the free, prior and informed consent of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]<sup>26</sup>

As noted, the square brackets denote where a final decision is yet to be made. As a visual indicator, the fractured and incomplete text of the Draft Articles reflects the complexities of reconciling the varied needs of the multiple stakeholders. However, more than that, it seems to speak to the fundamentally problematic nature of protecting folklore through copyright.

Boateng suggests that ‘the copyright thing’ does not work in Ghana because intellectual property law ‘is part of a normative modernization framework that leaves very little space for alternative modes of social, economic, and legal organization’.<sup>27</sup> While this may be true, it is not intellectual property law *per se* that is the problem but its application to folklore. As explored, copyright law does leave space for innovation and use of protected works under certain, well established, circumstances.

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<sup>26</sup> WIPO, ‘The Protection of Traditional Cultural Expressions: Draft Articles’ (Geneva, 2014) 2. Available at: [www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_27/wipo\\_grtkf\\_ic\\_27\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_5.pdf). Accessed 10/4/14.

<sup>27</sup> Boateng, *This Copyright Thing Doesn’t Work Here*, 166.

The inclusion of exceptions to protection such as fair use mitigates over-protection. Moreover, defined terms of protection allow that the exploitation of works benefit the author and their estate for a limited period, after which works fall into the public domain. The perpetual term of protection attached to folklore, though logical in terms of the works' relevance to the life-cycle of a community, is incompatible with the function of the public domain as a safeguard against monopoly.

This is not to suggest that folklore should not receive legal protection, that the rights of those individuals or groups who maintain and continue to develop folklore should not be protected, or that states' interest in preserving, protecting and economically gaining from the exploitation of folklore is not a legitimate aim. As discussed in the introduction to this thesis, it is not my position that folklore does not require protection or that it is not subject to unfair exploitation. The clear imbalances between states in the global North and global South identified by Collins, Story and others, does suggest that a mechanism that guards against illegitimate exploitation at the international level is both desirable and necessary. However, it is possible that any long-term, nuanced protection that is capable of reconciling the needs of the various stakeholders may not be achievable through the mechanism of copyright law.

However, whatever mechanism is settled upon it is crucial that the use and reuse of folklore by national artists is recognised as an important, and in some cases essential, element in the continued growth of states' cultural industries and cultural identity. Doris Long makes the point that 'traditional knowledge in the form of folklore and folk art deserves a different level of protection than that of sacred traditional knowledge'.<sup>28</sup> She suggests that sacred traditional knowledge requires a 'far different protection regime than one that merely affords assurances of adequate compensation for rights holders'.<sup>29</sup> This is also the case for works derived from folklore. To implement a regime that simply protects the original, or as Nyadzie terms it 'the raw' folklore against all use, is to ignore the fact that the original folklore and the works that draw from it were created in very different contexts, and perhaps centuries apart, to address very different cultural needs. To illustrate this: the political need for

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<sup>28</sup> Long, 'Traditional Knowledge and the Fight for the Public Domain', 323.

<sup>29</sup> Long, 'Traditional Knowledge and the Fight for the Public Domain', 323.

Sutherland's *anansegoro* following independence does not diminish the social importance of *anansesem* to the Akan. Nor does the existence of *anansesem* as the 'authentic' folkloric story telling event detract from the theatrical accomplishments of Abdallah's *abibigoro*. The original folklore and its derivative forms are not in competition with each other but are complementary.

As noted in the poem quoted at the beginning of this concluding chapter, folklore remains a potent resource for artists and continues to act as the inspiration for new generations of artists. This was acknowledged by WIPO's IGC in a paper published in 2002, in which it stated that 'cultural heritage is in a permanent process of production; it is cumulative and innovative'.<sup>30</sup> Accordingly, it is imperative that any future international protection for folklore acknowledges that one of the ways in which innovation occurs is through the reuse of folklore by artists. To disincentivise use by national artists risks both the abandonment of folklore by artists who will seek alternative inspiration and, perhaps most importantly within a postcolonial context, the ability of new artists to contribute to the continuing development of a national cultural identity in a manner that is consistent with established cultural practice.

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<sup>30</sup> WIPO, 'Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore', 8.

## Appendix A

### List of Interviewees and key excerpts<sup>31</sup>

**Nii Amarkai** - King Maker of the Ga Nation.

- I work more than a judge in a court [...] If we can't settle the matter I write a letter to the court to settle the matter...the same way that the court can order me to take care of some case because they can't understand, the case is traditional so they can't understand it...they don't know customary things...it's not in the constitution. So when there is some traditional thing they have to bring it to me, if I can't understand it, I call another traditional head.

Interview undertaken: 19 September 2012.

**John Collins** - Professor of Music, University of Ghana.

- I think it's fair enough to apply such a law to non-Ghanaians, but not to nationals, but what they did was apply it specifically to Ghanaians.
- There were a few test cases very early on. They voluntarily paid money. There were some NGOs who wanted to use a folkloric song but this was years and years ago. But there's never been a case when somebody's been arrested for breaking this law.
- The downtrodden musicians of Ghana are the least rich people to be taking money from.
- On the one hand they are complaining that the youth of Ghana are following American culture and they should go back to their roots, and on the other hand they're saying that the roots are now nationalised, so hands off unless you pay.
- I was put in that position on the folklore board by Ben Abdallah who was the minister of culture...they put me into this safe position, quiet, archival and look what happened, I got caught into this whole intrigue about taxing Ghanaians.
- After two or three years, we were working very well together and then this split occurred and it was literally a split between the performing artists, the poets and musicians on the committee and the lawyers, it was literally that simple.
- It's a very dangerous signal to the youth. My generation we're dead and gone, we've used the traditional resources...but the youth is the problem. The youth will develop Nigerian music or American music because it's free, why

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<sup>31</sup> All original recordings are held by the author.

bother with the Ghanaian? Or, they could call the Ghanaian folklore Ewe because the Ewe play the same music as the Ghanaians, they just say it's not a Ghanaian Ewe rhythm, it's a Togolese Ewe rhythm.

- There was the original \$70,000 dollars from Paul Simon, and also there were a few thousand dollars from JVC who were making films on African music, and then there were a couple of NGOs who felt guilty who paid small amounts of money. But the only significant money, I would say, is Paul Simon's money...it might still be coming in because his initial payment was about \$20,000, and by the end of my time with the folklore board it was about \$70,000.

Interviews undertaken: 14 September 2012 and 3 February 2014.

