

## **THE NATIONALIZATION AND COMMERCIALIZATION OF GHANAIAN FOLKLORE**

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Folklore is an integral component of a nation's cultural identity. For over thirty years the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and World Intellectual Property Organization (WIPO) have advised developing countries to implement special protection for folklore within their local copyright legislation. In 2005, Ghana passed its second copyright act that enacted such protection for folklore and became the first country to extend that framework to include a domestic tax on folklore. The 2005 law attempted to enforce stronger penalties for unauthorized foreign use of Ghanaian folklore. The same law, however, discourages commercial adaptation of Ghana's folklore by its own citizens. The controversial law, which has yet to be enacted by the Ghanaian president, demonstrates the legal, political, and economic challenges in using copyright law to safeguard folklore both domestically and abroad. Overall, the law's vague definition of folklore, inactive national folklore inventory, and lack of reciprocity for foreign folklore render Ghana's copyright exception for folklore ineffective in its present form.

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## **INTRODUCTION**

In countries struggling with poverty, globalization can be a double-edged sword. Governments in poor countries must seek innovative ways to spur economic growth and develop infrastructures that allow them to compete in the world market. At the same time, many developing countries face threats to their cultural sovereignty, as the increased social and cultural exchanges across borders can overshadow or exploit the rich cultural heritage of indigenous people. Cultural heritage influences a nation's social identity as well as provides the foundation for future artistic works. These developing countries, under intense economic pressure, must therefore balance the seemingly more practical interest of centralized economic development with the preservation of the cultural identity of its citizens.

International organizations have developed a number of mechanisms for fostering development in poor countries while also protecting cultural heritage. In the 1970s, the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) recognized the potential for developing countries to use copyright restrictions on their national folklore. WIPO and UNESCO recommended that developing countries reclaim their cultural heritage and demand their share of the lucrative world music industry. Specifically, WIPO and UNESCO recommended that national government assume the copyright ownership of folklore and implement a tax on foreign uses or adaptations of folklore sold within the country.

Ghana, a country known both for its previous involvement in anti-piracy efforts in the 1970s and its growing, vibrant music industry, is one of the few countries to implement the recommendations from WIPO and UNESCO. In 1985, the Ghanaian government passed a copyright law (P.N.D.C. Law No. 110) that removed folklore and other works of cultural

heritage from the public domain. As a result of the law, Ghanaian folklore was no longer free for anyone anywhere to copy, perform, or adapt. In accordance with the WIPO/UNESCO recommendations, the 1985 law identified the national government as the steward and copyright holder of folklore. The 1985 law established a royalty system for works or adaptations of Ghanaian folklore that artists produced abroad and imported into Ghana. In the late 1990s, the legislature introduced a draft copyright bill that extended the folklore royalty to expressions of Ghanaian folklore produced within Ghana and enforced stricter penalties for those who fail to pay royalties. In 2005, after several years of debate, the Ghanaian parliament passed Act 690, which allows the government to collect royalties on the commercial use of folkloric works developed both domestically and abroad and defines harsh consequences for those who infringe.

The 2005 law is the first copyright law to apply a domestic folklore royalty. It raises serious issues for Ghanaian musicians, dancers, actors, writers, poets, graphic artists, fashion designers, painters, sculptors, and local filmmakers. These individuals' businesses and livelihood rely heavily on utilizing their cultural heritage, upon which they now must pay a tax for commercial uses.<sup>1</sup> The legislation's intent to protect cultural heritage and support economic growth within Ghana may be overshadowed by the great difficulty in its enforcement and the threats it poses to Ghanaians' use of their own cultural heritage. The possible consequences include stunting creative adaptations of folklore; threatening long-term cultural preservation; and allowing for government exploitation of indigenous populations, folk musicians, and folk artists. Due to the vocal criticism of the Ghanaian artists, the Ghanaian president has yet to enact the 2005 law. Yet, the debates surrounding the 2005 law demonstrate the legal, political, and economic challenges in encouraging the domestic use of folklore while also preventing foreign exploitation.

## **OVERVIEW OF COPYRIGHT INFRINGEMENT AND THE GHANAIAN MUSIC**

### **INDUSTRY**

Ghana has had a strong presence in the music industry for decades. It was the first country in West Africa to build its own recording studios and vinyl record manufacturing plants.<sup>2</sup>

Similarly, the Ghanaian government has had an equally long presence defending artist rights against music piracy. In the late 1970s, the vinyl factories closed due to loss in revenue caused by illegal cassette duplication.<sup>3</sup> This led to strong anti-piracy campaigns against cassette technology in the 1980s. Foreign record companies, the most prominent of whom was the International Federation of Phonogram Industries (IFPI), led such campaigns. These fervent, foreign-led, anti-piracy campaigns limited the legal, decentralized production and distribution of music in Ghana.

