Bridging the International Gap in the Protection of Folklore: Analysis of the Ghanaian Approach Against Comparative Experiences from Selected African Countries

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INTRODUCTION

"Expressions of folklore constitutes manifestations of intellectual creativity deserving to be protected in a manner inspired by the protection provided for intellectual productions."[1]

The protection of traditional knowledge and folklore is one of the most vexing and morally compelling issues in domestic and international law governing the protection of Intellectual Property (IP) Law.[2] World Intellectual Property Organization (WIPO) uses the terms "traditional cultural expression" and "expressions of folklore" interchangeably[3], though the latter usage is more common in international discussions and domestic laws. WIPO's[4] definition of folklore, as summed up by Mi-

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[1] UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION & WORLD INTELLECTUAL PROPERTY ORGANIZATION, MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS 9. (1985). [hereinafter UNESCO/WIPO]

[2] Ruth L. Okediji, *Traditional Knowledge and the Public Domain*, CTR. FOR INT'L GOVERNANCE INNOVATION PAPERS NO. 176, June 26, 2018, at 2.

[3] Referring to tangible and intangible forms in which traditional knowledge and cultures are expressed and activities of the Department for Transition and Developed Countries of WIPO.

[4] INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, WORLD INTELLECTUAL PROPERTY ORGANIZATION, THE

chael Anderson,[5] means:

> Any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested. . . which are (aa) the products of creative intellectual activity, including individual and communal creativity; (bb) characteristic of a community's cultural and social identity and cultural heritage; and (cc) maintained, used or developed by such community, or by individual having the right or responsibility to do so in accordance with the customary law and practices of that community.[6]

Folklore belongs to the genre of intellectual creations which IP is meant to protect.[7] However, the special nature of folklore makes it difficult for the international community to appreciate[8] its value and the need for greater protection. There are several creative cultural works of indigenous or ethnic groups that have been developed as part of their cultural practices and have become part of their cultural heritage. United Nations Educational Scientific, and Cultural Organization (UNESCO), under the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, has recognized these cultural works as a source of intangible and material wealth.[9] According to UNESCO's view, these works constitute manifestations

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PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: UPDATED DRAFT GAP ANALYSIS Annex I, 3 (2019) (Document prepared by the Secretariat. The Secretariat notes that there are, many definitions in national and regional laws and international instruments guiding the IGC in coming out with a definition for folklore: (a) the products creative intellectual activity, that (b) have been handed down from one generation to another, either orally or by imitation, (c) reflect a community's cultural and social identity, (d) consist of characteristic elements of a community's heritage, (e) are often made by authors unknown and/or unlocatable and/or by communities (f) are often primarily created for spiritual and religious purposes, (g) often make use of natural resources in their creation and reproduction, and (h) are constantly evolving, developing and being recreated within the community..).

5 Michael Jon Anderson, *Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge*, 1 CASE W. RES. J. L. TECH. & INTERNET 148, 151 (2010).

6 WIPO's Intergovernmental Committee is still considering an appropriate all-embracing definition for folklore. But in the meantime, WIPO provides that, folklore "may be considered as the forms in which traditional culture is expressed; form part of the identity and heritage of a traditional or indigenous community; are passed down from generation to generation. They are integral to the cultural and social identities of indigenous and local communities, embody know-how and skills, and transmit core values and beliefs." *Traditional Cultural Expressions,* WIPO (Nov. 7, 2019), https://www.wipo.int/tk/en/folklore/.

7 *See* Adebambo Anthony Adewopo, *Protection and Administration of Folklore in Nigeria*, 3 SCRIPT-ED, 1, (2006.).

8 *Id*. at 5; For instance, Prof. Michael Brown, an American anthropologist specializing in the study of indigenous peoples, once dismissed calls for greater intellectual property protection for indigenous property as part of "a polemical romanticism that produces memorable bumper-sticker slogans (Give the natives their culture back) without due regard to the need to maintain the flow of information.." He further argues that allowing indigenous communities to maintain a shroud of secrecy with regard to the use of certain cultural items would be an affront to the cherished "political ideals of liberal democracy". Michael Brown, *Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193,193 (1998).

9 UNESCO, THE 2005 CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS 3 (2015); UNESCO notes on the Convention's website that "cultural and creative industries are among the fastest growing sectors in the world. With an estimated global

of intellectual creativity and can make a significant contribution to the sustainable development of states and therefore need adequate protection and promotion.[10]

Article 2 on the guiding principles of UNESCO's Convention[11] reiterates the principles of equal dignity of respect for all cultures, including the cultures of persons belonging to indigenous peoples. Allying these with the recognition of the creativity in these works as recognized by UNESCO and WIPO, serious efforts towards preservation and protection of folklore to curtail these cultural distortion ventures and commercial exploitations must be made.

In spite of the multi-dimensional significance of folklore, international law does not protect it, though UNESCO has recognized indigenous communities' right to protect and preserve their culture.[12] This lack of international protection of folklore is a major gap in international law.[13] Nevertheless, in light of the UNESCO/ WIPO guidelines for protection of folklore, domestic legislators have taken some initiative to protect folklore at the national level.

Ghana, for instance, protects folkloric works under the Copyright Act of 2005.[14] This form of protection under the copyright law, though a good initiative, has been considered inadequate by several scholars,[15] especially because the law does not properly account for the unique features of folklore as opposed to other forms of intellectual property.. More recently, Ghana passed a law on geographical indications[16] that seeks to protect Kente, among other folklore, on the basis that

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worth of 4.3 trillion USD per year, the culture sector now accounts for 6.1% of the global economy. They generate annual revenues of US $2,250 billion and nearly 30 million jobs worldwide, employing more people aged 15 to 29 than any other sector. The cultural and creative industries have become essential for inclusive economic growth, reducing inequities and achieving the goals set out in the 2030 Sustainable Development Agendas." *The Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, UNESCO, https://en.unesco.org/creativity/convention. (last visited August 1, 2020).

10 UNESCO, *supra* note 9 at 8; *See also* UNESCO/WIPO, *supra* note 1, at 3–8.

11 UNESCO, *supra* note 9, at 5–6.

12 UNESCO, RECORDS OF THE GENERAL CONFERENCE, TWENTY-FIFTH SESSION, PARIS, 17 OCTOBER TO 16 NOVEMBER 1989 238–243 (1990); *See also* UNESCO/WIPO, *supra* note 1, at 9.

13 Doreen Adoma Agyei, *Rethinking Ghana's Folklore Board's Bid to Sue Black Panther Producers for Using Kente Without Authorisation*, GHANA L. HUB (Sep. 30, 2019 5:00 AM), https://ghanalawhub.com/rethinking-ghanas-folklore-boards-bid-to-sue-black-panther-producers-for-using-kente-without-authorisation/.

14 Copyright Act, 2005 (Act 690) (Ghana).

15 Scholars like Boatema Boateng, John Collins, Katehrine ludewig, Gertrude Tokornoo, and Stephen Collins *See generally e.g.* BOATEMA BOATENG, THE COPYRIGHT THING DOES NOT WORK HERE; ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA (2013); John Collins, *Hitechnology, Individual Copyright and Ghanaian Music, in* GHANA: CHANGING VALUES CHANGING TECHNOLOGIES (Helen Lauer ed., 2000); Kathleen Ludewig, *The Nationalization and Commercialization of Ghanian Folklore*, 6 MICH. J. PUB. AFF. 1 (2006); Gertrude Torkornoo, Creating Capital from Culture - Re-Thinking the Provisions on Expressions of Folklore in Ghana's Copyright Law, 18 ANN. SURV. INT'L & COMP. L. 1 (2012);; Stephen Collins, *Who Owns Ananse? The Tangled Web of Folklore and Copyright in Ghana*, 30 J. AFR. CULT. STUD. 178 (2018).

16 Geographical Indication Act, 2003 (Act 659) (Ghana); *See also* Boatema Boateng, *supra* note 15, at 9.

goods originating from Ghana or a locality in Ghana should not be marketed under the original name by any manufacturer[17] without recourse to the rightful authorities concerned.[18] But these measures, given the spate of manufacturers marketing imitated Kente and Adinkra textiles under their original names without a single known action against any, have seemingly proved ineffective.

The African Regional Intellectual Property Organization (ARIPO), in 2015,[19] passed the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore[20] to protect folklore regionally. Though Ghana has signed this protocol, it has not yet ratified it. Given the opportunities that the protocol offers, ratification and domestication or implementation have become particularly imperative in the light of the fact that the African Continental Free Trade Agreement (AfCFTA) came into effect in 2019. The full coming into force of AfCFTA will open the African national borders for free trade and, therefore, will increase the possibility that the growth of domestic manufacturers will be threatened by the flood of cheap and counterfeit goods from neighboring countries.[21] Accordingly, the protection of folklore will face a major challenge due to the free market movement in the African Union for which copyright laws may not provide adequate protection.

Though researchers[22] allude to the challenge inherent in enforcing intellectual property protections beyond state's borders, none have proffered measures and recommendations that will limit the problem. The international nature of the challenge dictates a both regional and global solution. Finding a global protection for folklore is still under discussion, but how do we fill this gap regionally on the African Continent to meet this global challenge at least halfway? Against this backdrop, this article seeks to reexamine the existing legal framework and literature on folklore protection in Ghana. The article illuminates the reasons for the inadequacy of copyright as a means of protecting folklore in Ghana. In doing so, it comparatively draws on the experiences of other African countries such as Nigeria, Kenya, and South Africa to inform and guide recommendations for effective protection of folklore in Ghana and other African countries.

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17 Michael Blakeney, EXTENDING THE PROTECTION OF geographical indications: case GEOGRAPHICAL INDICATIONS: CASE STUDIES OF AGRICULTURAL PRODUCTS IN AFRICA (Abingdon, Oxon; Earthscan,199 (Michael Blakeney et al. eds., 2012) at 199).

18 Adinkra' is a Twi word that means 'bidding farewell' and 'kente' is a derivative of 'kenten', the Twi language work for basket. The name 'kente,' depicts both the art of weaving employed to create kente, and the conceptual mosaic framework of every kente design. Gertrude Torkornoo, *Creating Capital from Culture - Re-Thinking the Provisions on Expressions of Folklore in Ghana's Copyright Law*, 18 ANN. SURV. INT'L & COMP. L. 1, 1 (2012).

19 Ghana is a member of ARIPO

20 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, August 9, 2010, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/text/201022.

21 Andrew Green A. *What Can the African Continental Free Trade Area Really Deliver?*, WORLD POL. REV. (July 12, 2019), https://www.worldpoliticsreview.com/trend-lines/28030/what-can-the-african-continental-free-trade-area-really-deliver

22 *See generally* Josephine Asmah, *Recent Challenges to the Protection of Copyright Literary Works: A Study of Ghana and Canada* 282 (1998) (unpublished Ph.D. thesis, Dalhousie University).

Part I provides an overview of the international recognition of folklore as an asset worthy of preservation and protection. It shows that the debate over whether folklore is a type of asset that belongs to the 'public domain' is at the heart of the international discussions over the issue. Part I challenges this view by arguing that folklore is not work in the public domain and must be protected internationally.

Part II comparatively discusses the ways Ghana, Nigeria, Kenya, and South Africa protect folklore under their domestic legislation and how effective their approaches have been.

Part III discusses the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, and how it seeks to achieve effective national and regional protection of folklore. This is followed by recommendations and a guide to the approach that Ghana and other African countries can take in protecting folklore widely beyond their jurisdiction.

I. Graduated Responses to International Protection of Traditional Cultural Expressions/ Folklore.

"*The history of [and continual] authorized access, use and uncompensated appropriation of property belonging to Indigenous and minority groups. . . underlie justifications for the entitlement-like claim sought by such groups in international fora."*—Prof. Ruth Okediji[23]

Concern over cultural misappropriation has taken global center stage. This section of the article therefore discusses international responses to cultural misappropriation, especially by the World Intellectual Property Organization (WIPO). It discusses WIPO's efforts to positively protect traditional knowledge and folklore as a material wealth of indigenous people to augment United Nations Educational Scientific and Cultural Organization's (UNESCO's) recognition of the cultural wealth of indigenous people.

The dictates of globalization have inevitably increased misappropriation and commodification of cultural products like folklore as well as their circulation in social and economic contexts beyond their original communities.[24] However, intellectual property (IP) rights protection will be an important intervention that can mediate between the global markets and the need to protect and preserve cultural assets.[25] This is premised on the fact that these assets are products of creative intellectual activities by communities. Nevertheless, there are unbridled misuses coupled with commercial uses of these works without the authorization of indigenous communities. In consequence, because IP protects intellectual creations, IP instruments should be used as a policy response to the concerns of indigenous and traditional communities in the same or similar way as it does for traditional intellectual proper-

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[23] Okediji, *supra* note 2, at 3.
[24] Boateng, *supra* note 15, at 146.
[25] *See* UNESCO/WIPO, *supra* note 1, at 7.

ty.[26]

Lily Martinet, an expert on folklore in international law, explains that this need for protection has come about in international law as a response to commodification and commercial appropriation.[27] When a folklore is misused by a person outside of its community of origin, it not only robs the community of economic benefits but also can shake the community to its core, based on the meaning and significance attached to said folklore.[28] Martinet notes that, in some cases, the folklore is "distorted or mutilated."[29] This appalls the indigenous communities. The users modify the folklore "without taking into account its meaning or the cultural values it expresses,"[30] thus woefully diluting its cultural relevance and significance. This damage caused to the community, as stressed by Martinet in her research, "is increased when the traditional cultural expression mutilated is sacred."[31] This should not be allowed to continue when there has been a great deal of international recognition for the need to respect and preserve cultural heritages of indigenous people as a source of their identity and contribution to the development of their economies.

Protecting the intellectual creations of cultural nature is not new, it is an old subject dating back to the 1970s[32] and, per Mihaela Daciana Natea, an expert it the field, the debate is mainly centered on how much we protect and what exactly we define as cultural creations and the rights of indigenous people.[33] United Nations Educational Scientific and Cultural Organization (UNESCO) has long, under the Convention on the Protection and Promotion of the Diversity of Cultural Expressions[34], recognized the importance of traditional knowledge and folklore as a source

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26 PAUL KURUK, WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, Thirty Fourth Session Geneva, June 12 to 16 11 (2017); *See also* Interview with Wend Wendland, Director, WIPO, Traditional Knowledge Division (2017) (discussing why it is important to seek Intellectual Property (IP) protection for Traditional Cultural Expressions (TCE's) and folklore, such as indigenous designs, performances, art, and music, argued. He argues that, these cultural works embody rich creativity and are vulnerable to being misappropriated by third parties. Thus, creativity qualifies the folklore as worthy of intellectual property protection. Wendland, continues that it makes sense for the intellectual property system to respond in some way to concerns that indigenous people, local communities, and developing countries have that their (folklore) should be protected in the same way that "non-traditional" cultural expressions are.)