**Dzifa Glikpoe** - Former Director of the National Theatre Players (Abibigromma).

- The beginning of theatre as we know it today come from folklore, because all the stories that were told or performed at the early stages, at the developmental stages, were all from folklore.
- Efua Sutherland decided to bring folktales on to the stage. So the beginning of contemporary theatre in Ghana started at its roots with the folklore.
- I grew up in a village with no electricity [...] An old man is telling a story and say I have just eaten [...] and start to doze off. Then somebody comes in with a song "Yes! I was there; I was there when the hunter did that and this is how the song goes". Then everybody starts to sing and clap, and you are not dozing anymore. Then the story continues. The story telling sessions are not passive where you sit down and just listen.
- Efua Sutherland had a group...before the plays got written she had done it already in Twi. She had a village...the Queen Mother there was a friend to her so they used that village as a story village and they get the people there to tell stories, and they had a lot of stories. So she thought 'OK, we'll put these on stage'... so we translate the thing on to the stage.
- Because we had a lot of stories from the South, the group went to the North and we got people there to also tell us their stories and then these ones were also done on television.
- These are folk tunes they all know...and it goes with a certain rhythm, the rhythm of weeding. So we as Abibigromma we were supposed to research into all of these things and develop them to meet national and international standards. We could take them and bring in some contemporary things that would make it look good.
- As for folktales, you look at Martin Owusu, *the Legend of Aku Sika* and *The Story Ananse Told*, all of these are folktales which we've taken and up on stage. So these plays maintain the fusion of the dialogue, the music, the dance.
- I know we have a copyright law and all that, but I don't know the little, little detail.

Interview undertaken: 18 September 2012.

**Dzifa Gomashie** - Deputy Minister for Tourism and Culture.

- Our Creative Arts is fed by the folklore so its relevance and sustenance is crucial to the development of the sector. Our folklore sets us apart and is our identity therefore it is the foundation on which we build our image.
- Its role is the vehicle through which our forebears nurtured and groomed the young, acculturation, and we in the present learn about the past from the verbal/words, music/instruments/dance/ stories/ artifacts etc. Folklore is the bridge between the past and the future.
- The establishment and strengthening of the National Folklore Board and its activities, advocacy in mainstreaming culture...which includes folklore We envisage that the Ministry will lead, with its agencies including the National Theater, in the crusade to promote, protect and produce, for the benefit of Ghanaian's and the world, authentic and unique Cultural and Creative Arts programmes that speak to our very existence.

Interview undertaken: 10 February 2014.

**Dorothy Habadah** - Legal Officer, Ghana Copyright Office.

- Works that fall into the public domain are owned by the state on behalf of the people...all works.
- If you're going to make commercial gains from it...once it has fallen into the public domain it would be difficult to administer someone who copies it wholly...public domain works are actually supposed to be free for use ...so I don't know what the position of the use of public domain works is.
- There's no administration of public domain works as yet.
- There have still been no cases relating to folklore.

Interviews undertaken: 20 September 2012 and 13 February 2014.

**Ben Nyadzie** - Senior Folklore Officer at the Ghana Copyright Office.

- WIPO, UNESCO, ARIPO have been looking at it and they realized it's a creative work, even though you don't know the person who has creative work...so long as it is a creative work it should be protected...and copyright protects creativity...[because of this] it should come under copyright.
- Why the protection? We have realised that these things have social, economic, educational and commercial values, they have all these values...so they need to be preserved and protected.

- If you come to exploit for commercial purposes...then the community that created the folklore will not benefit from it.
- Music – you go to the community, you go to the cultural centre and you record traditional music or you video their traditional festival then you take it away, you parcel it very well and then you sell it and the communities won't benefit, this is happening. That is why the law is put in place.
- In our part of the world documentation of these works is very difficult because the people who create these works, sometimes their educational background is very low...so they create these things and people assume they belong to folklore. Some of them in actual fact do not belong to folklore but because it has not been documented and the owner does not come forward to claim it people assume it is folklore.
- The proposal is [...] for example, in music we have the lyrics we have the rhythms and so on and people use these things. We have our traditional rhythms and many composers use these rhythms, these folklore rhythms to create their own works. We use short stories, proverbs and so on, things belonging to folklore, to create musical works. So you are allowed to create out of folklore, but the commercialization of what we called the raw folklore is what the law is against.
- They look at the quantum of the folklore that you want to put into your creativity and then they charge you accordingly.
- You would be surprised, sometime ago people misunderstood the provisions on folklore and they feel that it should be free, because they feel that people create out of it so it should be free, otherwise you will stifle creativity, that is the argument some people use, but all over the world now folklore is protected.
- We cannot say that it belongs to all of us and nobody protects it...things thing is for all of us and we all sit back...even though it belongs to all of us some people should be appointed to be responsible for the protection, then we will be able to preserve it and it will be there for us always.
- We have to promote the folklore, we have to preserve it and we need money to do all these things ... it means people who want to use it for commercial purposes, after all they are gaining something from it, so pay something little...maybe part of it will be used for the folklore board for administrative purposes. It's just like tourism.
- It's a bit controversial, but it can be managed.
- The communities sometimes are not even willing to provide the information on their folklore. Some of them feel that it is spiritual and they don't want to give this kind of information to people. Some feel that 'eh, the moment I reveal this secret then the spirits will go', or the spirits will punish me and so on.
- We are following international convention...when experts in copyright came to look at it carefully they began to realize that we are losing some of the works because there is no protection, so we need protection to preserve it. So it belongs o the community as well as they nation.

- It's just like a gold mine, a gold mine may be sited within a community, it belongs to the community and it belongs to the whole nation.
- I haven't heard of anybody who has been prosecuted under folklore yet.
- You will pay this prior to recording the song 'because if you ask the person to pay after he has sold the song he may not come back so when you come and you are given the permission, then you pay. If you pay and you don't use it nobody cares but if you say to the person 'go and sell and bring the money', the person will not come back.

Interviews undertaken: 20 September 2012 and 13 February 2014.