27 *See* Lily Martinet, *Traditional Cultural Expressions and International Intellectual Property Law*, 47 INT'L J. LEG. INFO. 6, 6–12 (2019).

28 *Id*. at 11.

29 *Id*.

30 *Id*.

31 Lilly *Id*. (adding that, in 2013, American company "Nike" commercialized women's sportswear inspired by traditional Polynesian tattoos. This product, according to Martinet, deeply offended the Samoan community because the pattern and the placement of the tattoos copied by Nike are reserved for men. This regard for the customary rules regulating which gender was authorized to bear those tattoos caused an uproar, forcing Nike to pull the sportswear..)

32 Ulia Popova Gosart, *Protection of Knowledge and Indigenous People*, *in* TRADITIONAL KNOWLEDGE & INDIGENOUS PEOPLES (ed. Ulia Popova Gosart, 2007).

33 Mihaela Daciana Natea, *Protecting Traditional Knowledge Through Historical Arguments*, 1 STUDIA UNIVERSITÄT'S PETRU MAIOR SERIES HISTORIA 173–178 (2017)

34 UNESCO, *supra* note 1.

of intangible and material wealth, and in particular the knowledge systems of indigenous people, and their positive contribution to sustainable development, as well as the need for their adequate protection and promotion[35] The convention represents an important step forward for the protection of folklore because it does not only recognize its importance but also extends the definition of culture by differentiating common goods from cultural goods that represent values, identity and meaning.[36] This also sits well with the United Nations Declaration on the Rights of Indigenous People (UNDRIP) that provides in Article 11 that

[i]ndigenous peoples have the right to practice and revitalize their cultural traditions and customs. This include the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.[37]

Taking on the mandate from the United Nations Organizations, WIPO has, for nearly two decades, engaged in formulating the nature and content of "a text-based legal instrument or instruments for the effective protection of genetic resources (GRs), traditional knowledge (TK), and folklore within or relating to the international intellectual property system."[38]

Notable, however, of the graduated effort is that WIPO seeks the "protection against copying, adaptation, and other forms of [IP-like] misappropriations."[39] "This is referred to as 'legal protection,' as opposed to 'preservation' and 'safeguarding,' which are addressed in UNESCO conventions and are sometimes referred to as 'material protection.'"[40] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is the body manded to undertake text-based negotiations with the objectives of reaching agreement on a text(s), which will ensure the effective protection of traditional knowledge(TK), folklore and genetic resources (GRs) globally. However, Gertrude Tokornoo, a Ghanian Supreme Court Judge, points out that, "Notwithstanding over forty years of working towards an international framework" for the protection of folklore (among others), no conclusions have as at yet been reached.[41] This means the issue of a globally acceptable regime for regulating folklore in Intellectual Property law remains unresolved.[42]

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35 Natea, *supra* note 33, at 175.

36 *Id*. at 175–176.

37 G.A. Res. 61/295, 2007, United Nations Declaration on the Rights of Indigenous People (Sep. 13, 2007).

38 Chidi Oguamanam, *Towards a Tiered or Differentiated Approach to Protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) in Relation to the Intellectual Property System*, 23 AFR. J. INFO. COMM. 1, 2 (2019).

39 Interview with Wend Wendland, Director, WIPO, Traditional Knowledge Division (2017)

40 *Id*.

41 Gertrude Tokornoo, *Creating Capital From Culture – Re-thinking the Provisions on Expressions of Folklore in Ghana's Copyright Law*, 18 ANN. SURV. INT'L COMP. L. 1, 1, 6 (2012).

42 *Id.*

Adewopo Adebambo, a leading intellectual property scholar in Nigeria, explains that "[o]pinions are [] sharply divided on the nature and framework of protection to be accorded to folklore. While some favor protection under the [IP] subjects, others believe that an entirely new system is required."[43] Tokornoo adds "[s]cholars agree that the problem lies in the convergences and divergences between necessary incidents of IP law such as mode of authorship of protected works,. . . fixation and duration of rights, and the general character of [folklore]."[44] Wend Wendland, head of the Traditional Creativity, Cultural Expressions and Cultural Heritage Section for WIPO, also admits that though WIPOs intergovernmental committee is making progress, "progress in narrowing gaps between delegations is slow."[45] According to Wendland, gaps remain on core issues such as the definition of folklore, beneficiaries of protection, the scope of right, exceptions and limitations and the relationship between TCE's or folklore and the public domain.[46] A notable gap that has been a subject of arguments is the divergent view that folklore are works in the public domain and therefore free for the taking.[47]

While WIPO is still at work, a plethora of legal scholars are thoroughly arguing whether indeed folkloric works are works in the public domain. A section of scholars argues that folklore is a resource for all mankind. Thus, its protection, if there should be any at all, should be left to national legislations and any attempt to protect it internationally will limit intellectual freedom and endanger the public domain.[48] On the contrary, other scholars argue that an international protection is needed to better protect misappropriation of folklore, and the assertion that such a protection would endanger the public domain is a fallacy because there is no such thing as a universal public domain.[49] Ruth Okediji states that even with traditional IP regimes, what would constitute public domain differs and so it is with different jurisdictions perception of public domain.[50]I agree with this opinion;, folklore is not work in the public domain underserving of protection. An author makes use of information accessible to all to write a book and receive automatic copyright protec-

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43 *Id*.

44 Tokornoo, *supra* note 41, at 6.

45 Wendland, *supra* note 26.

46 *Id.*

47 *Note on Meanings of the Term 'Public Domain' in the Intellectual Property System, with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore para. 4, U.N. Doc. WIPO/GRTK/IC/17/INF/8 (2010) (defining the public domain as " tangible and intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired").

48 *See, e.g.* Doris Estelle Long, *Traditional Knowledge and The Fight for the Public Domain*, 5 JOHN MARSHALL REV. INTELL. PROP. L.,317, 318 (2006).

49 Okediji, *supra* note 2, at 1, 6.

50 Okediji, *supra* note 2, at 6.

tion against unpermitted uses upon publication regardless of whether the author has registered it with a governmental body. How different is that from folkloric works? Are they all not creative works? Irrespective of the fact that they are all out there, upon creation copyright protects a book, so why should we not have intellectual property protection for folklore?[51] Joana Gibson has also said that

> there is no public domain. . . even knowledge shared and used widely does not fall into the public domain. When knowledge is shared, it is shared among those who are trusted to know their roles and responsibilities in using the knowledge. . . For this reason, misappropriation and misuses [of folklore] is not simply a violation of 'moral rights' leading to a collective offence, but a matter of cultural survival for many Indigenous peoples.[52]

The absence of international protection notwithstanding, countries have taken the bull by the horns and protected folklore under domestic legislation. This has mainly been inspired by the WIPO/UNESCO guidelines for the protection of folklore by states and will be discussed next.

II. Protection of Folklore under National Laws in Africa

Nation States with significant folklore have taken to protecting folklore under their domestic legislation. The different approaches towards the protection of folklore in the selected African countries, Ghana, Nigeria, Kenya and South Africa, will be summarized and analyzed. This will inform nuanced and well-suited approach to protecting folklore in Ghana and other African Countries either through the traditional IP routes or through a *sui generis* framework for maximum effect beyond territorial jurisdictions.[53]

A. Protection of Folklore under Ghanaian Law

Ghana belongs to the group of countries that seek to protect folklore under their national law. The first entry of folklore into the Ghanaian IP law was in 1973

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[51] *See* Adebambo, *supra* note 7, at 4 (noting that the fact that traditional intellectual property rights cannot conveniently accommodate folklore because of its non-western system of ownership does not mean that folklore cannot be effectively protected. Rather, the content and nature of protection will differ from what is available under the present intellectual property system.).

[52] Johanna Gibson, *Audiences in Tradition: Traditional Knowledge and the Public Domain*, *in* INTELLECTUAL PROPERTY: THE MANY FACES OF THE PUBLIC DOMAIN 174, 188, (C. Waelde & H. MacQueen eds.,2007) (quoting Tulalip Tribes (2003), Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain, 9 July, WIPO Intergovernmental Commitee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, 5–17 July); *See also* Adebambo, *supra* note 7, at 5.

[53] Black's Law Dictionary (11th ed. 2019) defines "*Sui Generis*" as "[Latin "of its own kind"] of its own kind or class; unique or peculiar. The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a sui generis statute designed for that purpose." Simply put, sui generis is a system specifically designed to address the needs and concerns of a particular issue.

when the Textile Designs (Registration) Decree[54] was passed as an industrial property law to exclude the designs of indigenous fabrics from ownership claims by individuals and textile companies registering their designs under the law. In 1985, Ghana revised its copyright law and expanded its scope to include expressions of folklore, defining the latter very broadly to include not only oral culture, but also elements of material culture like adinkra[55] and kente designs.[56] The copyright protection of folklore was retained when the law was again revised in 2005 in compliance with TRIPS (Trade Related Aspects of Intellectual Property Rights) obligations.[57] The current Ghanaian Copyright Act (Act 690)[58] protects folklore by providing special provisions under the statute in that regard. This approach, however, has been criticized as inappropriate in respect to the unique characteristics and wide span of folkloric works. This paper will assess of how copyright protects folklore in Ghana and how effective this approach has been. In assessing the appropriateness or inappropriateness of the Ghanaian Copyright Act's protection of folklore, the following issues will be addressed. First, the subject matter framework and fixation, second, limited duration granted for copyright protection, third, the identifiable original authorship requirement, and then fourth, the requirement of fee payment for commercial folklore use.

1. Definition of Folklore

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 known, and any similar work designated under this Act to be works of folklore".[59] Act 690, singles out for mention adinkra and kente designs in its definition of folklore presumably because, "[a]part from their exquisite beauty, adinkra and kente are two of the most visible, commercialized, and versatile arts forms emanating from Ghana".[60] Globally, Kente is the most significant, and it has been popularly used for adorning graduation gowns and tassels.[61] Adinkra, on the hand, is a language expressed in art form, which would have only aesthetic value for some people but is fast expanding into an expression of African identity nonetheless.[62]

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54 Textile Designs (Registration) Decree, Accra, 1973 (N.R.C.D. 213) (Ghana: Government Printer, Assembly Press).

55 'Adinkra' is a Twi word that means 'bidding farewell' and 'kente' is a derivative of 'kenten', the Twi language work for basket. The name 'kente','kente,' according to Torkornoo, depicts both the art of weaving employed to create kente, and the conceptual mosaic framework of every kente design.

56 Boatema Boateng, *The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law*, 47 L. & SOC. REV. 943, 943 (2013).

57 *Id.*

58 Copyright Act, 2005 (Act 690) (Ghana).

59 *Id.* § 76.

60 Tokornoo, *supra* note 41, at 6.

61 *Id.*

62 *Id.* at 11. Torkornoo writes that the adinkra symbol 'Sankofa,' which is depicted by a bird with its

Ghana's protection of folklore within this well-established legal form under the Copyright Act is significant in response to the rising need to protect folklore against misappropriation. However, the definition proffered here does not offer much assistance to Ghanaians and non-Ghanaians as to what category of works are folkloric. Folkloric works are very broad. Merely classifying them as literary, artistic and scientific expressions still retains the uncertainties as to which works are folkloric. Furthermore, it exposes the fact that some folkloric works can be classified as scientific and ought not to be protected under copyright according to Ghana's international obligations under the Berne Convention,[63] which clearly defines the subject matter of works to be protected.

2. Subject-Matter Framework and Fixation

The protection of folklore was initially envisaged on a copyright model, because of the similarity of subject matter between copyright law and folklore. However, although copyright laws seem well suited to meet some of the needs and objectives of folklore holder, it is limited in its mission of protecting the folklore.[64] The subject matter framework and the requirement for fixation under Act 690[65] clearly shows a displacement in the protection of folklore under copyright statute. Section 1 (1) of Act 690 reads,

"an author, co-author or joint author of any of the following works is entitled to the copyright and protection afforded to that work under this Act: (a) Literary works (b) Artistic works (c) Musical works (d) Sound recordings (e) Audio-visual works (f) Choreographic work (g) Derivative work, and (h) Computer software or programmes.

Expression of folklore spans every aspect of human resource going beyond the enlisted subject matters here.[66] Section 1 subsection (2) of Act 690 then gives a caveat that,

"despite subsection (1), a work is not eligible for copyright unless (b) it has been fixed in any definite medium of expression now known or later to be developed with the result that the work can either directly or with the aid of any machine or device be perceived, reproduced or otherwise communicated. . ."This require-

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

63 *See* Berne Convention for the Protection of Literary and Artistic Works art. 2, Sep. 9, 1886, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/text.jsp?file_id=283698. Ghana is a signatory to the Berne Convention. It signed the Convention on July 11, 1991 and it entered into full force Oct. 11, 1991.

64 DAPHNE ZOGRAFOS, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS1 (2010).

65 *Cf.* Berne Convention for the Protection of Literary and Artistic Works art. 2, Sep. 9, 1886, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

66 This includes unique marks of identification (in trade) that may pass for trademark, formulas in indigenous medicines that may pass for "scientific" invention for patent, and some secrets in rituals that may also be classified as trade secret or confidential information.

ment cannot be met by all because folklore comprises both copyright tangibles and intangibles. The intangible forms of folklore are, broadly, oral traditions— communicated orally and passed on from generation to generation orally. The fixation requirement under the Copyright Act will force intangible folklore out of the ambit of copyright protection under Act 690.[67]

3. Limited Duration

The difficulty discussed above is further aggravated by the law vesting copyright folklore in the President in perpetuity. IP laws are structured to encourage the exposure of new creative expressions and useful information into the intellectual commons, after the originator has been rewarded with monopoly rights for a period of time.[68] In line with this ideology, copyright laws are granted for a limited period.[69] However, section 17 of Act 690 provides that 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.[70] With this provision, the ideology of eventual "granting of access" purpose of IP law is disrupted by the "perpetual vesting of expressions of folklore in the president of Ghana."[71] This grant, however, is not out of place in the protection of folklore because "several international instruments support the perpetual protection of cultural heritage from appropriation and distortion[,]" according to Tokornoo.[72] "These include the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)[73] and the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972)."[74] Notwithstand-

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67 The Tunisia Model Law on protection of folklore under copyright noted this difficulty of fixation requirement for folklore. According to Christine Haight Farley44, the commentary that accompanied the Tunisia Copyright Law provided 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 or in the form of dances whose steps have never been recorded; the fixation requirement might, therefore, destroy the protection of folklore. . . consequently, . . . the authors of the Model Law have made an exception to the fixation rule, particularly since, if this rule was sustained, the copyright in such work might well belong to the person who takes the initiative of fixing them"." Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 44 (1997).

68 Tokornoo, *supra* note 41, at 13–14.

69 *See* Berne Convention for the Protection of Literary and Artistic Works art. 7, Sep. 9, 1886, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

70 Copyright Act, 2005 § 17 (Act 690) (Ghana).

71 Tokornoo, *supra* note 41, at 14.

72 *Id*.

73 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Article 13(d)), Nov. 14, 1970, 823 U.N.T.C. 231 (providing that "[t]he state parties to this Convention also undertake, consistent with the laws of each state: (a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property.").

74 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritages, art. 4, Dec. 17, 1975, 1037 U.N.T.C. 151 (providing "each state party to this convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Article 1 and 2 and situated

ing the support for perpetual protection for folklore found in the Ghanaian law and international instruments described above, I agree with Tokornoo that the perpetual duration provision in Act 690 "[creates] a legal conundrum irreconcilable in general IP lawtenets."[75]

4. Identifiable Authorship and Ownership of Folklore

According to Doris Long, an expert in international intellectual property law, "one of the most difficult issues facing efforts to reconfigure copyright protection to allow some form of [folklore] protection is the present dichotomy between the individualistic authorship construct of present IP regimes and the collective or tribal authorship of traditional arts."[76] The unique identification of folkloric authors is well seated in the communal, tribal and ethnic authorship and ownership. Very few folklores are created by individuals. Most of the time, "the group is the author and owns the right to control such works."[77] Communal authorship, on the other hand, appears to be at variance with copyright. Particularly in the case of the Kente and Adinkra textiles where the communities recognize and traces authorship down to ancestors who passed the folklore down to present generations.[78]

However it may be called, whether as joint authorship or group authorship, the concept of collective authorship already exists in IP rights regimes.[79] The difficulty, however, under copyright protection will be with identifying each authorship for

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on its territory, belongs primarily to the State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which may be able to obtain. .") (Article 5(4) further provides that "to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country: take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage[.]).

75 *See* Tokornoo, *supra* note 41, at 15.

76 Long, *supra* note 48, at 324.

77 *Id*.

78 Boateng, *supra* note 15, at 41. In Boateng's interviews with some members of the Kente weaving and Adinkra cloth production towns on how they determine authorship of their works, the interviewees were particular in their responses that "the tongue does not rot" as Boatema Boateng puts it, meaning a person's words and creative acts are not curtailed by death. By this, the community members were trying to posit the recognition of the collective contribution and role that earlier curators of the Kente and Adinkra played in the folklore, establishing the fact that the textiles are collectively created and owned by members of the authoring communities.

79 Long, *supra* note 48, at 324; Okediji, *supra* note 2, at 5 (buttresing this point by describing the multiple-authored or -invented works that are the hallmark of folklores] as fairly common in the IP landscape.. "[I]ndeed, in a number of disciplines, group authorship is the norm, and rare is the patented invention that has a sole inventor. Additionally, in the digital landscape, group authorship of literary and artistic works is a widespread practice with significant technical and economic advantages. These advantages, are paradigmatically denoted in open-source software projects, reflecting a commons-based approach to innovation that is now an accepted and, in some cases, preferred model for the production of knowledge goods..");*see generally*, Yochai Benler, *Law, Innovation, and Collaboration in Networked Economy and Society* 13 ANN. REV . L. & SOC. SCI;. 213 (2017); Jonathan Zittrain, *The Generative Internet* 119 HarvardHARV. L. REV. 1975 (2006).

purposes of protection and enforcing rights. Torkornoo,[80] in her writings on how Act 690's protection of folklore disincentivizes development, expressed the sentiment that, "in Ghana's multi-ethnic society, the identification of the members of any community for the purpose of determining the author(s) of a particular folkloric expression would prove to be an extremely difficult task."[81] Despite this concern, it has always been a remarkable trait of almost all ethnic, tribal and indigenous communities, including those in Ghana, to have well-structured governance system with clear and respected leadership to represent the group at all times when it comes to ascribing and or asserting communal authorship and ownership to folklore.[82] This unique characteristic feature would favor argument that folklore needs its own unique framework of protection distinct from copyright and the traditional intellectual property regimes to allow for proper focus on the communal ownership and authorship.[83] This chasm between communal authorship of expressions of folklore and the need to identify authors of copyright works influenced Act 690 to make the president of Ghana the trustee of folkloric expressions.[84]

By doing this, the Ghanaian Copyright Act has resorted to the nationalization of the rights of folklore expressions because it takes authorship rights away from the creators and places them in the president.[85] This removes from the authoring communities the right to economic reward and moral rights of attribution,[86] the two rights that copyright accords authors. It is worth noting that, these authoring communities invest a lot economically and culturally in the creation and continual recreation of folkloric works, and the majority of them depend on them as their sources of livelihood and thus require proper recognitions as authors.[87] Due to nationalization, there are no means or opportunities for indigenous communities concerned with particular folklore to directly benefit from the revenues collected for permissions granted for commercial use of their works. Surprisingly, any revenue generated is earmarked for the promotion of Ghanaian folklore and indigenous art, without the mention of any direct indigenous community benefit component.[88]

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80 Tokornoo, *supra* note 41, at 11.

81 *Id.* at 36.

82 *See id.* (attesting to this fact and writing that "Ghanaians are very clear on the ethnic sources of their folklore".").

83 *See* Adebambo, *supra* note 7, at 4.

84 Tokornoo, *supra* note 41, at 11.

85 *Id*. at 3.

86 *Id*.

87 Kente and Adinkra fabrics historically originated from the Akan people. The Akan people traditionally occupy a large area spanning from the present Akan's in Ghana all the way to a substantial portion of south eastern parts of Cote d' Ivoire. Stemming from this, the production and usage of Kente and Adinkra as part of native culture is not limited to the Akan ethnic group of Southern Ghana but stretches to the Akan's in Cote d'Ivoire. Nationalization of Kente and Adinkra fabrics therefore defeats the very purpose of section 76 of Act 690, which recognizes that folklores are developed by ethnic communities. *See* Copyright Act, 2005 § 76 (Act 690) (Ghana).

88 The use of revenue generated from folklore for the promotion of Ghanaian folklore is a good one. However, the authoring communities need some recognition and stake in the determination and usages of the revenue generated out of their folklore. Section *See* Copyright Act, 2005 §64 (2) and (3) a and bAct 690) (Ghana).

According to Kathleen Ludwig, the case of *Yaa Amponsah* is a good illustration of this issue.[89] *Yaa Amponsah* is considered to be the source of the basic melodic pattern of Ghanaian high life music, and ,in 1990, American singer Paul Simon paid $16,000 in royalties to the Ghana Copyright Administration for the use of the song in his album *The Rhythm of the Saints*.[90] John Collins recalls that Simon intended the royalties for Kwame Asare (also known as Jacob Sam), who was said to be the song's composer.[91] However, since Asare had died in the 1950s, the National Commission on Culture declared Yaa Amponsah to be a *"*work of anonymous folklore*"* and used the royalty paid by Paul Simon to set up the National Folklore Board without any known direct benefit to the indigenous author or his estate.[92] Even though Paul Simon's royalty was put to good use, this trend has the potential of creating conflict between the government and the indigenous communities over copyright issues of authorship and ownership.[93]Additionally, Act 690 does not spell out how it protects and rewards individual Ghanaian folkloric authors. The wording of section 76 of the statute implies that folklore is necessarily always the creation of the community at large. This is not always the case. There are instances of individual authorship and folklore protection needs to take recognition of that and factor it into folklore protection.

5. Fee Payment for Commercial Use of Folklore

Besides the nationalization of folkloric rights by Act 690, the law incorporates strict penalties for non-compliance with section 64, which requires a person who intends to use folklore for any purpose other than those permitted under section 19 of the act to apply to the National Folklore board for permission in the prescribed form and pay a fee that the Board may determine. Heavy penalties, including fines and up 3 years of jail time, can be imposed on all offenders.[94] This offense extends even to indigenous communities in Ghana, who may be beneficiaries and custodians of ancestral authorship of particular folklore in Ghana. What Act 690 effectively does here is threaten indigenous people with a jail term for the commercial use of their own folklore, which is part and parcel of their culture and development.[95] Worse,

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89 Kathleen Ludwig, *The Nationalization and Commercialization of Ghanaian Folklore*, 6 MICH. J. PUB. AFF., 1, 13 (2009).

90 John Collins, *Music Copyright, Folklore and Music Piracy in Ghana*, 20 CRITICAL ARTS 159, 165 (2009).

91 John Collins, *Ghana and the World Music Boom*, 6 COLLEGIUM: STUDIES ACROSS DISCIPLINES IN THE HUMANITIES AND SOCIAL SCIENCES 57, 66 (2009).

92 *Id*. at 67.

93 *Id*. at 67; *see also* Ludwig, *supra* note 89, at 13 (noting a that s second instance is "the payment of royalties to the Copyright Office by JVC a Japanese firm that released a film in traditional African music and dance..").

94 Copyright Act, 2005 § 43 (Act 690) (Ghana).

95 According to Kathleen Ludwig *supra* note 89, at 19, Act 690 may also be incompatible with multiple international treaties that Ghana has ratified. In 2000, Ghana signed the *International Covenant on Economic, Social and Cultural Rights* in which it "recognised the rights of everyone to take part in cultural life" (International Covenant on Economic, Social and Cultural Rights (1976), section 3, Article 15. Ratified 7th September 2000). In the same year, Ghana ratified the International Covenant on Civil and Political Rights, which states: "All people have the right of self- determination.

when revenue is generated from a grant permission by National Folklore Board for a folklore commercial use, the money is centralized and nationalized without any recompense to the indigenous communities concerned.

The essence of copyright law is to incentivize authors and promote creativity. But in this case, Act 690 instead creates a disincentive for Ghanaian artists to build upon works that are classified as folklore. This is because the Ghanaian artist will be required to pay royalties and fees for commercial use of folkloric works without regard, even narrowly, for the ethnic community the artist belongs to. The implication is that no Ghanaian may obtain rights to adaptation, translation, or transformation of any existing folklore unless they have paid for these rights.[96] Yet the definition of folklore again recognizes that the arts are created, developed, and preserved by Ghanaian communities.

Artists across art forms for instance have adopted, used, and reused folklore in the creation of different forms of cultural expressions.[97] Efua Sutherland, a playwright, developed *Anansegoro* as "a framework for aesthetics and theatrical devices that consist of a combination of traditional songs, rhythms and dances which move the action of the play forward."[98] If Sutherland was to do that today, section 64(1) of Act 690 requires her to seek permission from the National Folklore Board and pay a fee to be determined by the board before any such use. Tokornoo points out that

The law seems blind to the fact that the cultural use, preservation and development of these folkloric arts would naturally lead to their adaptation, translation and transformation. Thus, by directing that adaptation, translation and transformation must first be paid for; the law is overly contradictory.[99]

Tokornoo, however, infers that presumably, the intention of the law has no application in the domestic daily use of these arts, and it must not be literally interpreted.[100] If that is the case, then the legislature should clearly spell it out. Surprisingly, the language of the provision is very plain and clear, and it can only be interpreted literally without the express exclusion of Ghanaians from the payment of the folkloric commercial use fee. The provision, according to John Collins, was also vigorously opposed by some of the performing artists on the National Folklore Board right from its inception, including Koo Nimo, a folk guitarist, the poet Kofi Ayidoho, John Collins himself, a musicologist and scholar, and members of the wider Ghanaian artistic community, but the folkloric fee clause for Ghanaians was

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By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (International Covenant on Civil and Political Rights (1976), Section 1. Article 1. Ratified 7th September 2000.

96 Tokornoo, *supra* note 41, at 39.

97 Stephen Collins, *supra* note 15, at 178.

98 *Id.* at 182.

99 Tokornoo, *supra* note 41, at 12.

100 *Id.*

incorporated into the statute and the issue has to date gone unresolved.[101] Professor John Collins has long cautioned that putting brakes on Ghanaian folkloric development through revenue tax will actually enhance the flooding into Ghana of other African folkloric norms, stifling the development of indigenous folklore.[102]

It is imperative to note at this point that, though Ghana is a member of ARIPO and has signed the Swakopmund Protocol, it is yet to be ratified to form part of Ghanaian laws.[103] This gravely limits the form, contents, and extent of protection of Ghanaian folklore on the African continent and adds to the threat of their increasing misappropriation.[104]

Ghana is certainly not unique in protecting folklore: indeed, many nations in Africa, including most states in the West African Sub-region, equally protect folklore through copyright statutes and other viable means.[105]

B. Comparative experiences of protection of folklore under Nigerian Law

Nigeria, like most African countries, protects folklore under its Copyright statute, the Nigerian Copyright Act 1990 as amended.[106] Our discussion will begin with how the Nigerian copyright law defines folklore. This will give readers an idea of how the indigenous communities are recognized and acknowledged as authors of folklore. Following the definition, this section will move to a look at a unique feature of the Nigerian Law that sets out a distinct exception for folklore different from the general copyright exceptions. Lastly, this section will discuss the nature of permission required for commercial use of folklore by both Nigerians and non-Nigerians.

1. Definition of folklore

Section 28(5) of the Nigerian Copyright Act, defines folklore as

> a group oriented and tradition-based creation of groups or individuals reflecting the expectations 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 riddle; (b) folks songs and instrumental folk music; (c) folk dances and folk plays; (d) production of folk arts in particular, drawings paintings, carvings, sculptures, pottery, terracotta mosaic, woodcraft, metal work, jewelry, handicrafts, costumes and indigenous textiles.[107]

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101 John Collins, *supra* note 91, at 67.

102 *Id.*

103 Enyinna S. Nwauche, *The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa*, 27 J. WORLD INTELL. PROP. 191, 191 (2004).

104 *Id.*

105 *See id.*

106 Copyright Act (1990) Cap. (C68) (Nigeria).

107 *Id.* § 28(5).

Folklore is said to have the singular attribute of appealing to the mind and conscience of the people irrespective of age, language or geographical background.[108] This expansive definition[109] sets out, out of an abundance of caution, protects the majority of folkloric works to well inform the public of the categories of works protected.[110] It affords an easy determinant opportunity first hand to interested authors who intend to use folklore for their works. The Nigerian Copyright Act in Section 28(1) protects expressions of folklore against reproduction, communication to the public by performance, broadcasting, distribution by cable or other means, adaptations, translations and other transformation when such expressions are made for commercial purpose or outside their traditional or customary context creating an exception that limits fetters on the traditional uses of folklore.[111]

2. Exceptions to folkloric uses

Unlike the Ghanaian Copyright statute, which subjects exceptions to folklore protection to the general exceptions of copyright protection,[112] the Nigerian Copyright Act specifically states unique exceptions to the use of folklore.[113] Thus section 28(2) provides that,

the rights conferred in subsection (1) of section 28 shall not include the right to control- (a) the doing of any of the acts by way of fair dealing for private and domestic use, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its source; (b) the utilisation for purposes of education; (c) utilisation by way of illustration in an original work of the author; (d) the borrowing of expressions of folklore for creating an original work of the author; (e) the incidental utilisation expressions of folklore.[114]

This step takes into cognizance that the unique nature of folkloric rights requires its own set of exceptions, rather than a subjection to the general exceptions of traditional copyright protection. The creation of this unique folkloric exceptions by the Nigerian statute gives the opportunity to pay attention to the fact that artistic works are created, developed, and preserved by indigenous communities. It therefore does not require permission for indigenous communities to borrow expressions of folklore to create an original work.[115] The statute again acknowledges in print that the cultural use, preservation and development of folkloric arts by indigenous

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[108] Ikechukwu Magnus Olueze, Protection of Expressions of Folklore as a Vehicle for Cultural Dissemination under Nigerian Law, 25 INT'L LEGAL PRAC. 64, 64 (2000).