**Carlos Sakyi** - Chairman of the Ghana Music Rights Organization (GAMRO).

- The law means now that when a Ghanaian uses something that belongs to us, something that is our heritage without permission from the Board you can even go to jail. Why should I pay for something that belongs to me through our forefathers?
- It stifles creativity; it prevents people from using our works to create because it increases the cost of production. If you have to seek permission...you have to pay some money, you don't know how much, it's not been fixed yet...but you have to pay something it's all going to add to your cost of production.
- We have artificial bodies in most of Africa, between Ghana and Togo.... There are rhythms and songs in Ghana that are used in Togo too...we don't know who these things really belong to...if someone in Togo is not paying for the use of that and someone in Ghana is paying for the use of that the Ghanaian is at a disadvantage.
- The use of folklore by our own people has enhanced the image of Ghana abroad.
- We are working hard to get government to recognise that intellectual property is a major contributor to economic development.
- How do you protect folklore by preventing your own citizens from using folklore? It's counter productive.
- Some people only see it in terms of economics: 'let's charge so much for a,b,c then we will make money' but they don't see it from the angle where you have lots of people using folklore generating money in the system, taxes being paid...you don't get it up front but you get it from the back. It has even more value for the country, including enhancing the country's image, putting our identity out there so you hear 'this is from Ghana'.
- When you get into the literary world, with Kweku Ananse stories ... if we're going to stop Ghanaians from writing about Kweku Ananse, which is what this law will do because they all need permission, they all need to pay some money. It's virtually impossible to get a publisher to publish a book in Ghana because of the cost ... if they have to pay money before they even get these



things out, it's virtually impossible to get them out anyway, it's very difficult to sell them, now you want to add an additional burden? It doesn't make sense.

Interview undertaken: 20 September 2012.

**Collins Seymah Smith** - Director of the James Town Community Theatre.

Interview undertaken: 15 September 2012.

**Nii Quartey and Nii OkaiKoi Okai** – Playwrights.

Interview undertaken 11 February 2014.

## Appendix B

## Ghana Copyright Law Comparison

	Copyright Act 1985	Copyright Act 2005
Definition of folklore	Folklore means all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this law to be works of folklore (s.53)	Folklore means the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are not known, and any similar works designated under this law to be works of folklore (s.76)
Statement of Protection	Works of Ghanaian folklore are hereby protected by copyright (s.5(1))	An expression of folklore is protected under this Act against <ul style="list-style-type: none"> <li>(a) reproduction,</li> <li>(b) communication to the public by performance, broadcasting, distribution by cable or other means, and</li> <li>(c) adaptation, translation and other transformation (s.4(1))</li> </ul>
Ownership of rights	The rights of authors under this Law in such folklore are hereby vested in the Republic of Ghana as if the republic were the original creator of the works (s.5(2))	The rights of folklore are vested in the President on behalf of and in trust for the people of the republic (s.4(2))
Permission to use	Where a person intends to use and such folklore other than for a permitted use under section 18 of this Law, he shall apply to the Secretary so to do, and shall pay such fee as may be prescribed in relation thereto (s.5(3))	A person who intends to use folklore for any purpose other than as permitted under section 19 of the Act, shall apply to the [National Folklore] Board for permission in the prescribed form and the person shall pay a fee that the Board may determine (s.64(1))
Regulatory authority		See sections 59-63 concerning the establishment, membership, responsibilities and functions of the National Folklore Board.

		<p>The Board shall:</p> <ul style="list-style-type: none"> <li>(a) administer, monitor and register expressions of folklore on behalf of the Republic</li> <li>(b) maintain a register of expressions of folklore at the Copyright Office</li> <li>(c) preserve and monitor the use of expressions of folklore in the Republic;</li> <li>(d) provide members of the public with information and advice on matters relating to folklore;</li> <li>(e) promote activities which will increase public awareness on the activities of the Board;</li> <li>(f) promote activities for the dissemination of expressions of folklore within the Republic and abroad (s.63)</li> </ul>
Management and use of funds generated	Any sums of money accruing from the use of folklore under this section shall be paid into a fund established by the Secretary and shall be used for the promotion of institutions for the benefit of authors, performers and translators (s.5(4))	<p>There shall be established by the Minister with the approval of the Accountant-General a fund for the deposit of any fees that may be charged in respect of the use of folklore (s.64(1))</p> <p>The fund shall be managed by the Board and shall be used (a) for the preservation and promotion of folklore, and (b) for the promotion of indigenous arts (s.64(3))</p>
Duration	The rights vested in the republic of Ghana in respect of folklore under section 5 of this Law exist in perpetuity (s.16)	The rights vested in the President on behalf of and in trust for the people of the Republic in respect of folklore under section 4 exist in perpetuity (s.17)
Exceptions	See section 18 (nothing specific about folklore)	See section 19 (nothing specific about folklore)
Infringement	No person shall without the permission in writing of the Secretary import into Ghana, sell, offer or expose for sale or distribution in Ghana any copies of the following works	<p>A person shall not sell, offer or expose for sale or distribution in the Republic copies of</p> <ul style="list-style-type: none"> <li>(a) works of folklore made in or outside the Republic, or</li> </ul>

	<p>made outside Ghana –</p> <p>(a) works of Ghanaian folklore; or</p> <p>(b) translations, adaptations, or arrangements of Ghanaian folklore (s.46(1))</p>	<p>(b) translations, adaptations, arrangements of folklore made outside the Republic without the permission in writing of the National Folklore Board (s.44(1))</p>
Penalty for infringement	<p>Any person who contravenes subsection (1) of this section shall be guilty of an offence and liable on conviction to a fine of not less than c10,000.00 and not exceeding c1,000,000.00 or to imprisonment not exceeding two years or both; and in the case of a continuing offence to a further fine of not less than c5,000.00 for each day during which the offence continues (s.46(2))</p>	<p>A person who contravenes this section commits an offence and is liable on summary conviction to a fine of not more than one thousand penalty units and not more than one hundred and fifty penalty units or to a term in prison of not more than three years or to both; and in the case of a continuing offence to a further fine of not less than twenty-five penalty units for each day during which the offence continues (s.44(2))</p>

## Appendix C: List of African States that include protection for folklore within their Copyright statutes

Country	Title
<b>Algeria</b>	Copyrights and Neighboring Rights Act 2003
<b>Angola</b>	Law on Authors' Rights No. 4/1990
<b>Benin</b>	Law No. 2005-30 on Protection of Copyright and Neighboring Rights in the Benin Republic
<b>Burkina Faso</b>	Law No. 032-99/AN of December 22, 1999 on the Protection of Literary and Artistic Property
<b>Chad</b>	Law No. 005/PR/2003 of May 2, 2003 on Protection of Copyright, Neighboring Rights and Expressions of Folklore
<b>Congo</b>	Law on Copyright and Neighbouring Rights No. 24/1982
<b>Côte d'Ivoire</b>	Law No. 96—564 of July 25, 1996 on the Protection of Intellectual Works and the Rights of Authors, Performers and Phonogram and Videogram Producers
<b>Djibouti</b>	Law No. 154/AN/06 of 23 July 2006 on the Protection of Copyright and Neighboring Rights
<b>Egypt</b>	Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, Copyrights and Neighboring Rights