[109] Which is preferred to the limited definition given in the Ghanaian Copyright Act under section 76.

[110] Olueze, *supra* note 108, at 64 (summarizing the term folklore as the "totality of a traditionally evolved system of cultural and social identity, standards, beliefs and values of a given community handed down, orally or by imitation or otherwise, from the ages.").

[111] Nigerian Copyright Act, *supra* note 106, § 28(1).

[112] Copyright Act, 2005 §64(1) (Act 690) (Ghana) ("a person who intends to use folklore for any purpose other than as permitted under section 19 [the general copyright exceptions] of this Act, shall. . .").

[113] Nigerian Copyright Act, *supra* note 106, § 28(2).

[114] *Id.*

[115] *See* Stephen Collins, *supra* note 15, at 182.

communities would naturally lead to their adaptations, translations and transformation when it excludes from section 28(1) "uses in their traditional and customary context," unlike the Ghanaian statute which did not note and factor in this special feature of folklore creation and development.[116]

3. Permission and fee payment for folkloric uses

Another point in contrast to Ghana's copyright protection of folklore is the fact that, beyond the requirement of seeking permission from the Nigerian Copyright Commission for the commercial use of folklore, there is no additional requirement of the payment of a fee upon the grant of permission. The requirement for the payment of a fee upon the grant of permission for commercial use of folklore as required under Ghanaian law is, according to John Collins, a reaction to the threat of folklore appropriation that most developing countries face.[117] He suggests that "the world is not a level playing field: there are rich and poor nations, and the rich ones are, to a large extent, in a favorable technological position to commercially exploit the poor ones. UNESCO and WIPO[118] model provisions for national laws on the protection of expressions of folklore envisaged this concern and provided under section 10(1) that

[a]pplications for individual or blanket authorization of expressions of folklore subject to authorisation under this [law] shall be made [in writing] to the [competent authority] [community concerned]. (2) Where the [competent authority] [community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff established] [approved] by the supervisory authority.

With this in view, the total exclusion of fee payment from the Nigerian Copyright Law constitutes under-protection and is not recommendable. Adebambo shares a similar view that the whole idea of administration of copyright and folklore rights is to manage all the rights involved to the full benefit of the right owners.[119] Since the law restricted reproduction, broadcasting, public performance and other public performance of folklore, it necessarily means that the purpose of the restriction could not have been for the moral rights only.[120] It must include economic rights which will involve charging a fee for the benefit of the right owners and the state as the case may be.[121] It appears then that folklore is under-protected by the Nigerian law, which rules out economic benefit to the indigenous communities.

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[116] *Cf.* Copyright Act, 2005 §4(1), §19, §44 (Act 690) (Ghana).

[117] John Collins, *The Folkloric Tax Problem in Ghana*, WORLD ASS'N FOR CHRISTIAN COMM, (Nov 21, 2016), https://www.tandfonline.com/doi/abs/10.1080/13696815.2016.1256121.

[118] Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts, UNESCO, WIPO 1985, part II, sect. 10. "Applications for individual or blanket authorization of expressions of folklore subject to authorisation under this [law] shall be made [in writing] to the [competent authority] [community concerned]. (2) Where the [competent authority] [community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff established] [approved] by the supervisory authority."

[119] Adebambo, supra note 7, at 9.

[120] *Id.*

[121] *Id.*

In sum, the Nigerian copyright statute provides a long and expansive definition detailing most of the cultural expressions protected as folklore. This helps identify which works are folklore that require permission for commercial use outside of their traditional context. Nigerian copyright law also distinguishes the traditional or customary use of folklore from every other use and creates an exception for such expressions from requiring permission to be used. This process helps individuals and communities retain control and ownership over their unique forms of folklore, and it avoids the nationalization of folklore rights under the guise of "unknown authors." However, the absence of fee payments to the owners of folklore leaves much to be desired with regard to protection of the economic rights of Nigerian folklore owners. On the other hand, the Nigerian fee system is less burdensome on nationals than that of Ghana, which requires nationals and non-nationals alike to pay a fee for commercial use of Ghanaian folklore.

C. Comparative Experiences of Protection of Folklore under Kenyan Law

The protection of folklore in Kenya has attracted increasing attention over the years, particularly with regard to the *Maasai*, an ethnic group of southern Kenya and northern Tanzania whose members are famous as warriors and cattle-rustlers.[122] Over the last decade, the Maasai have attempted to take more control over the alleged misappropriation of the Kenyan Kikoi fabric and their name, image, symbols, and reputation, each of which have been used to promote "products ranging from cars to shoes [to] exercise equipment" all around the world.[123] This greatly influenced the nation in 2013 to take a historic step to be the first ARIPO country within the region to develop a legal framework to validate legislation to protect traditional knowledge and folklore.[124]

This step is also pursuant to articles 11, 40(5), and 69 of the Kenyan Constitution[125], each of which generally require the state to protect the intellectual property rights of Kenyans, including those that arise out of the creation of folklore.[126] First, article 11 "recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation."[127] This is an important step—the recognition of the value of the culture of indigenous communities as a resourceful

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[122] Elenora Rosati, *Protection of Traditional Knowledge and Cultural Expressions: the Case of 'Massai IP'*, THE IPKAT (January 30, 2018), http://ipkitten.blogspot.com/2018/01/protection-of-traditional-knowledge-and.html./

[123] *Id*.

[124] Victor Nzomo, *Unveiling of Proposed Law on Protection of Traditional Knowledge and Traditional Cultural Expressions in Kenya*, IP KENYA (May 7, 2013), https://ipkenya.wordpress.com/2013/05/07/event-unveiling-of-proposed-law-on-protection-of-traditional-knowledge-and-traditional-cultural-expressions-in-kenya/.

[125] CONSTITUTION art. 11, 40(5), 69(1)(c) (2010) (Kenya).

[126] *See id*. ("The Kenya Copyright Board recognises that the protection of [traditional knowledge (TK)] and [traditional culture expressions (TCEs)] is also in tandem with Kenya's 'Vision 2030' blue print that aims to move the nation to a middle-income economy by the year 2030 through wealth creation, increased trade and national development").

[127] CONSTITUTION art. 11(1) (2010) (Kenya).

heritage is vital for their identity, and justifies the concerns about inappropriate forms of cultural appropriation. Article 11 goes on to require parliament to enact legislation to "ensure communities receive compensation or royalties for use of their cultures and cultural heritage," and then to "recognize and protect ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by communities in Kenya."[128] The emphasis here is on the communities as the source of origin of folklore, hence their protection against inappropriate use of their culture.[129]

The Kenyan Constitution further provides that, the state shall support, promote, and protect the IP rights of the people of Kenya.[130] This is a phenomenal step above Ghana in the sense that, the starting point for folklore protection is the Kenyan constitution, which specifically requires the state to take steps to protect IP rights of the Kenyan people. It is within this constitutional context that the Kenyan parliament, *inter alia*, enacted a *sui generis* legislation on the protection of traditional knowledge and folklore.[131] Thus the long title of the statute reads, "An Act of Parliament to provide a framework for the protection and promotion of traditional knowledge and cultural expressions (folklore); to give effect to Article's 11, 40 and 69 (1) of the Constitution;. . ." to protect the intellectual property rights of the Kenyan people.[132]

1. The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Act no. 33 of 2016)

This statute will be referred to as Act 33 in this discussion and will be reviewed in the light of the thematic areas on folklore protection that have been discussed earlier under Ghanaian and Nigerian Law. That is first, the subject matter framework setting out the types of works protected. Secondly, the duration of protection of the rights under the statute, then the issue on authorship and ownership of the works involved here and finally the fee payment requirement for commercial use of folklore.

2. Subject matter of protection

It is intuitive to note at the onset that, unlike the Ghanaian Copyright Act

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[128] CONSTITUTION art. 11(3) (2010) (Kenya).

[129] With inference from articles 11 of the Kenyan 2010 constitution, the ethnic communities are at the heart of this move when it comes to the protection of folklore. According to Enyinna Nwauche, although the Kenyan constitution does not specifically define "communities," it recognizes communities in two aspects respects worth noting. "First, section 63 indicates that communities can be identified on the basis of "ethnicity, culture or similar communities of interest. Secondly, section 260 defines marginalized communities as inclusive of indigenous peoples, traditional communities, pastoral persons and communities, as well as communities living at the fringes of Kenyan society." Nwauche, *supra* note 103, at 196.

[130] CONSTITUTION art. 40(5) (2010) (Kenya).

[131] *See* Nwauche, *supra* note 103, at 196.

[132] The Protection of Traditional Knowledge and Cultural Expressions Act of Kenya, No. 33 (2016) KENYAN GAZETTE SUPPLEMENT NO. 154.

which generally clumps traditional knowledge and folklore together,[133] Act 33 separates the two and sets out, under section 14, works that are considered as folklore. It provides that:

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

The products of creativity and cumulative intellectual activity, including collective creativity or individual creativity where the identity of the individual is unknown;

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

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

Individually or collectively generated;

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

(f) Integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.[134]

Without a definition of what a folklore is, the statute rather sets out the nature and characteristics of traditional creative works that qualifies as folklore for its protection. This leaves the ambit very wide and open to all folklore that meets the standards set now and in the future.

3. Duration of Protection

The approach to circumscribing the length of protection of folklore under Act 33 appears unique compared to the perpetuity protection of folklore under Ghana's Copyright Act. Nwauche states,

[t]he fact that expressions of folklore are timeless is a fundamental feature which distinguishes this property from individual IP rights which are granted by the state for specific periods. The timelessness of expressions of folklore is involved in the way communities are also timeless- or at least conceived to be.[135]

But the challenge has been whether to protect folklore in perpetuity or for a

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[133] Copyright Act, 2005 § 4 (Act 690) (Ghana).

[134] The Protection of Traditional Knowledge and Cultural Expressions Act of Kenya, No. 33 (2016) KENYAN GAZETTE SUPPLEMENT NO. 154 §14.

[135] Enyinna Sodienye Nwauche, *The Sui Generis and Intellectual Property Protection of Expressions of Folklore in Africa* (May 2016) (unpublished Ph.D. thesis, North-West University) (available at https://repository.nwu.ac.za/handle/10394/19787) (Folklore is distinguished from IP rights such as patent, copyright, and industrial designs.).

limited period.

Kenya's Act 33 adopts a unique approach and makes the length of protection of folklore conditional on maintained and sustained creativity in any particular folklore. By this, section 17 provides that, "cultural expressions [folklore] shall be protected against all acts of misappropriation, misuse, unlawful access or exploitation for as long as the cultural expression fulfil the protection criteria sets out in section 14."[136] The Kenyan Act evasively avoids the imbalance between the express grant of a right in perpetuity and the grant of a limited duration for folklore. The position taken appears logical and is suggestive of a conscious effort of indigenous communities upholding and maintaining their cultural heritage at all times in order to be accorded protection under Act 33.

4. Authorship and Ownership of Folklore

A reflection on Articles 11 and 40 of the Kenyan constitution as discussed earlier, makes it evidently clear that the Kenyan people and, for that matter, their indigenous communities are at the heart of the protection of folklore.[137] In this vein, Act 33 provides that:

the protection of cultural expressions [folklore] shall relate to cultural expressions. . . of a community's cultural identity and cultural heritage that have been maintained, used or developed by such community in accordance with the customary laws and practices of that community;. . . integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws and protocol.[138]

This expressly reveals that the "local and traditional communities to whom the custody and protection of folklore are entrusted in accordance with the customary laws and practices of those communities, and who maintain and use the traditional cultural expressions as a characteristics of their traditional cultural heritage shall be the owners and beneficiaries of the protection," accorded by the statute.[139] Consequently, the protection of folklore in Kenya is by the state and its institutions, but they merely manage the protection on behalf of the communities. This is the prime focus that underscores folklore protection.

Ownership of property is accompanied by an economic benefit. Act 33 takes cognizance of this right and ensures the communities' involvement in the protection procedures through a requirement of prior informed consent from the holding folkloric community before the grant of any license.[140] This makes the negotiation for a

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[136] The Protection of Traditional Knowledge and Cultural Expressions Act of Kenya, No. 33 § 17 (2016) KENYAN GAZETTE SUPPLEMENT NO. 154.

[137] *See* Nwauche, *supra* note 103, at 196 (expressing a similar view).

[138] The Protection of Traditional Knowledge and Cultural Expressions Act of Kenya, No. 33 §14 (2016) KENYAN GAZETTE SUPPLEMENT NO. 154.

[139] *See* Nwauche, *supra* note 103, at 197.

[140] The Protection of Traditional Knowledge and Cultural Expressions Act of Kenya, No. 33 § 12, 17

grant of permission or license transparent to both the traditional communities and the state. Part of this negotiation process is the equitable renumeration or benefit-sharing terms with the traditional community.[141] As Nwauche notes, "it is this recognition of traditional and local communities as creators of folklore and their extensive involvement in the management and protection of third party use of expressions of folklore that signposts the Kenyan reform process[,]"[142] in tune with the letter and spirit of the Swakopmund protocol.[143] This is in sharp contrast to the Ghanaian Copyright Act which vests the rights of folklore in the President of Ghana on behalf of and in trust for the people of Ghana,[144] a step that overlooks the indigenous communities and the role they play in the authoring, development and maintenance of folklore.

The situation under Ghanaian statute gets murkier when it requires anyone who intends to use folklore in Ghana for commercial purposes to seek permission from the National Folklore Board and pay a fee for the grant of permission. As already discussed, this requirement is of general application, and including the indigenes of the authoring communities makes it unsustainable. Section 18 of Kenya's Act 33 uses similar generalization words as in Ghana's Act 690 to the effect that a person shall not, in any way, misappropriate or make use of folklore without the prior and informed consent of the owners. However, it purposefully draws a distinction between usages by the members of the authoring community(s) as against usages by outsiders and follows section 18 with a caveat under section 19 that,

(1) Notwithstanding section 18, the protection of traditional knowledge or cultural expressions [folklore] shall—

(a) not restrict or hinder the normal usage, development, exchange, dissemination and transmission of traditional knowledge or cultural expressions by members of a particular community within the traditional and in accordance with the customary law and practices of that community;

(b) extend only to uses of traditional knowledge or cultural expressions taking place outside their traditional or customary context, whether for commercial gain or

(2016) KENYAN GAZETTE SUPPLEMENT NO. 154.