<b>Democratic Republic of the Congo</b>	Ordinance-Law No. 86-033 of April 5, 1986 on the Protection of Copyright and Neighboring Rights
<b>Burundi</b>	Law No. 1/021 of December 30, 2005 on the Protection of Copyright and Related Rights in Burundi
<b>Cameroon</b>	Law No. 2000/011 on Copyright and Neighbouring Rights
<b>Cape Verde</b>	Decree-Law No. 1/2009 of April 27, 2009, Revising the Law on Copyright
<b>Gambia</b>	Copyright Act 2004
<b>Ghana</b>	Copyright Act 2005
<b>Kenya</b>	Copyright Act No. 130 of 2001
<b>Lesotho</b>	Copyright Order No. 13 of 1989
<b>Liberia</b>	Copyright Law 1997
<b>Madagascar</b>	Law No. 94-036 of 18 September 1995 on Literary and Artistic Property
<b>Malawi</b>	Copyright Act 1989
<b>Mauritius</b>	Copyright Act No. 12 of 1997

<b>Morocco</b>	Law No. 2-00 on Copyright and Related Rights
<b>Mozambique</b>	Copyright Law No. 4, 2001 and Law No. 10/88 of December 22, 1988 (Law on the Protection of Cultural Heritage)
<b>Niger</b>	Decree No. 93-027 on Copyright, Related Rights and Expressions of Folklore
<b>Nigeria</b>	Copyright Act - Chapter C28
<b>Rwanda</b>	Law No. 31/2009 on the Protection of Intellectual Property
<b>Senegal</b>	Law No. 2008/09 of January 25, 2008 on Copyright and Neighboring rights in Senegal
<b>Seychelles</b>	Copyright Act 1991, Chapter 51
<b>Sierra Leone</b>	Copyright Act 2011
<b>Sudan</b>	Copyright and Neighbouring Rights Protection Act 1996
<b>Togo</b>	Law No. 9112 of June 10, 1991 on the Protection of Copyright, Folklore and Related rights
<b>Tunisia</b>	Law No. 94-36 of February 24, 1994, on Literary and Artistic Property
<b>Uganda</b>	Copyright and Neighbouring Rights Act 2006

<b>United Republic of Tanzania</b>	Copyright and Neighbouring Rights Act, (No. 7) 1999
<b>Zimbabwe</b>	Copyright and Neighbouring Rights Act (Chapter 26:05)
<b>Botswana</b>	Copyright and Neighbouring Rights Act 2002
<b>Kenya</b>	Copyright Act No. 12 of 2001
<b>Rwanda</b>	Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property



**Appendix D: Anglophone  
Copyright  
Comparison**

	Ghana	Nigeria	The Gambia	Sierra Leone <sup>1</sup>	ARIPO
Name and Date enacted	Copyright Act, 2005  Repealed Copyright Act , 1985	Copyright Act (Cap. 68, Laws of the Federation of Nigeria, 1990 as amended by the Copyright Amendment Decree No. 98 of 1992 and the Copyright (Amendment) Decree 1999) Repealed Copyright Act of 1970 (no mention of folklore)	Copyright Act 2004.  Repealed The Copyright Act (UK?)		Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore  Swakopmund, Namibia 2010
Folklore included under Works Eligible for Protection	Separately, under s. 4	Separately, under s. 28.	Separately, under s. 8		
Definition of folklore	"folklore" means the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore	For the purpose of this section, "folklore" means a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means including— (a) folklore, folk poetry, and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; (d) productions of folk arts in	"folklore" means the literary, artistic and scientific work belonging to the cultural heritage of The Gambia which are created, preserved and developed by ethnic communities of The Gambia or by unidentified Gambian authors;  "expression of folklore" means a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its		"expressions of folklore" are any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: i. Verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names and symbols; ii. musical expressions, such as but not limited to songs and instrumental music;

<sup>1</sup> Sierra Leone enacted copyright laws in 2011 to replace the 1965 Copyright Act but they are not currently available. It is a signatory to TRIPS

	(s.76)	particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles. (s. 28 (5))	cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including (a) folktale, folk poetry and folk riddle; (b) folk song and instrumental folk music; (c) folk dance and folk play; and (d) production of folk art, in particular, drawing, painting, carving, sculpture, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, handicraft, costume and indigenous textile;		iii.expressions by movement such as but not limited to dances, plays, rituals and other performances; whether or not reduced to material form; and iv.tangible expressions, such as productions of art, in particular drawings, designs, paintings (including body painting), carving, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts, musical instruments; and architectural forms (s.2.1).
Statement of Protection	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. (s.4(1))	Expressions of folklore are protected against— (a) reproduction; (b) communication to the public by performance, broadcasting, distribution by cable or other means; (c) adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context. (s.28(1))	Expression of folklore is protected by copyright 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, when the expression is made either for commercial purposes or outside a traditional or customary context. (s.8(1))		Protection shall be extended to expressions of folklore, whatever the mode or form of their expression, which are: (a) the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and (b) characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community. (s.16)
Holder or Owner	The rights of folklore are	The right to authorise acts referred to	The right to authorise an act		The owners of the rights in

of Rights	vested in the President on behalf of and in trust for the people of the Republic. (s.4 (2))	in subsection (1) of this section shall vest in the Nigerian Copyright Commission. (s.4)	referred to in subsection (1) shall vest in the Secretary of State on behalf of and in trust for the people of The Gambia (s. 8(4)).		expressions of folklore shall be the local and traditional communities: (a) to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities; and (b) who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage (s.18). <sup>2</sup>
Permission to use	Use of folklore A person who intends to use folklore for any purpose other than as permitted under section 19 of this Act, shall apply to the Board for permission in the prescribed form and the person shall pay a fee that the Board may determine. s.64. (1)				Where the national competent authority acts under sections 22.1 and 22.2 of this Protocol: (a) authorizations shall be granted only after appropriate consultations with the communities concerned, in accordance with their traditional processes for decision-making and public affairs management; (b) authorizations shall comply with the scope of protection provided for the expressions of folklore concerned and shall, in particular, provide for the equitable sharing of the benefits arising from their use (s.22(3)).
Exceptions	s. 19. Permitted uses of copyrighted works.	Second Schedule Exceptions from Copyright Control:	The protection conferred in subsection (1) does not include		Measures for the protection of expressions of folklore shall:

<sup>2</sup> Where two or more communities in the same or different countries share the same expressions of folklore, the relevant national competent authorities of Contracting States and ARIPO Office shall register the owners of the rights in those expressions of folklore. The owners of the traditional knowledge and maintain relevant records. (s.17.4)

	Contains nothing specific about expressions of folklore	<p>The right conferred in subsection (1) of this section shall not include the right to control—</p> <p>(d) the borrowing of expressions of folklore for creating an original work of an author:</p> <p>Provided that the extent of such utilisation is compatible with fair practice;</p> <p>(e) the incidental utilisation of expressions of folklore. (s.2)</p>	<p>the right to control -</p> <p>(c) the borrowing of expression of folklore for creating an original work of an author, provided that the extent of such utilisation is compatible with fair practice; or</p> <p>(d) the incidental utilisation of expressions of folklore. s.(2)</p>	<p>(a) be such as not to restrict or hinder the normal use, development, exchange, dissemination and transmission of expressions of folklore within the traditional or customary context by members of the community concerned, as determined by customary laws and practices;</p> <p>(b) extend only to uses of expressions of folklore taking place outside their traditional or customary context, whether or not for commercial gain;</p> <p>(c) be subject to exceptions in order to address the needs of non-commercial use, such as teaching and research, personal or private use, criticism or review, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions of expressions of folklore for inclusion in an archive or inventory exclusively for the purposes of safeguarding cultural heritage, and incidental uses, Provided that in each case, such uses are compatible with fair practice, the relevant community is acknowledged as the source of the expressions of folklore where practicable and possible, and such uses would not be offensive to the relevant community. (s.20 (1)).</p> <p>The measures put in place for the</p>
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					protection of expressions of folklore may make special provision for their use by the nationals of the country concerned. (s.20 (2)).
Regulatory Body	National Folklore Board s.59. (1) There is established by this Act a National Folklore Board referred to in this Act as "the Board". (2) The Board shall consist of (a) a chairperson, (b) the Copyright Administrator, (c) a person nominated by the National Commission on Culture; and (d) six other persons who shall be appointed by the President in consultation with the Council of State.	The Nigerian Copyright Commission.	The Collecting Society of the Gambia. Though it is unclear whether they have any specific role in regulating the use of folklore		Authorizations to exploit expressions of folklore shall be obtained from the national competent authority which acts on behalf of and in the interests of the community concerned. (s.22 (2)). .
Management and use of funds generated	There shall be established by the Minister with the approval of the Accountant-General a fund for the deposit of any fees that may be charged in respect of the use of folklore. (s.64.(2)) The fund shall be managed by the Board and shall be used (a) for the preservation and promotion of folklore, and		The Society shall maintain a fund into which shall be paid – (a) Royalties; (b) Fees charged for services rendered; (c) Donations and gifts; (d) Membership dues; and (e) Such other sums as may accrue to the Society from any other source (s. 77) There is no specific mention of how the money should be spent. The Society is required to:		Any monetary or non-monetary benefits arising from the use of the expressions of folklore shall be transferred directly by the national competent authority to the community concerned (22(d))

	(b) for the promotion of <i>indigenous</i> arts. (s.64(3))		(d) charge and collect on behalf of its members royalties from the users of their works and pay the royalties to the appropriate members, subject to the deduction of agreed charges. (s. 74)		
Duration	The rights vested in the President on behalf of and in trust for the people of the Republic in respect of folklore under section 4 exist in perpetuity. (s.17).	There is no specific mention of folklore. In the case of anonymous or pseudonymous literary, musical or artistic works the copyright therein shall subsist until the expiration of seventy years from the end of the year in which the work was first published. s.2(3)	The rights vested in the Secretary of State on behalf of and in trust for the people of The Gambia in respect of expression of folklore under section 8 exist in perpetuity. (s.26)		Expressions of folklore shall be protected against all acts of misappropriation, misuse or unlawful exploitation for as long as the expressions of folklore fulfill the protection criteria set out in section 16. (s.21) (There is no specific guidance on how long copyright lasts)
Infringement	Offences related to folklore 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. (s.44. (1))	Infringement of folklore: Any person who, without the consent of the Nigerian Copyright Commission, uses an expression of folklore in a manner not permitted by section 28 of this Act shall be in breach of statutory duty and be liable to the Commission in damages, injunctions and any other remedies as the court may deem fit to award in the circumstances. (s.29).	A person who sells, offers or exposes for sale or distribution in The Gambia copies of (a) expression of folklore made in or outside The Gambia; (b) a translation, an adaptation, arrangement or expression of folklore made outside The Gambia without the permission in writing of the Centre; (c) willfully misrepresents the source of an expression of folklore, or (d) willfully distorts an expression of folklore in a manner prejudicial to the honour, dignity or cultural interests of the community in which it originates, commits an offence, (s.55. (1))		The Contracting States shall ensure that accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies are available where there is a breach of the provisions relating to the protection of traditional knowledge and expressions of folklore. (s.23 (1)). The national competent authority shall be entrusted with the task of advising and assisting holders of protected traditional knowledge and communities who are beneficiaries of protected expressions of folklore in defending and enforcing their rights and instituting civil and

					criminal proceedings, where appropriate and when requested by the holders and communities concerned (s.23(2)). <sup>3</sup>
Penalty for infringement	A person who contravenes this section commits an offence and is liable on summary conviction to a fine of not more than one thousand penalty units and not less than one hundred and fifty penalty units or to a term of imprisonment of not more than three years or to both; and in the case of a continuing offence to a further fine of not less than twenty-five penalty units for each day during which the offence continues (s.44 (2))	Not specified	(2) A person who commits an offence under subsection (1) is liable on conviction, in the case of (a) an individual, to a fine not exceeding one hundred thousand dalasis or imprisonment for a term not exceeding twelve months or to both the fine and Imprisonment; and (b) a body corporate, to a fine of five hundred thousand dalasis, (3) A Court before which an offence under this section is tried may order that the infringing or offending article be delivered to the Centre		
ARIPO member (Lusaka Agreement)	Yes (1978)	No	Yes (1978)	Yes (1980)	
Signatory of the	Yes (2010)	No	No	No	

<sup>3</sup> Eligible foreign holders of traditional knowledge and expressions of folklore shall enjoy benefits of protection to the same level as holders of traditional knowledge and expressions of folklore who are nationals of the country of protection, taking into account as far as possible the customary laws and protocols applicable to the traditional knowledge or expressions of folklore concerned. (s.24.1).

Measures should be established by the national competent authority and ARIPO Office to facilitate as far as possible the acquisition, management and enforcement of such protection for the benefit of the holders of traditional knowledge and expressions of folklore from foreign countries (s.24.2).

ARIPO may be entrusted with the task of settling cases of concurrent claims from communities of different countries with regard to traditional knowledge or expressions of folklore; to this end, ARIPO shall make use of customary law, local information sources, alternative dispute resolution mechanisms, and any other practical mechanism of this kind, which might prove necessary. (s.24.3)

Swakopmund Protocol (2010)					
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**Appendix E**      **Francophone Copyright Comparison**

	Burkina	Cote d'Ivoire	Togo	Niger
Name and Date enacted	Law No. 032-99/AN On the Protection of Literary and Artistic Property, June 2012  Repealed Order No. 88-016/CNR/PRES 1983 on the Protection of Copyright	Law No. 96-564 of July 25, 1996 on the Protection of Intellectual Works and the Right of Authors, Performers and Phonogram and Videogram Producers	Loi n° 91-12 du 10 juin 1991 portant protection du droit d'auteur, du folklore et des droits voisins	Decree No. 93-027 of March 30, 1993 on Copyright, Related Rights and Expressions of Folklore  Repeals Law No. 57-298 of March 11 1957, on Literary and Artistic Property
Definition of folklore	For the purposes of this Law, “expressions of traditional cultural heritage” shall be understood as productions made up exclusively of characteristic elements of traditional artistic and literary heritage, which is developed and continued by a national community of Burkina Faso or by individuals who are considered to meet this community’s traditional artistic expectations, especially popular tales, popular poetry, popular songs and instrumental music, popular dance and shows and artistic expressions of rituals and productions of popular art. The purpose of the provisions of this Title shall be to protect expressions of traditional cultural heritage in terms of aspects related to literary and artistic property. (Art.88).	Folklore is an original component of the national heritage. For the purposes of this Law: -“folklore” means all literary and artistic productions handed down from generation to generation and forming part of the traditional Ivorian cultural heritage, the authors of the said productions being unknown but affording every reason to believe that they are nationals of Cote d'Ivoire. (Art. 8).	Le folklore appartient à titre originaire au patrimoine national. Au sens de la présente loi, le folklore est l'ensemble des productions littéraires et artistiques créées sur le territoire national par des autres anonymes, inconnus ou oubliés présumes ressortissants togolais ou des communautés ethniques togolaise, transmises de génération en génération et constituent l'un des éléments fondamentaux du patrimoine culturel national <sup>1</sup> (Art. 66).	(1) “Folklore” means any productions created within the national territory by national ethnic communities, handed down from generation to generation, and constituting one of the fundamental elements of the national cultural heritage. (2) “Expressions of folklore” means any productions 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: -verbal expressions, such as

<sup>1</sup> Folklore is an original component of national heritage. For the purposes of the present Law, folklore is the totality of literary and artistic productions created in the national territory by authors anonymous, unknown or forgotten presumed to be Togolese or from ethnic Togolese communities, transmitted from generation to generation and constituted from fundamental elements of national cultural heritage.

				<p>folk tales, folk poetry and riddles;</p> <p>-musical expressions, such as folk songs and instrumental music;</p> <p>-expressions by actions, such as folk dances, plays and artistic forms of ritual;</p> <p>-tangible expressions such as:</p> <p>(a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes;</p> <p>(b) musical instruments;</p> <p>(c) architectural forms (Art. 54).</p>
Statement of Protection/ Nature of Rights	<p>Expressions of traditional cultural heritage which are part of national heritage shall be protected under this Law against illicit exploitation and other prejudicial actions. Any publication and communication to the public of an identifiable expression of traditional cultural heritage which is part of national heritage shall properly indicate its source either by mentioning the name of the author or by mentioning the community and/or the geographical place from where the expression originates.</p>	<p>The public performance of folklore and its reproduction with a view to profit making exploitation require authorization (Art 8).</p>	<p>Les exemplaires des œuvres du folklore national, de même que les exemplaires des traductions, arrangements et autres transformations de ces œuvres, fabriques sans autorisation du Bureau togolais du Droit d'Auteur, ne peuvent être ni importes, ni exportes, ni distribues (Art. 71).<sup>2</sup></p>	<p>Under the present Part of the Decree, the expressions of folklore developed and maintained in Niger shall be protected against unlawful exploitation and other prejudicial action (Art. 55).</p>

<sup>2</sup> Copies of the works of national folklore, and copies of translations, arrangements and other transformations of these works, made without authorization of the Togolese Office of the copyright, may not be imported, exported, or distributed

	The copies of expressions of traditional cultural heritage, including for copies of translations, arrangements and other alterations of these expressions, made without either authorization or declaration as required, may not be imported, exported or distributed. (Art.90)			
Holder or Owner of Rights				
Permission to use	The authorization of the collective management organization shall be granted subject to the agreement of the Minister of Culture against payment of a royalty, the amount of which shall be fixed in accordance with the conditions for use of protected works in the same category. (Art.93)	The right of exploitation of folklore shall be administered by the body of authors referred to in Article 62. The public performance of a work of folklore and its reproduction with a view to profit-making exploitation require authorization by that body. Authorization shall be granted against payment of a royalty	La représentation ou l'exécution publique, la reproduction par quelque procédé que ce soit du folklore national, en vue d'une exploitation lucrative, sont subordonnées à l'autorisation préalable (BOTUDRA) (Art. 69) <sup>3</sup>	Applications for individual or blanket authorization of any utilisation of expressions of folklore subject to authorization under this present Decree shall be made in writing to the Copyright Office of Niger (Art. 57(1))
Exceptions	The creation of works derived from expressions of traditional cultural heritage which are part of national heritage such as adaptations, translations, transcriptions, collections with or without agreement, and other alterations shall be free of charge for the people of Burkina Faso. Such creation shall be subject to authorization from the collective management organization for foreigners. The creation, after its production, shall be	Nothing explicit regarding folklore, however, under Art:7(3): 'The following shall be protected as original works, without prejudice to the rights of the author of the original work: (iii) works derived from folklore'	Les dispositions de l'article 69 ci-dessus ne sont pas applicable lorsque les œuvres du folklore national sont utilisées par une personne publique à des fins non lucrative. Cependant, cette personne publique tenu de faire une déclaration au BUTODRA (Art. 70) <sup>4</sup>	1 The provisions of article 55 shall not apply in the following cases:  (iii) Borrowing of expressions of folklore for creating an original work of an author or authors (Art 58)

<sup>3</sup> The representation or public performance of a work of folklore with a view to profit making will be contingent on the payment of a fee to the Bureau.