141 The Protection of Traditional Knowledge and Cultural Expressions Act of Kenya, No. 33 § 24 (2016) KENYAN GAZETTE SUPPLEMENT NO. 154 ("The protection of owners and holders of traditional knowledge or cultural expressions shall include the right to fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties . . .The right to equitable renumeration might extend to non-monetary benefits, such as contributions to community development, depending on the material needs and cultural preferences expressed by the communities themselves.)

142 *See* Nwauche, *supra* note 103, at 198.

143 Section 18 of the Swakopmund protocol reads,

"The owners of the rights in 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." Swakopmund Protocol, *supra* note 20, § 18.

144 Copyright Act, § 4, 2005 (Act 690) (Ghana).

not[.][145]

Emphasis is placed on the unlawful exploitation beyond folklore's traditional context, which must not be overlooked. If we are to, first of all, view folklore as a cultural asset worthy of protection, then we must make sure to equally protect and preserve its traditional usages, which immensely contribute to its development and maintenance. This feature has been craftily featured in Act 33 and serves a commendable purpose.

Laudable as the Kenyan statue may be, however, it is not devoid of challenges. This is to be expected for being the pioneer enacting a *sui generis* protection of folklore among ARIPO member states. The major challenge perceived from this discussion however, settles on the issue of which community owns what? Though the enhanced community involvement in the Kenyan statute's protection of folklore is to be applauded, it also stands the chance of breeding rivalry and unhealthy competition among ethnic communities over folkloric rights and benefit sharing. This is because folklore is now a potential wealth-generator for traditional communities and may therefore provide an incentive for leaders to seek exclusive control and to talk up inter-ethnic competition, when in fact many of these resources are shared between ethnic groups.[146] Issues on disputes over ownership and appropriate means of settling them are to be anticipated as a consequence of this potential challenge.

These challenges notwithstanding, Kenya's new Act represents a bold and forward-thinking effort to improve livelihoods and protect the cultural heritage of communities in Kenya by guarding against misappropriation of folklore in Kenya.[147]

D. Divergent Experience from South Africa's Protection of Folklore.

South Africa takes a distinct approach from how Ghana, Nigeria, and Kenya protect folklore. It tends first to conceptualize the protection of folklore from a Human Right point of view and thus subjects it to public law protection. In this vein, it nationalizes all cultural heritages as a national estate and establishes a national system of management and protection for them. Recently, South Africa has also instituted a positive protection over folkloric works, particularly intangible works, through its copyright statute.

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[145] Protection of Traditional Knowledge and Cultural Expressions Act, No. 33, § 19 (2016) (Kenya). (The act's purpose can be summarized as the protection of traditional cultural expressions from misappropriation, misuse, and unlawful exploitation beyond their traditional contex; the promotion of the sustainable utilization of traditional cultural expressions so that communities receive compensation or royalties for the use of their cultures and cultural heritage of national development; as well as the preservation of traditional cultural expressions to promote cultural diversity, national pride and identity.).

[146] John Harrington and Harriet Deacon, Africa's Gift to the World, KATIBA Institute (December 5, 2016), https://katibainstitute.org/traditional-knowledge-and-culture-expression-act-2016/https://katibainstitute.org/traditional-knowledge-and-culture-expressions-act-2016/

[147] *See Id.* ("Much will also depend on the willingness and ability of different levels of government to work together and enforce community rights.")

1. Human Right Protection of Folklore

The protection of expressions of folklore within a human right framework has always been a viable option and is arguably better than the existing intellectual property and sui generis protection regimes.[148] While it rejected the request to grant protection of intellectual property in the South African Bill of Rights,[149] South Africa saw the need to safeguard its national heritage as a resource, and that invariably includes all cultural heritages, extending to works of folklore.[150] Thus it indirectly protects works of folklore through the right to culture.

This led to the establishment of the National Heritage Resource Act (NHRA) of 1999, with the mandate to promote good management of the national estate and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations.[151] A heritage resource is defined by the statue in section 2(xvi) as "any place or object of cultural significance" and cultural significance is defined by the statute in section 2(vi) as "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance."[152] Though from the definitions, the act seeks to conserve and promote all national cultural heritage, the rest of the statute, as analyzed by Thabo Manetsi addresses primarily the conservation and management of heritage sites and objects leaving out intangible heritages.[153] To implement the aim of the NHRA, South Afri-

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[148] E.S. Nwauche, T*he Protection of Expressions of Folklore Through the Bill of Rights in South Africa*, 2 SCRIPT-ED 223, 231 (2005); *see also* Rosemary J. Coombe, *Intellectual Property Human Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 .IND. J. GLOBAL LEG. STUD. 59;83 (1998); Ruth. L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L. L. & POL'Y 109, 128 (2005); Ruth L. Gana,); *The Myth of the Development, the Progress of Rights: Human Rights to Intellectual Property and Development*, 18 L & POL'Y 315, 317 (1996).

[149] Nwauche, *supra* note 148, at 237 (arguing on the ground that the right to hold intellectual property is not a universally accepted right).

[150] This was also informed by the constitutional mandate under section 30 of the South African Constitution of 1999 which provides that "[e]veryone has the right to use the language and to participate in the cultural life of their choice." S. AFR. CONST. § 30, 1996. Section 31 further provides that persons belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practice their religion, or use their language, provided that the exercise of this right is consistent with all the provisions of the Bill of Rights in the Constitution. *Id.* § 31; see also Louise J. Kotze & Linda Jansen van Rensburg, *Legislative Protection of Cultural Heritage Resources: A South African Perspective*, 3 QUEENSLAND UNIV. TECH. L. & JUST. J. 121, 130 (2003).

[151] National Heritage Resources Act, No. 25 (1999.) (S. Afr.). The statute goes on to say that, "[o]ur heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character. Our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to empathise with the experience of others. It facilitates healing and material and symbolic restitution and promotes new and previously neglected research into our rich oral traditions and customs."

[152] *Id*. § 2(xvi) and (vi).

[153] Thabo Manetsi, *Can Intangible be Tangible? Safeguarding Intangible Heritage in the New South Africa: Towards Formulating Policy for the Conservation and Sustainable Management of Living*

ca established the South African Human Resource Act (SAHRA), to be the statutory body and the lead authority for the implementation.[154] Critics have observed that the NHRA did not specifically provide for the protection of intangible heritage not associated with objects and places.[155] The act also did not explicitly assign specific and sufficient instruments to guide or inform the management of intangible heritage, and this includes questions of how the management of intangible heritage should be carried out or what conservation measures or standards are applicable for management of intangible heritage.[156]

These gaps influenced the approach adopted by the SAHRA in its implementation of safeguarding heritage by making it lean more towards terms and conditions that normally govern the conservation of tangible forms of heritage such as sites and objects.[157] This inevitably makes it difficult to protect intangible heritage or folklore even though the NHRA sets out to protect both tangible and intangible heritage. It then leaves intangible heritage to be vulnerable to loss and free-taking, as it cannot (or it is almost impossible to) subject intangible heritage to the same legal mechanisms established for heritage places and objects.[158] This gap or limitation, among others, made it inconvenient and almost impossible to protect all forms of folklore, particularly intangible forms. Consequently, there is a call for an all-embracing approach to the protection of all forms of heritage, which includes folklore.

2. Copyright Protection of Folklore

As discussed above, the protection of expressions of folklore is an idea that does not appear to have been contemplated in South Africa's NHRA because of the focus on tangible cultural heritages.[159] As a consequence, intangible folkloric works had remained unprotected, susceptible to third parties' free use.[160] In reaction to this, the South African Cabinet approved the adoption of a policy on an indigenous knowledge system which led to the formulation of a policy on the commercialization and protection of indigenous knowledge through the intellectual property system.[161] In 2008, the South African Minister of Trade and Industry published a "Policy Framework for the Protection of Indigenous Traditional Knowledge Through the Intellectual Property Systems" and the Intellectual Property Laws Amendment Bill, [162] which was later assented to in 2013 after it had been subjected to several cri-

Heritage 54 (Feb. 14, 2007) (unpublished M.Phil. dissertation, University of Cape Town) (available at.https://open.uct.ac.za/bitstream/handle/11427/17106/thesis_hum_2007_manetsi_thabo.pdf?sequence=1).

154 *Id.* at 54.

155 *Id.*

156 *Id.*

157 *Id.* at 54–55.

158 *Id.* at 55.

159 Nwauche, *supra* note 135, at 153.

160 See *id.*

161 *Id.*

162 *Id.*

tiques.[163] What this then means is that South Africa, in addition to the NHRA, protects traditional knowledge and the expressions of folklore through conventional IP systems.

Discussion here will be on how effective this approach adopted by South Africa is, and our focus will be on South Africa Copyright Protection (Act 98 as amended by the Intellectual Property Law Amendment Act) of folklore. The discussion will start with eligibility of folklore for copyright protection, then turn to the duration of protection of folklore by the South African copyright act. Thirdly, authorship and ownership criteria for folklore will be discussed under the act, and, lastly, how public access to folklore for commercial use is determined.

3. Eligibility of Folklore for Protection

The subject matter composition of the Intellectual Property Amended Act (IPAA), 2013, comprised all forms of traditional works.[164] It further provides under section 28B subsection (2) that, 'notwithstanding section 2(2), a traditional work shall not be eligible for copyright unless it has been written down, recorded, represented in digital data or signals, or otherwise reduced to a material form or is capable of substantiation from the collective memory of the relevant indigenous community'. In that case, the work ought to be derivative of an existing folklore, especially for intangible folklores.[165] This takes us back to one of the main difficulties that this research has covered in support of the misfit of copyright for folklore—copyright generally does not protect ideas themselves, only their expression. If copyright protects works that are derived from folklore, then it's under copyright's normal ambit; there is no special protection of folklore as a cultural heritage in this direction. As a natural consequence, folkloric works that are intangible cannot be protected by copyright as set out in section 2(2) of the IPAA. Ncube is of the opinion that the IPAA addresses this problem by extending the concept of reduction to material forms or fixation to include the collaboration of the existence of a traditional work from the collective memory of an indigenous community.[166] But how is a collaboration of a traditional work from collective memory to be determined? Ncube alludes to this difficulty and uncertainty and adds that the IPAA does not provide exactly how such collaboration is to be established, recorded and present-

[163] The Intellectual Property Law Amendment Act, 2013 of South Africa, amends the copyright act by including provisions that seeks to protect and promote indigenous knowledge and cultural expressions.

Professor Owen Dean is noted to have strongly criticized this Act: "the South African Government has passed the Intellectual property laws Amendment Bill despite vociferous objections through acute trepidation. . . the law will simply be unworkable and is destined to be a dead letter." Professor Owen Dean, *Inside Views: The Mad Hatter In Wonderland: South Africa's New TK Bill*, INTELL. PROP. WATCH/INT'L. IP POLICY NEWS (Aug. 11, 2011), https://www.ip-watch.org/2011/11/08/the-mad-hatter-in-wonderland-south-africa-africa's-new-tk-bill/.

[164] Intellectual Property Laws Amended Act 28 of 2013 § 28B(1) (S. Afr.) ("traditional works shall be eligible for copyright").

[165] *Id.* § 28B(3).

[166] Caroline Ncube, INDIGENOUS INTELLECTUAL PROPERTY 558 (Matthew Rimmer ed., 2015).

ed.[167] This leaves that determination wide open to diverse interpretations susceptible to extrinsic evidence, which in this case will be largely oral. The burden put on indigenous communities here to establish their intangible folklore appears onerous and would not aid promotion and protection of folklore. This is because an indigenous community's governance settings are collectively illiterate in western terms.

4. Duration of Protection

Due to the fact that IPAA authorizes the protection of fixed folklore through copyright, it is able to specifically define and ascribe a duration period of protection in the usual, traditional copyright way, so that if the traditional work is derivative of a folklore and has been fixed, it becomes an indigenous derivative work and is protected 50 years from the end of the year in which the work was first communicated to the public with the consent of the author or authors or the date of the death of the author or all authors concerned, whichever term expires last.[168] However, in terms of indigenous works or folklore that remain traditional without any derivative works as espoused under section 28B(3)a of the IPAA, the duration of protection is in perpetuity.[169] This confirms the fact that folklore is the result of a group activity that has been observed and preserved over a considerable period. Thus, however crafty the legislature may be, as long as a particular folklore continues to be practiced, no limitation can be placed on the length of its protection as a heritage and cultural asset calling for a unique form of protection other than through copyright.

5. Authorship and Ownership of Folklore.

The issue or problem posed by the inability to identify an individual author or creator of many traditional works is solved by the IPAA's definition of author. IPAA defines the author of an indigenous work as the indigenous community from which the work originated and acquired its traditional culture.[170] When this is read with section 28B, which makes eligible for copyright works that are derived from folklore, two categories of author are perceived. First, authorship in the indigenous communities, and second, authorship in creators of derivative folklore works. What is most striking for the protection of folklore is the authorship in the indigenous communities. Copyright law generally recognizes the need for an identifiable person to be attributed as an author, a requirement that an indigenous community, as a group, may not meet. But for this purpose, the IPAA, under section 28D(1), deems an indigenous community to be a juristic person for the purpose of rendering it capable of owing copyright.[171] Thus, an appropriate indigenous community is regarded as the owner of a traditional work or folklore, while the owner of a derivative work is the person who first made or created the work. According to Ncube, "[b]estowing legal personality on indigenous communities for copyright purposes is

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[167] *Id.* at. 558.
[168] Intellectual Property Laws Amended Act 28 of 2013 § 28F(1) (S. Afr.).
[169] *Id.* § 28F(1)(b).
[170] Ncube, *supra* note 166, at 58.
[171] *Id*. at 558.

of concern because many such communities are unfamiliar with the intricacies of legal personality."[172] Though the IPAA provides a structure to guide the administration of copyright through indigenous protocol as a means of making use of this bestowed legal personality on communities, it is a complicated approach and does not afford certainty in the law for those meant to benefit from it.