<sup>4</sup> The provisions of section 69 above are not applicable when the works of folklore are utilised by a public person for non-profit purposes. However, this public person required to make a declaration to the Bureau

	declared to the collective management organization. (Art.92)  <i>Also:</i>  The exceptions to copyright provided for in this Law shall apply <i>mutatis mutandis</i> to expressions of traditional cultural heritage. (Art.94)			
Regulatory Body	The collective management organization [Bureau Burkinabe du droit d’auteur (BBDA)] shall be under the technical supervision of the Ministry of Culture. Its status shall be approved by the Council of Ministers at the proposal of the Minister of Culture. (Art.97)	The exploitation and protection of the rights of authors provided for in this Law shall be entrusted to a body of authors and composers... That body, to the exclusion of any other natural body or legal entity, shall be qualified to act as intermediary for the issue of authorization and the collection of related royalties in the dealings between the author or his heirs and the users of literary and artistic works. It is placed under the authority of the department responsible for cultural affairs. (Art 62.)	Il est crée un établissement public a caractère professionnel dénommé: Bureau togolais du Droit d’auteur (BUTODRA) place sous la tutelle du Ministère charge de la culture. Ce bureau dote de la personnalité juridique est charge de la gestion et de la défense des droits tels qu’ils sont définies dans la présent loi. (Art. 73) <sup>5</sup>	The rules relating to the establishment and running of the Copyright Office of Niger shall be the subject of an implementing decree decided on in the Council of Ministers. (Art. 61(2))
Management and use of funds generated	The proceeds from this royalty shall, after management fees have been levied, be paid into a fund for cultural promotion. The royalties payable by the users upon exploitation of works derived from expressions of traditional cultural heritage which are part of national heritage shall be shared between the rights holders and the collective management organization, in	Proceeds...shall be used for cultural and social purposes for the benefit of Ivorian authors (Art.62)	Les produits de cette redevance seront gères pua l’organisme vise dans l’alinéa ci-dessus et affectes a des fins culturelles et social en faveur des auteurs togolais (Art. 69) <sup>6</sup>	Where the Copyright Office of Niger grants authorization, it shall fix the amount of and collect fees/ the fees collected shall be used for the purpose of promoting or safeguarding Nigerien culture (Art.57(2)).

<sup>5</sup> Article 73 creates a professional public body called: the Bureau of Author’s Rights, placed under the Minister for Culture. The Bureau will have legal rights and will be in charge of developing and defending rights as defined in the present law.

<sup>6</sup> Proceeds...shall be used for cultural and social purposes for the benefit of Togolese authors

	accordance with the provisions to be established in the distribution rules of this organization. (Art.93).			
Penalty for infringement	1-3 years and/or 150,000-1,500,000 Francs Art 110	3months – 2 years in jail and/or 100,000-5,000,000F Art 100	3 months in jail or 500,000-1,000,000F fee.	Art 65, 1 – 2 years in jail or a fine of 20,000-200,000F
Duration	The protection of expressions of traditional cultural heritage which are part of national heritage shall be guaranteed without limitation as to time. (Art. 90)	No explicit mention of folklore	Les œuvres du folklore national sont protégées sans limitation de temps (Art. 67) <sup>7</sup>	No explicit mention of folklore
OAPI Member (Bangui Agreement)	Yes (1983)	Yes (1982)	Yes (1982)	Yes (1982)

<sup>7</sup> Art. 67 – Works of national folklore are protected without limitation in time.

## Appendix F: List of Ghanaian languages and Ethnologic Map

The official language is English.

### A: GOVERNMENT-SPONSORED LANGUAGES

- |   |                                      |
|---|--------------------------------------|
| 1. AKAN (Ashanti, Fante, Akuapem, Akyem, Kwahu) |                                      |
| 2. DAGAARE / WAALE                              | Spoken in Upper Western Region       |
| 3. DANGBE                                       | Spoken in Greater Accra.(G/A)        |
| 4. DAGBANE                                      | Spoken in Northern Region (NR)       |
| 5. EWE  | Spoken in Volta Region (VR)          |
| 6. GA   | Spoken in Greater Accra Region (G/A) |
| 7. GONJA  | Spoken in Northern Region (NR)       |
| 8. KASEM  | Spoken in Upper Eastern Region (UER) |
| 9. NZEMA  | Spoken in Western Region (WR)        |