6. Payment of royalties and benefits

Property ownership comes with benefits. The IPAA outlines the parameters for determining payment of royalties or benefits for use of folklore. First of all, it acknowledges that, aside from the moral right of attribution and use of a folklore from a grant, economic benefits or royalties ought to be paid to the community concerned if it so wishes.[173] From earlier discussion, a registration of folklore as copyright requires "prior informed consent obtained from the relevant authority or indigenous community . . .[and] a benefit-sharing agreement between the applicant and the relevant authority or indigenous community."[174] This is one of the major fundamental reasons why folklore ought to be protected, especially against misappropriation. The IPAA captures the two interests by first preserving the right of attribution and then acknowledging the need for communities to reap some benefits from the commercial use of their folklore. Also of importance here is the direct involvement of the communities in the negotiation agreements of the royalties to be paid. This is captured under section 28H(3)of the IPAA, which requires that, "the amount of any royalty, benefit, or both such royalty and benefit due for the use of traditional work shall be determined by. . .an agreement between the user of the traditional work and the owner of the copyright in such work, or between their representatives collecting societies[.]"[175]

Though South Africa has the National Council for Indigenous Knowledge to ensure compliance with intellectual property laws and the relevant community protocols, their role is clearly regulatory, in that they only interfere in this negotiation process, first, where no agreement is reached between the two parties[176] or, second, where an agreement is reached but regarded as not favorable to the indigenous communities.[177] Where any clause in the contract is regarded as not being to the benefit of the indigenous community or member of the indigenous community concerned, the National Council for Traditional Knowledge must request renegotiation and intervene to provide the necessary advice.[178] These advantages notwithstanding, the choice of integrating folklore protection into copyright statute has the high possibility of creating unnecessary friction and misfit situations at one point or the other as has been discussed here and in other jurisdictions.

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[172] *Id.* at 559.
[173] *See* Intellectual Property Laws Amended Act 28 of 2013 § 28H (S. Afr.).
[174] *Id.* § 28B(1)(a), (c).
[175] *Id.* § 28H(3).
[176] *Id.* § 28(H)(3)(b).
[177] *Id.* § 28H(4).
[178] Nwauche, *supra* note 135, at 167.

Caroline Ncube has criticized this move, saying that "South Africa's choice to protect [folklore] under copyright is ill-advised as it deprives the jurisdiction of the benefit of a well-developed and nuanced *sui generis* approach."[179] Professor Owen Dean[180], has also cautioned that the "[g]overnment's attempt at protecting traditional knowledge (folklore) by amending current IP statutes remains an unmitigated disaster, the scope of which is yet to be fully realized."[181] Susanna Chung and Louis van Wyk, two indigenous knowledge systems experts, have stated their concern with how the IPAA will be enforced. They feel the IPAA is a "huge challenge for South Africa and an obstacle to its existing IP laws" and should be repealed entirely and replaced with a *sui generis* approach.[182] These criticisms from renowned IP experts in South Africa and the obvious challenges in the IPAA, point towards the fact that the South Africa IPAA was a failure from birth.

7. Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (Act No. 6 of 2019)

In reaction to the concerns discussed, South Africa, passed the Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019[183] in August 2019 to provide for the protection of indigenous knowledge (hereinafter "Act 6"). South Africa appears to be moving towards a *sui generis* protection of traditional knowledge and folklore.

Indigenous knowledge is defined under Act 6 to include indigenous cultural expressions.[184] This from the onset makes one wonder what the relationship is between Act 6 and the IPAA. In answering this this question, section 32 of Act 6 provides that "[t]his act does not alter or detract from any right in respect of any statute or common law" and that "compliance with any procedures or requirements laid down in this Act does not constitute compliance with any procedures or requirements imposed in any other Act[.]"[185] The implication here is that any creation or innovation which involves indigenous cultural expressions, such as folklore, may be regulated by one or more, possibly conflicting, laws.[186] It appears South Africa reg-

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[179] Ncube, *supra* note 166, at 56. South Africa is not a member of ARIPO, but it has remained an observing state for a long time.

[180] Professor Owen Dean is a Professor at the Law Faculty of Stellenbosch University and is the incumbent of the Anton Mostert Chair of Intellectual Property Law.

[181] Owen Dean, *A NEW South Africa Traditional Knowledge Bill – Sui Generis Protection for TK*, INTELL. PROP. WAT H/INT'L. IP POLICY NEWS, (Mar. 18, 2012), https://www.ip-watch.org/2012/03/18/a-new-south-africa-traditional-knowledge-bill-sui-generis-protection-for-tk/.

[182] Linda Daniels, *A Cautious Welcome For South Africa's Traditional Knowledge Legislation*, INTELL. PROP. WATCH (Apr. 29, 2015), https://www.ip-watch.org/2015/04/29/a-cautious-welcome-for-south-africas-traditional-knowledge-legislation/.Susanna Chung and Louis van Wyk are Intellectual Property and Indigenous Knowledge systems specialists in South African.

[183] Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 (S. Afr.).

[184] *Id.* § 1.

[185] *Id.* § 32.

[186] Lee-Ann Tong, *Adopts Sui Generis Indigenous Knowledge Protection Legislation*, 14 J. INTELL. PROP. L. & PRACTICE 936, 936 (2019).

ulates the protection of folklore through the IPAA, Act 6, and, to some extent, the Bill of Rights,[187] and to the extent that they coexist, it can be said that all the laws are meant to complement each other.

A review of how Act 6 seeks to protect folklore reveals that Act 6 seeks to enhance and clarify the protection offered to folklore by the IPAA. The IPAA sought to extend traditional copyright protection to folklore. As a *sui generis* statute, Act 6 proffers the opportunity to comprehensively protect the unique characteristics of folklore and other traditional knowledge. There is a clear recognition and empowering of communities as authors of their folklores.[188] In this regard, provision is made for indigenous communities to receive credit for their knowledge, both from licensing agreements and commercial benefits.[189] Exceptions are created to balance exclusive rights to folklore with a reasonable access by the public.[190] A phenomenal change under Act 6, however, is revealed in the way the term duration of folklore protection is constructed. Protecting folklore through *sui generis* means offers the opportunity to appreciate and firmly establish that protection will only last as long as the folklore meets the eligibility criteria set out in the Act.[191] It charges communities to justify at all times why their folklore should continually be protected. This is akin to the Kenyan approach to ascribing duration for folklore protection. Thus, if a community's folklore "ceases to meet the eligibility criteria set out in section 11, it falls into the public domain from the date of proven ineligibility.[192]

South Africa is not a member of ARIPO, but from the content of Act 6, it appears ARIPO's Swakopmund Protocol has greatly influenced the provisions.[193] This is not surprising because, though not a member of ARIPO, South Africa has for a very long time remained an observer state and the Swakopmund protocol according to ARIPO is equally available for any African state to make use of as a model sui generis protection statute for folklore.

Since Act 6 is territorial and does not apply outside of South Africa, the indigenous communities will not be able to rely on the Act to claim benefits from commercial success derived from the use of folklore outside South Africa.[194] But how can African countries protect their folklore beyond their boundaries? In the absence of international protection, regional protections would be the best option, in the circumstances, for African countries to embrace.

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[187] *Id*.

[188] Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 § 3 (S. Afr.).

[189] *Id*. § 13(1) and § 26(1).

[190] *Id*. § 26.

[191] *See id*. § 13. Eligibility criteria for protection requires that, it " (a) has been passed on from generation to generation within an indigenous community; (b) has been developed within an indigenous community; (c) is associated with the cultural and social identity of that indigenous community."

[192] *Id*. § 10(2).

[193] *See* Nwauche, *supra* note 135, at 146 (noting that "though Nigeria and South Africa are not members of ARIPO, it would appear that the text of the Swakopmund protocol could be very instructive as both countries grapple with how to energise the protection of their folklore.").

[194] Tong, *supra* note 186, at 2.

E. Regional Initiatives on the Protection of Folklore

Regional efforts have been made, in the absence of an international protection of folklore, to extend protection beyond the borders of nation-states. This section provides an overview on regional efforts being made on the African continent to enhance the protection of folklore beyond the borders of individual states' protection(s). It marks an important step and offers an opportunity for African states to embrace the lead in protecting folklore widely.

While the international community debates international standards for the protection of folklore, a number of parallel initiatives have been unfolding at regional levels.[195] These efforts seek to identify approaches and best practices for tackling the many complex questions associated with mainstreaming these issues into conventional IP policies and systems.[196] In the African region, two main regional initiatives have emerged as positive steps towards transborder protection of folklore. The first was initiated by the African Regional Intellectual Property Organization (ARIPO)[197] an inter-governmental organization that facilitates cooperation among its Member States on IP matters.[198] In the spirit of global efforts to protect folklore, ARIPO took a historic step in adopting a legal framework known as the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.[199] The protocol seeks to address inherent inadequacies within the conventional IP system by providing effective protection for the wealth of African natural and cultural resources that have contributed to the advancement of the arts, science, and technology.[200] The protocol also seeks to prevent misappropriation, misuse, and unauthorized exploitation[201] of these resources by third parties by broadening the extent of protection of folklore on the African Region. This step was heralded by the WIPO Director General, Francis Gurry, as a significant milestone in the evolution of intellectual property.[202] Emmanuel Sackey, ARIPO's Program Manager for

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[195] The Archival Platform, S*wakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklor*e, CULTURE IN DEV. (Jan. 19, 2011), http://www.cultureindevelopment.nl/News/Heritage_Africa/804/Swakopmund_Protocol_on_the_Protection_of_Traditional_Knowledge_and_Expressions_of_Folklore. .

[196] *Id.*

[197] The African Regional Intellectual Property Organisation was established by the Lusaka Agreement on December 9, 1976 with a mission to foster creativity and innovation for economic growth and development in Africa. www.aripo.org

[198] The current members of ARIPO are: Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, the Sudan, the United Republic of Tanzania, Uganda, Zambia and Zimbabwe.

[199] This landmark event which took place at a Diplomatic Conference in the coastal town of Swakopmund, Namibia was the result of 10 years in the evolution of intellectual property. The Archival Platform, *supra* note 195.

[200] Susan Mwiti, ARIPO's *D*rive to *S*trengthen Africa's *Innovation E*cosystem, WIPO MAG. (Sep. 2018), https://www.wipo.int/wipo_magazine/en/2018/. . ./article_0007.htm

[201] *See* Swakopmund Protocol *supra* note 20, § 19.1.

[202] Press Release, WIPO, WIPO Director General Welcomes Moves to Enhance Protection of Traditional Knowledge and Folklore in Africa (Aug. 31, 2010) (available at http://www.wipo.int/pressroom/en/articles/2010/article_0028.html); *see also* The Archival Platform, *supra* note 195.

the Protection of Genetic Resources, Traditional Knowledge and Expressions of Folklore, explains that this step affirms the principle that traditional or local communities are the custodians of their traditional knowledge and its associated genetic resources and folklore, and empowers them to exercise rights over their knowledge and resources.[203] A similar initiative developed by ARIPO's sister, Organization Africaine de la Propriata Intellectuelle (OAPI)[204] was adopted in 2007 to deal mainly with French-speaking countries of Central and West Africa.[205] The adoption of these two important initiatives reflects a commitment by the majority of sub-Saharan African countries to protect the rights of traditional and local communities in their knowledge, innovations, and practices.[206] Ghana is only a member of ARIPO, not OAPI. This will thus limit our discussions to analysis of the Swakopmund Protocol.

III. The Swakopmund Protocol

The Swakopmund Protocol,[207] adopted in August 2010, is underpinned by the principle that the knowledge, technologies, biological resources, and cultural heritage of traditional and local communities are the result of tested practices of past generations.[208] These resources are held in trust by today's custodians for future generations[209] and their routine usage forms a core of the cultural heritage of the indigenous communities, thus vital for their survival.

The objectives of the Protocol as articulated in Article III of the Lusaka Agreement[210] is to include the promotion of the harmonization and development of the intellectual property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole.[211] As reflected in the objectives, the protocol is supposed to serve as a template to guide national legislation regarding

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[203] The Archival Platform, *supra* note 195.

[204] www.oapi.int. Member states of OAPI are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea-Bissau, Mali, Mauritania, Niger, Senegal and Togo.

[205] WIPO Director General Welcomes Moves, *supra* note 202.

[206] Emmanuel Sackey, *A New Dawn for Custodians of TK in Africa*, WIPO MAG. 4, (Dec. 2010), https://www.wipo.int/wipo_magazine/en/2010/06/article_0008.html. (adding that, "not only have these initiatives repositioned ARIPO and OAPI as leading forces in the development of IP in Africa, they have has also enabled African countries to play a leading role in global norm-setting processes relating to the protection of TK and folklore.")

[207] Hereinafter referred to as 'the Protocol'

[208] Sackey, *supra* note 206, at 2.

[209] *Id.*

[210] The Lusaka Agreement is the Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO) as amended on August 13, 2004. (Adopted by the Diplomatic Conference for the adoption of an Agreement on the Creation of an Industrial Property Organization for English-Speaking Africa at Lusaka (Zambia) on December 9, 1976, and amended by the Administrative Council of ARIPO on December 10, 1982 and November 27, 1996 as amended by the Council of Ministers on August 13, 2004). www.wipolex.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=301376

[211] Nwauche, *supra* note 103, at 191.

intellectual property in traditional knowledge and folklore,[212] but, more importantly, it is designed to harmonize and coordinate the laws and policies of member states on intellectual property in the areas of traditional knowledge and folklore for mutual benefit.[213]

A. The Scope of Protection

In developing IP law for the protection of folklore, the Protocol starts by circumscribing what constitutes folklore through a definition of expressions of folklore. Expression of folklore is laid down to be 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;

iii. Expressions of movement, such as but not limited to dances, plays, rituals, and other performances; whether or not reduced to a material form; and

iv. Tangible expressions, such as productions of arts, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments, and architectural forms[.][214]

This comes out as a useful guide because it broadly, without limiting, sets out the various forms of works that are categorized as folklore for purposes of IP protection. The clear and all-embracing definition is most useful because it provides a high level of certainty in determining works of folklore. Most people who get attracted to the (commercial) usages of folklore are foreigners and may have no idea of what constitutes folklore within a particular community. But a clear definition serves as a good determiner for people who have good intentions to make use of folklore in an appropriate way.

As discussed earlier, Ghana's Copyright Act generalizes folkloric works as "literary, artistic, and scientific expressions, including Kente and Adinkra designs." This limits the understanding of what folklore is. In today's global world, a definition must be tailored to inform a broader audience, especially outside Ghana, since folkloric works are used beyond Ghana and protections are also sought beyond

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[212] Eva Owusu Sarpong, *The Dilemma of Copyright in Sub-Saharan Africa: Ghana in Focus* 46 (Apr. 2013) (unpublished master's thesis, Univ. of Ottawa) (available at http://pdfs.semanticscholar.org>/0189/).

[213] *Id.* ARIPO works in collaboration with the World Intellectual Property Organization (WIPO) to ensure that the policies of the organization are in line with the standards of WIPO.

[214] Swakopmund Protocol, *supra* note 20, § 2.

Ghana. The definition in the Protocol should therefore serve as a template for nation-states— including Ghana— in defining folklore for national statutes. Kenya, in enacting a *sui generis* statute to protect folklore, adopted a similar approach that reflects, to a large extent, the path taken by the Swakopmund Protocol. Broadly establishing the ambit within which indigenous works may fall and be classified as folklore creates room for the inclusion and protection of all forms of indigenous creative works that may qualify for protection at any point in time. This is particularly important for intangible folkloric works which are not always readily ascertainable. South Africa's parallel statutes on folklore protection do not adopt this approach, mainly because the IPAA protects only folkloric works that have been fixed to a tangible medium. Recognition is given to intangible folklore, but the mode of ascertainment, as discussed earlier, is a burdensome one and does not offer much assistance to third parties. A fairly high level of certainty in the law is a virtue in achieving its purpose, and the Swakopmund Protocol's reification of folklore is on point for members states to emulate.

B. Precondition for Protection

A cultural work falling within the definition of folklore does not, however, automatically invoke protection under the Protocol. Rather, it must further meet the protection criteria as set out under section 16. Section 16 states that:

Protection shall be extended to expressions of folklore, whatever the mode or form of their expression, which are:

(a) The product of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and

(b) Characteristics 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.[215]

This seeks to avoid a wholesale form of protection for all forms of folklore, some of which may not necessarily be the creation of intellectual activity or may not be an integral part of the cultural identity of an indigenous community. In like manner, it encourages and promotes the continual usage and development of folklore by indigenous communities as part of their cultural identity and heritage. Ghana, in providing for folklore protection under Copyright Act 690, did not contemplate this essential requisite. This may be attributable to the fact that folklore was being considered under copyright, rather than *sui generis*. Thus, as it was not the main subject matter being contemplated for protection under Act 690, little time and deliberation were allotted to its details. Prerequisites have, however, always been a vital component of IP protections. In copyright, for example, beyond the creative work falling within the subject matter, it must also meet the requirements of origi-

[215] Swakopmund Protocol, *supra* note 20, § 16.

nality and fixation.[216]

Since there are discussions on international protection of folklore, efforts made at the regional and national levels to protect folklore ought to meet the standards and benchmarks for conventional IP protection, that is recognition, protection, and reward for creative industry of authors, and the Protocol has well exemplified this under Section 16.

C. Categorizing ownership and authorship of folklore

Communal authorship and ownership have been distinct features of folkloric works. The Protocol resonates this characteristic feature and accords beneficial protection and ownership of folklore to indigenous communities.[217] As Sophia Lareya notes, it thus "vests authorship and ownership of folklore in recognized individuals or local communities that create, preserve[s] and transmit[s the] same."[218] The protocol provides that

the owners of the rights in expressions of folklore shall be the local and traditional communities:

(a) to whom the custody and protection of the expression 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.[219]

This is the best approach for according authorship and ownership of folklore. IP rewards creators for their creative works and the communities, which mostly are the creators of folklore, should be recognized as such. As discussed earlier, Ghana has not clearly set out the communities as the authors and owners of folklore. It rather vests folklore developed by ethnic communities in the President, for and on behalf of the people of Ghana. This amounts to denial of the right of attribution, since the President is, in this vein, seen as the "custodian" of all folklore. It invariably has contributed to the absence of a provision in the Ghanaian Act for a benefit-sharing or equitable remuneration for the lawful use of folklore for commercial gain, the economic benefit of having an IP right. Ownership always goes with an economic

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[216] *See* Copyright Act § 1, 2, 4, 2005 (Act 690) (Ghana) (providing that "a work is not eligible for copyright unless (a) it is original, (b) it has been fixed in any definite medium of expression").

[217] *See* Swakopmund Protocol, *supra* note 20, pmbl., para. 15 (emphasizing that "legal protection must be tailored to the specific characteristics of traditional knowledge and expressions of folklore, including their collective or communal context, the intergenerational nature of their development, preservation and transmission, their link to a community's cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned.").

[218] Sophia Laryea, '*To Have and to Hold*'*—Should Traditional Knowledge Rights in Ghana Be Vested in the Local Community or the Government?, in* WIPO Academy, University of Turin and ITC-ILO- Master of Laws in IP- Research Papers Collection- 2012–2013 (Feb. 28, 2013).

[219] Swakopmund Protocol, *supra* note 20, § 18.

benefit, but this misplaced vesting ignores the indigenous communities in Ghana and any economic gain that may result from third party uses.

Provisions under Sections 18 and 19.3[220] of the Protocol give guidance to African states on how the ownership and authorship rights in folklore should be treated in a balanced way by African countries. As discussed above, Kenya, right from its constitutional mandate under Articles 11 and 40, acknowledges the indigenous communities as authors and owners for purposes of protection. Consequently, any negotiation for third party use of folklore is to be done by such third party and the community concerned, with the state institution merely steering affairs and seeing to equitable beneficial conclusions for the communities, as it should be. Without downrating the pivotal role that the state institutions play in the management of folklore, the rights of ownership must clearly be attributed to the authoring communities at all times as illustrated under the Swakopmund Protocol and domesticated in the Kenyan *sui generis* statute on folklore.

D. Exclusive right entitlements

A fundamental rationale for protecting folklore is to prevent misuse and misappropriation against the rights assigned to the indigenous communities who are the authors and owners of these rights. A means of determining what would amount to a misuse or misappropriation is by reference to the exclusive rights vested in the communities. The Protocol specifies these exclusive rights to include:

19.1 Expressions of folklore shall be protected against all acts of misappropriation, misuse and unlawful exploitation.

19.2 in respect of expressions of folklore of particular cultural . . . significance to a community, the contracting states shall provide adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts from taking place without its free and Prior Informed Consent:

(a) in respect of such expressions of folklore other than words, signs, names and symbols:

i. The reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the expressions of folklore or derivatives thereof;

ii. Any use of the expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the expressions of folklore;

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[220] *Id.* § 19.3 (providing that "[i]n respect of the use and exploitation of other expressions of folklore, the Contracting States shall provide adequate and effective legal and practical measures to ensure that: (a) the relevant community is identified as the source of any work or other production adapted from the expressions of folklore; . . . (d) where the use or exploitation is for gainful intent, there should be equitable renumeration or benefit-sharing on terms determined by the national competent authority in consultation with the relevant community.").

iii. Any distortion, mutilation or other modification of, or other derogatory action, in relation to the expressions of folklore; and

iv. The acquisition or exercise of intellectual property rights over the expressions of folklore or adaptations thereof[.][221]

To secure respect for and implementation of these exclusive rights, the protocol obligates member states to "ensure that, accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies are available to remedy breach of the provisions relating to the protection of . . . expressions of folklore."[222] The protocol sets a guide and minimum standard for member states and all African countries. Kenya broadens exclusive rights in folklore by including, among other things, communication of folklore to the public by means of television, radio, satellite, or cable transmission.[223] Keeping abreast with modern trends of information dissemination, Kenya again exclusively allots to the communities the right to make available online or electronic transmission to the public,[224] further enlarging the exclusive rights. It is apparent that Kenya has largely met its treaty obligation under the protocol by implementing most of its core and standard provisions.

To promote enforcement, section 23.2 of the protocol mandates a national competent authority in member states to be entrusted with the task of advising and assisting communities who are beneficiaries of protected folklore in defending and enforcing their rights and instituting civil and criminal proceedings, where appropriate and when requested by the communities concerned.[225] This obligation is met under Kenya's Act 33 when it mandates that the county government, in consultation with the national government, shall establish a mechanism to ensure that communities have the means to prevent the misuse and misappropriation of folklore.[226] Kenya already has in place the Kenyan Copyright Board, which additionally promotes and protects folklore in this regard. Ghana has the formidable Folklore Board,[227] which is mandated, among other things, to preserve and monitor the use of expressions of folklore in the country. From the Protocol's model and Kenya's moves, Ghana stands a better chance of effective restructuring of the mandates and roles of the Board to cover some of these requirements in achieving its goals. The Board has been very instrumental in the fight against misappropriation of folklore. As part of fulfilling its mandate under the Act, the Ghana Folklore Board, in January, signed a contract with AB and David, a Law firm to empower the board in its legal mandate.[228]

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[221] *Id.* § 19.1–19.2.

[222] *Id.* § 23.1.

[223] Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 (2016) § 17(2)(d) (Kenya).

[224] *Id.* § 17(2)(g).

[225] Swakopmund Protocol, *supra* note 20, § 23.1.

[226] *Id.* § 18(4).

[227] Copyright Act § 63, 2005 (Act 690) (Ghana).

[228] Hafsa Obeng, *National Folklore Board Signs Contract to Protect Folklore*, GHANA NEWS AGENCY (Jan. 31, 2019), https://ghananewsagency.org/social/national-folklore-board-signs-contract-to-

E. Duration for protecting folklore

The length of protecting folklore has been debatable. IP ultimately envisages a reversal of exclusive rights into the public domain after exhaustion of the rights conferred. But the ever-growing dynamism and timelessness of folkloric works coupled with their passage from generation to generation makes it difficult to limit this right to a period.

Without leaning toward either side, the Swakopmund Protocol craftily balances divergent views and provides that

expressions of folklore shall be protected against all acts of misappropriation, misuse or unlawful exploitation for as long as the expression of folklore fulfill the protection criteria set out in section 16.[229]

Section 16 of the protocol supplements this by requiring that, 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 or individual creativity where the identity of the individual is unknown; and

(b) characteristics 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.[230]

Both sides of the coin are embedded within this duration of protection in that folklore is protected loosely in perpetuity so long as the creative and intellectual activity is maintained, used, and developed; on the other hand, if the creative and intellectual activity is not maintained, used, and developed, it stands the chance of being classified as not worthy of protection, thus limiting its protection by law.

This approach is not unique to folklore; trademarks are protected by WIPO and member states for an initial duration and may be renewed indefinitely. In effect, so long as a trademark owner renews its right and makes use of the mark, protection is accorded without any limitation on the length of protection.[231] A responsibility, however, is put on trademark owners to always make relevant commercial use of the protected mark. This is comparable to the means of sustaining duration of folklore protection. Protected rights are balanced by indirectly encouraging authoring communities or individuals, as the case may be, to be dynamic in the usage, development, and maintenance of their creative cultural assets in order to enjoy indefinite protection.

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229 Swakopmund Protocol, *supra* note 20, § 21.

230 *Id*. § 16.

231 This helps prevent confusion in the minds of the public in relation to the protected mark and other similar or competitive marks. It also puts a responsibility on trademark owners to always make relevant commercial use of the protected mark.

F. Balanced Access Paradigm

Public access to creative works for non-commercial uses is a vital component in promoting creativity and knowledge transfer in society.The Protocol balances its protection regime by making provision for reasonable public access to folkloric works that would otherwise be restricted by exclusive rights.[232] By this, the protocol equally upholds the promotion of knowledge, and excludes from the exclusive rights of owners non-commercial uses 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."[233] It also, significantly, requires members to exclude the traditional usages and transmissions of folklore within the traditional context from the exclusive rights. Section 20 provides that, "Measures 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 the customary laws and practices".[234] This offers recognition for the customary usages of folklore and encourages free traditional usages to promote development of folklore.

G. A Potential Challenge

A potential challenge, however. would be the question of which groups of people the protocol refers to as a "community"[235] The protocol defines a community to include "a local or traditional community" wherever context so permits.[236] To Enyinna Nwauche, "'local or traditional community' appears to refer to ethnic communities which are organized on the basis of blood decent."[237] He, however, argues that, communities can also be organized around other social factors, such as religion and language, in a way that could qualify as "local" and "traditional".[238]

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[232] Section 19 of the protocol spells out the various exclusive rights accorded authors and owners of folklore. Swakopmund Protocol, *supra* note 20, § 19. This is also reflected in the 12th paragraph of the preamble, which provides that "[w]"e, the Contracting Parties. . .recognizing that protection must reflect the need to maintain an equitable balance between the rights and interests of those who develop, preserve and maintain traditional knowledge and expressions of folklore, and those who use and benefit from such knowledge and expressions of folklore." *Id*. pmbl., para. 12.

[233] *Id*. § 20.1(c). In Section 20.1 in general, the Protocol attaches a caveat to the effect that, the exclusions are allowed to the extent that such uses are compatible with fair practice, the relevant community is acknowledged as the owner of the expressions of folklore where practicable and possible, and such uses would not be offensive to the relevant community.

[234] *Id. § 20.*

[235] *See* Nwauche, *supra* note 103 at 193; *see also* Tokornoo, *supra* note 41, at 11.

[236] Swakopmund Protocol, *supra* note 20, § 2.1.

[237] Nwauche, *supra* note 103, at 193*; see also* Harrington & Deacon, *supra* note 146, at 3.

[238] Nwauche, *supra* note 103, at 193 (Nwauche gives an example: many African communities are organized around what is usually termed "traditional African religion", and it is important to determine whether such religious communities are contemplated in the reference to "local or traditional community" and also whether such term would encompass Islamic and Christian communities.).

This degree of extension of "local or traditional communities" by Nwauche is, in my respectful opinion, too wide for purposes of folkloric protection, owing to the fact that social organization of traditional societies has proven to be "based on a strong pattern of kinship groups with lineage as their basic constituent."[239] Among the Asante in Ghana, for instance, community organization is purely based on a matrilineal (mother/birthright) linkage. Accordingly, every person of a matrilineal descent is a member of his mother's lineage and hence a lineage consists of the male and female descendants of a single ancestress, descent being reckoned on the uterine line.[240] Thus, in reading the definition of "local or traditional communities" together with section 16(b)[241] of the Protocol, I will argue that, for purposes of protection of folklore, this definition would naturally imply communities organized by blood descents.

The determination of who belongs to a particular community for IP protection will, however, not be an easy one, due to migration and intermarriage among traditional communities. However, this is an inherent problem when protecting rights of groups of people whose boundaries are not well defined, and it is not unique to Africa alone but all communal groupings all over the world.[242] All first attempts undoubtedly face challenges which by themselves, overtime will help inform how to address them to improve the Protocol moving forward. The benefits of the Protocol, however, outweigh this challenge, as it seeks to ultimately harmonize folklore protection among African countries.

H. Harmonization

One of the core objectives of ARIPO is to coordinate, harmonize, and develop IP activities affecting its member states.[243] In working towards harmonization, the protocol applies the "National Treatment" and principles of reciprocity as found under TRIPS[244] to all folklore that are made use of beyond its territorial confines in

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239 Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U.L. REV. 769, 781 (1999).

240 CHRISTINE OKALI, COCOA AND KINSHIP IN GHANA: THE MATRILINEAL AKAN OF GHANA (1st ed. 1983).

241 Section 16 of the Protocol reads that protection shall be extended to folklore. . . which is ("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." Swakopmund Protocol, *supra* note 20, § 16.

242 *See also* Harrington & Deacon, *supra* note 146, at 3–4.