### B: NON-GOVERNMENT SPONSORED LANGUAGES

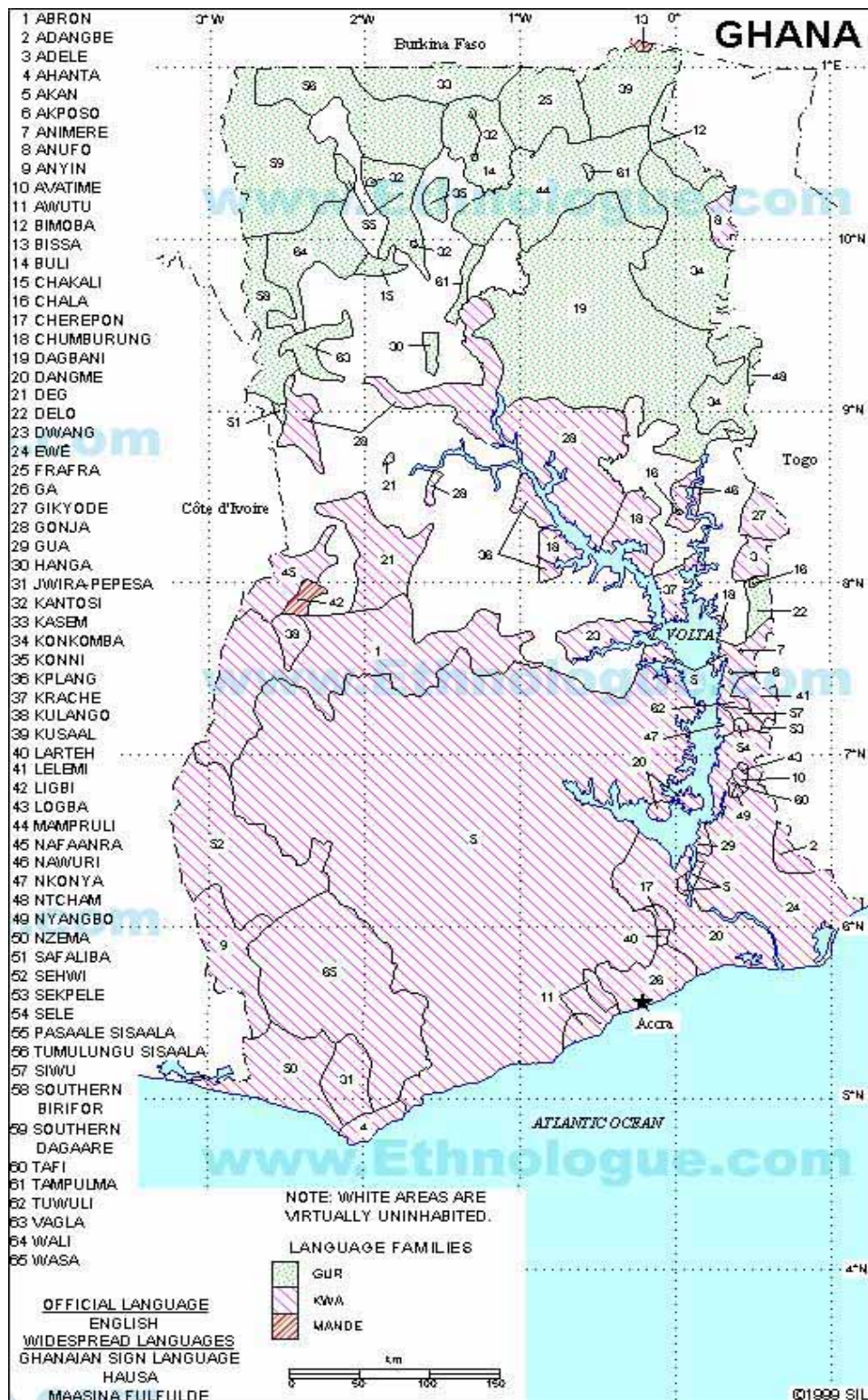
LANGUAGE	LOCATION
----------	----------

- |                   |                                      |
|-------------------|--------------------------------------|
| 1. ADELE          | Spoken in VR (Tutukpene & Nkwa)      |
| 2. ANUFO/CHOKOSI  | Spoken in NR (Chereponi)             |
| 3. BULI           | Spoken in UER (Sandema)              |
| 4. BIMOBA         | Spoken in NR (Bunkpurugu)            |
| 5. BIRIFOR        | Spoken in UWR & NR (Bilema & Birifo) |
| 6. BASSARI        | Spoken in NR...                      |
| 7. CHUMBURUNG     | Spoken in NR & VR (Ekumdi)           |
| 8. FRAFRA         | Spoken in UER (Bolgatanga)           |
| 9. GIKYODE/AKYODE | Spoken in VR (Shiari)                |
| 11. HANGA         | Spoken in NR                         |
| 12. KONKOMBA      | Spoken in NR (Saboba)                |
| 13. KUSAAL        | Spoken in UER (Bawku)                |
| 14. KASEM         | Spoken in UER (Navrongo)             |
| 15. KOMA          | Spoken in UER (Yipabongo)            |
| 16. BUEM/ LELEM   | Spoken in VR (Jasikan & Bodadze)     |
| 17. MAMPRULI      | Spoken in NR (NALERIGU)              |
| 18. MO/ DEG       | Spoken in B/A&NR (New Longor)        |
| 19. NAFAANRA      | Spoken in B/A (Banda Ahenkro)        |
| 20. NKONYA        | Spoken in VR (Aklobo & Wurup)        |
| 21. NTRUBO / DELO | Spoken in VR (Pusupu)                |
| 22. NAWURI        | Spoken in NR (Kitare)                |
| 23. SISAALA       | Spoken in UWR (Tumu)                 |
| 24. TAMPULMA      | Spoken in NR                         |
| 25. VAGLA         | Spoken in NR                         |
| 26. WALI          | Spoken in UWR                        |

#### Additions to be made:

Guan speaking people of Anum, Larteh, Adukrom, Dawu, Awukugua, Bireku, Winneba. Bono speaking people of Brong Ahafo, the Moo people of Sehwia, Aowins, Krobos.

Source: <http://www.ghanaweb.com/GhanaHomePage/tribes/la>



Source:

<http://www.ghanaweb.com/GhanaHomePage/tribes/map.php>.

## Appendix G: Ghanaian Heads of State

Tenure	Incumbent	Affiliation	Notes
1957 - 1966	Kwame Nkrumah	Convention Peoples Party (CPP)	Deposed in a military coup.
1966 - 1969	Major General Joseph Ankrah	National Liberation Council	Forced to resign
1969 - 1970	Brigadier Akwasi Afrifa	National Liberation Council, subsequently Chairman of the Presidential Commission	Handed power to a civilian government
1970	Nii Amaa Ollennu	Independent	Chairman of the Presidential Commission, Ollennu served a twenty-four day term as acting president prior to the election of Akufo-Addo
1970 - 1972	Edward Akufo-Addo	Independent	Deposed in a military coup.
1972 - 1978	Colonel Acheampong (subsequently General)	National Redemption Council, subsequently Supreme Military Council	Deposed in a palace coup.
1978 - 1979	Lieutenant-General Akuffo	Supreme Military Council	Deposed in a military coup.
1979	Flight Lieutenant Rawlings	Armed Forces Revolutionary Council	Handed power to a civilian government
1979 - 1981	Dr Hilla Limann	People's National Party (PNP)	Deposed in a military coup.
1981 - 2001	Flight Lieutenant Rawlings (subsequently President)	Provisional National Defence Council (subsequently National Democratic Council (NDC))	Stood as a civilian candidate in the 1993 Elections.
2001 - 2009	John Kufour	New Patriotic Party (NPP)	Served two terms (the maximum



			permissible under the Constitution
2009 - 2012	John Evans Atta Mills	NDC	Died in office
2012 - Present	John Mahama	NDC	Incumbent

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