243 *See* Swakopmund Protocol, *supra* note 20, pmbl., para. 2(stating that "[w]e, the Contracting Parties. . . [i]n accordance with the objectives of ARIPO generally and in particular Article III (c), which provides for the establishment of such common services or organs as may be necessary or desirable for the coordination, harmonization and development of the intellectual property activities affecting its member states[.]").

244 TRIPS defines the "National Treatment" thus: "[e]ach 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," though this is subject to various exceptions. Trade-Related Aspects of Intellectual Property Rights, art. 3.1, Apr. 15, 1994, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/text.jsp?file_id=305907

other member states. This is a measure meant to help curb the misappropriation of folklore beyond state borders. To accomplish this goal, ARIPO provides that "[e]ligible foreign holders of . . . expressions of folklore shall enjoy benefits of protection to the same level as holders of . . . 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 . . .expressions of folklore concerned."[245] This provision, in my opinion, remains the cornerstone of the protocol. A major challenge in the protection of folklore is the absence of international protection, which leaves folklore that is made use of in foreign countries to its own perils. The Swakopmund Protocol, however, bridges this gap by extending protection of folklore beyond territorial boundaries to the wider community of its member states.[246] This means that folklore protected in Liberia will automatically be protected in Zambia, as both are members of ARIPO and have ratified the Protocol. This development provides the necessary tools to limit the ongoing misappropriation of folklore in Africa.[247] The custodians of folklore are now empowered to exercise rights over that folklore beyond their national laws.[248]

This development, however, would achieve maximum effect only if all member states were to fully ratify the Protocol and enact legislation on the protection of folklore to reflecting its standards..[249] This would achieve wider harmonization not only because all the member states would have laws and protocol applicable to the expressions of folklore, but also because the laws that would be applied to protect and enforce folklore in member states would not substantially differ. This implies supporting ARIPO member states should ratify and fully adopt the Swakopmund Protocol, *mutatis mutandis*,[250] to achieve greater protection of folklore on the African continent.[251]

I. A *sui generis* protection of folklore for Ghana

Recommendations

This section makes recommendations to inform and guide a move for domesticating and implementing the Swakopmund Protocol specifically in Ghana, in the

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245 Swakopmund Protocol, *supra* note 20, § 24(1).

246 The Swakopmund Protocol required that at least 6 member states should ratify the protocol for it to come into effect. In 2015, the protocol was ratified by a 6th and 7th member state making it possible for members to protect their folklores beyond their national borders. *Entry into Force of the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, ARIPO (May 11, 2015), https://www.aripo.org/entry-into-force-of-the-aripo-swakopmund-protocol-on-the-protection-of-traditional-knowledge-and-expressions-of-folklore/.

247 Sackey, *supra* note 206.

248 *Id.* (quoting Gift Sibada, the former ARIPO Director General).

249 As of 2015, these ARIPO member states had fully ratified the protocol: Botswana, Gambia, Liberia, Malawi, Namibia, Rwanda, Zambia, and Zimbabwe.

250 A Latin phrase that translates 'with the necessary modifications'

251 WIPO has encouraged countries to take the initiative nationally, as Kenya has done, to protect their folklore through a sui generis approach reflecting the Swakopmund protocol. *See* Harrington & Deacon, *supra* note 146.

midst of the heightening rate of misappropriation of folklore. As Adebambo Adewopo, the Director General of Nigerian Copyright Commission, has stated, "globalization and the information Technology revolution have pushed the demand for IP protection beyond the borders of sovereign nations." [252] This has led to the unavoidable interactions among the various categories of IP and folklore and suggests an urgent need for a new workable mechanism to police the national and cross border misappropriation of folklore, particularly when the right may extend to the knowledge and practices of indigenous and local communities.[253]

According to research,[254] a measure needed to improve the current IP regime for effective protection in Ghana is to improve the legal frameworks to meet acceptable workable standards. Research by Tokornoo[255] in response to this call recommended that the current copyright regime be amended to suit folklore protection properly. However, from discussion on how inadequately copyright protection serves folklore, and from the experiences of countries like Kenya and South Africa, this paper will instead recommend that a *sui generis* protection framework be drafted to, *inter alia*, provide for folklore protection in Ghana, because this avenue will offer the opportunity for the unique features of folklore to be adequately considered and factored in for greater protection. Again, it will offer the opportunity to deal broadly with all forms of traditional knowledge protections alongside folklore in that same *sui generis* statute, as other African countries like Kenya and South African have done. In enacting a *sui generis* statute, the provisions should, to a large extent, reflect the standards set in the Swakopmund Protocol and make specific provisions for the following points.

The starting point will be to define what folklore is. To do that, any potential legislating body will need to bear in mind that the essential element of folklore is community creations being handed down from generation to generation and reflecting the communities cultural and social identities. Giving many examples of folkloric works would also better clarify the a potential statute's definition of folkloric works.[256] The identity of the beneficiaries of folklore should flow from that definition. The beneficiaries should be the authors and owners of a particular folklore, following the Swakopmund Protocol's guidance. When this is clearly set out, there should be no difficulty in ascribing the exclusive rights conferred on authors to communities concerned.

Certainty of the law requires that there must be clear statements of the exclu-

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

[253] Ruth L. Okediji, *Traditional Knowledge and Public Domain,* CIGI PAPERS No. 176, June 2018, at 2.

[254] Committee on Development and Intellectual Property (CDIP), *A Country Study on Innovation, Intellectual Property and the Informal Economy: Traditional Herbal Medicine in Ghana*, Committee on Development and Intellectual Property (CDIP) Thirteenth Session Geneva, May 19 to Feb. 12, 2014, WORLD INTELL. PROP. ORG. at page 45.

[255] Tokornoo, *supra* note 41, at 42.

[256] WIPO Intergovernmental Committee, *supra* note 4.

sive rights of authors to inform potential users what would amount to a misuse, misappropriation, and unlawful exploitation. The exclusive rights in folklore vested in the authors and or owners must be clearly set out in a detailed manner to facilitate enforcement. Because the creation of folklore is evidenced as being continually passed on from generation to generation and forming an integral part of the identity of a community, no time limits should be put on the length of protection. The duration must continue as long as the works bear the qualities identified in its mode of creation and are sustained.[257]

Governmental institutions like the National Folklore Board in Ghana play pivotal roles in granting licenses for the use of folklore. A *sui generis* statute, however, must actively involve the communities concerned in negotiations for the grant of a license. Benefits accruing from a license should also be apportioned in such a manner that the communities concerned directly benefit from such agreements. In order not to inhibit the creative activities of individuals who may want to build upon or make use of existing folklore works, Ghanaian nationals should be exempted from paying a license fee for a derivative or adapted folklore use.[258] In the alternative, a minimal amount should be required of Ghanaians who make use of folklore to promote creativity in the creative arts by Ghanaians.

A *sui generis* protection would offer Ghana the opportunity to gain greater control over its folklore. However, the exclusive rights must be balanced with exceptions and limitations to allow public noncommercial access to information and knowledge in the areas of research and teaching, private use, critiques, legal proceedings, and other incidental uses that seek to promote knowledge and are not characterized by commercial gain. The statute must also distinctively demarcate the normal uses and development of folklore within the traditional or customary context by members of communities as determined by their customary laws and practices from nontraditional use requiring a license. This will circumvent the pitfall of subjecting members of authoring communities to licenses for their customary practices uses of folklore.[259]

Enforcement plays a vital role in securing and defending exclusive rights. Both criminal and civil liabilities should be attached to a breach of exclusive rights. This will offer rights holders the opportunity to determine which liabilities to pursue in a particular case to achieve effective results. There are times when criminal sanctions serve the purpose of deterring like minds. Other times, civil suits would best serve a purpose of enjoining or recouping unjust enrichment from folklore used without a license. In some instances, a combination of the two classes of liability may prove to be effective. In Ghana's current practice, the National Folklore Board (NFB) plays a very active role in enforcing the protection of Ghanaian folklore. Provisions must be made to reinforce this role and also to provide accessible enforcement ave-

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[257] The Swakopmund Protocol supports this mode of protected duration and it has been adopted by Kenya in its *sui generis* statute on folklore. *See* Swakopmund Protocol *supra* note 20, § 21.

[258] *See* WIPO/UNESCO's Model Provisions, *supra* note 1; Swakopmund Protocol, *supra* note 20.

[259] *See* Swakopmund Protocol, *supra* note 20, § 19 (providing a model for how to avoid this).

nues to help the NFB continue in assisting beneficiaries of folklore in upholding and defending their rights.

IP laws should not only be positive but must also be defensive in a manner that helps prevent a breach of the law. A challenge in protecting folklore in Ghana is the lack of proper documentation of folkloric works. Compiling a data base that would preserve folklore and serve as a source of identification would be a major effective tool in fighting misappropriation of folklore.[260] This may come with its own challenges, ranging from financial, to personnel, to political. But just as documentations of other IP rights like trademarks and patents have been sustained, documentation of folklore can equally be achieved.[261] Ghana can start this process with the major folklore that is attracting commercial attention and gradually progress into more obscure folklore.[262]

However comprehensive a *sui generis* protection of folklore in Ghana may be, its application will be limited to the territorial boundaries of Ghana. What this means is that, while persons in Ghana would be prevented from commercial use of folklore, other nationals outside Ghana may capitalize on it without any restrictions due to limited protection. In order to extend protection of folklore in Ghana beyond the boundaries of Ghana, it is again recommended that Ghana ratifies the Swakopmund Protocol. ARIPO is made up of 19 member states so far and 7 countries out of this number have ratified the Protocol. Ghana Signed the Protocol in 2010.[263] However, treaties and protocols signed by Ghana does not form part of Ghanaian Laws unless they are ratified by parliament and given effect through legislation.[264]

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[260] This will serve as a replica of patent laws' "prior art," which serves as a reference point in determining infringements.

[261] Betty Mould Iddrisu, Ghana's former Copyright Administrator has long said that, "[f]olklore in Africa is a vibrant and living work of intellectual creativity which has reached an opportune time for it to be documented and preserved." Betty Mould-Iddrisu, Copyright Adm'r, Accra, The Experience of Africa, Speech at UNESCO-WIPO World Forum on the Protection of Folklore (Apr. 8, 1997), *in* WORLD INTELL. PROP. ORG, UNESCO-WIPO WORLD FORUM ON THE PROTECTION OF FOLKLORE 27 (1998).

[262] An earlier attempt to document folklore in Ghana by the National Folklore Board of Trustees, Technical Committee, detailed the areas of expressions of folklore and provided a guide on how to achieve the documentation. It will be useful to consult this document and make the necessary changes to suit present times to guide this move. *See id.* at 18–25. Another avenue that can be exploited is to identify various aspects of the documentation processes and source scholars and graduate students' inputs through research collaborations with the Public Universities in Ghana.

[263] Sackey, *supra* note 206, at 3.

[264] International law identifies two approaches by which countries receive international law into their domestic laws. They are the Monist and the Dualist approaches. By the Monist approach, once an international treaty or protocol is signed, it automatically forms part of the nation's laws and can be enforced in their law courts. With the Dualist approach, on the other hand, upon signing an international treaty or protocol, legislative consent and approval is required before it forms part of the laws of the nation. This may be achieved by the state inculcating the international law into an appropriate existing national law or enacting a new legislation to reflect the international obligations. Ghana belongs to the Dualist state and always requires ratification through parliament for international law to be enforceable in the country.

Article 75 of the 1992 Constitution of Ghana provides that, "(1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana. . . .(1) A treaty, agreement

Ratification of the Protocol will require that Ghana, either inculcates the standards in the protocol in existing legislation or enacts new legislation to give it effect. In this regard, reference is made to the earlier recommendation and this paper maintains that a *sui generis* protection should be adopted. Ratification is essential here to offer trans-border protection of folklore beyond Ghana to all ARIPO member states that have ratified the Protocol and might do so in the future. This will help bridge the international gap by extending protection to most African States, especially when majority of misappropriated folklore, in the form of indigenous textiles Kente and Adinkra, are found on the African market.

Another significant milestone made in the African region to promote the protection of IP rights is that the two main regional bodies on the protection of IP Rights, ARIPO and OAPI, are working towards merger and unification to achieve maximum impact. In line with these goals, ARIPO and OAPI in 2017 signed a memorandum of understanding to harmonize the IP systems of the two institutions.[265] This step has received the full blessing and support of WIPO[266] and will go a long way to strengthen IPR in Africa. The two regional bodies in 2019 again signed a revised work plan towards achieving this unification goal.[267] When fully materialized, folklore of all member states of these two regional bodies will automatically be protected among 35 African countries.[268] This will be a great achievement in promoting and protecting IP to suit African circumstances.

Conclusion

However effective national and region protection of folklore may be, they still have limited impact. The very dictates of global trade, which encourage widespread

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or convention executed by or under the authority of the President shall be subject to ratification by- (a) Act of Parliament; or (b) a resolution of parliament supported by the votes of more than one-half of all the members of Parliament."

This position has been made clear by the Ghanaian Supreme Court in the case of Mrs. Margaret Banful and Henry Nana Boakye v. The Attorney General and The Ministry of Interior, where the Chief Justice, Justice S. A. B. Akuffo, presiding ruled, inter alia, that, "The language of Article 75 is perfectly clear. The Article forms part of the set of provisions governing the role of the Executive arm of government in Ghana's international relations. The scope of the Article deals with treaties in general and the body of the text makes reference to 'treaties, agreements and conventions. It is also clear that the instruments referred to relate to Ghana's international relations with other countries or groups of countries and the Article require that such instruments must be ratified by Parliament. . .";

See also, INTER-MINISTERIAL COMMITTEE, REPUBLIC OF GHANA TREATY MANUAL 2 (2009).

265 Hillary Muheebwa, A*RIPO, OAPI To Harmonise Practices on Intellectual Property in Africa*, INTELL. PROP. WATCH (Feb. 21, 2017), http://wwwip-watch.org>2017/02/21>aripo-oapi-harmonise-practices-issues-intellectual-property-africa/.

266 *WIPO, OAPI and ARIPO reach an agreement for IP in Africa*, INVENTA INTL (Oct. 3, 2018), http://inventa.com/en/news/article/330/wipo-oapi-and-aripo-reach-an-agreement-for-ip-in-africa.

267 *ARIPO-OAPI Fifth Joint Commission Adopts a Revised Work Plan for 2019–2020*, ARIPO (Aug. 2, 2019), .http://www.aripo.org/aripo-oapi-fifth-joint-commission-adopts-a-revised-work-plan-for-2019-2010/.

268 ARIPO is currently made up of 19 member states and OAPI is currently made up of 16 member states.

misappropriation of folklore, equally require global measures to protect folklore internationally. Instituting this will promote the protection of folklore widely around the globe within countries that will be signatories to an international protection framework. Working with other nations to achieve international protection of folklore should be the ultimate goal for Ghana.