In 1987, the Ghana Tape Recordists Association (GTRA), a group of eight hundred music pirates who illegally duplicated music and distributed it on cassettes, organized a contract with a local producers association called the National Phonogram Producers Union (NPPA) to legalize their businesses. The Ghanaian Copyright Administration endorsed the licensing arrangement. Under the licensing arrangement, the GTRA were allowed to maintain their businesses and paid approximately \$6,000 (USD) to the NPPA.<sup>4</sup> However, it was shut down soon after due to political backlash from the Musicians Union of Ghana (MUSIGA) and the Phonograph Producers Society (PPS) who claimed that the agreement legitimized piracy by treating GTRA members as businessmen instead of criminals guilty of copyright infringement.<sup>5</sup> The National Commission of Culture convinced the Copyright Administration to rescind its endorsement of the GTRA and NPPA license agreement.<sup>6</sup> In 1988, in another attempt to limit piracy, the Ghanaian government implemented a 40-percent levy on imported blank cassettes

that would be used to compensate artists for sales lost due to piracy.<sup>7</sup> In 1989, the IFPI invested \$20,000 in an anti-piracy educational campaign. Three years later, the Copyright Administration installed a program that affixed anti-piracy stamps known as *banderoles* to legal cassettes and CDs.

Due to the combined strategy of the levy, IFPI's anti-piracy campaign, and the *banderoles* program, Ghanaian music piracy dropped from 90 percent of the entire population to 15 percent.<sup>8</sup> This success led IFPI to declare in 1996 that Ghana was second only to South Africa in terms of fostering a viable music industry within African countries.<sup>9</sup>

### **BACKGROUND ON THE WORLD MUSIC INDUSTRY**

World music, though variously defined, often intersects with folklore and usually refers to recordings of traditional songs by non-Western musicians. The category "world music" emerged in the early 1980s with the founding of the organization World of Music, Arts and Dance (WOMAD) by musicians Peter Gabriel, Thomas Broome, and Bob Hooton and the establishment of annual World Music Day (Fête de la Musique) in France. Ethnomusicology professor Jocelyn Gilbault explains, "The term has usually been associated with musics from Africa and the African diaspora [but] now covers American, Asian and European musics, albeit those of minority groups within these geographical areas."<sup>10</sup> Professors John Connell and Chris Gibson describe it more broadly as "a marketing category for a collection of diverse genres from much of the developing world."<sup>11</sup> The category overlaps with a wide range of genres including reggae, Afro-Cuban, Latin, Celtic, and folk music. World music is released under a variety of labels, including mainstream labels such as Sony Music or Real World Records founded by Peter Gabriel in 1989 as well as more specialized ones like Putumayo Records, UNESCO Collection,

Earthworks, Alula Records, and Bembé Records. University of Ghana Professor John Collins estimates that the world music industry is worth \$5 billion a year and that African music makes up twenty-five percent (\$1.25 billion) of the world music industry.<sup>12</sup>

The musicians from developing countries who inspire or contribute to these recordings often receive little or no compensation for their recordings or radio broadcasts.<sup>13</sup> One recording that has drawn much attention for its uncompensated use of world music is the internationally successful album *Deep Forest*. In 2002, two “ethno-techno” musicians, Michel Sanchez and Eriq Mouquet, combined ethnomusicological recordings from Ghana, the Solomon Islands, and African pygmies with techno music for their album *Deep Forest*. Since Michel and Sanchez were the first to record the music and fix it in a tangible form they received the copyright for the music, even though the original musicians and composers offered the underlying artistic contributions and creative expression necessary for the album. The album sold over two million copies and was used in commercials for Coca-Cola, Porsche, Neutrogena, and the Body Shop. None of the contributing musicians from Ghana, the Solomon Islands, nor the African Pygmies shared in the resulting profits.<sup>14</sup> Examples such as *Deep Forest* pose many unresolved questions for the intersection of the world music industry, artist rights, and folk expression. How should the folk artists be compensated for their contributions to new music creations that draw upon, recreate, or adapt their folk music? Who should be compensated, if at all, for the use of folk music? What are the proper provisions that should be implemented in legislation at the national, regional, and international level?

## **WIPO AND UNESCO RECOMMENDATIONS AND MODELS TO PROTECT FOLKLORE**

In order to address the threat of foreign exploitation to folklore, UNESCO and WIPO have organized a series of international discussions and reports on methods for protecting cultural heritage. In 1970, UNESCO brokered a cultural heritage treaty which introduced the notion that cultural heritage should be given special legal protection. In the 1970s and 1980s, UNESCO collaborated with WIPO in policy recommendations on how to safeguard folklore under the framework of copyright law. These documents demonstrate the evolution of the definition of folklore and the mechanisms employed for its preservation.

### **UNESCO World Heritage Convention (1972)**

In 1972, UNESCO introduced the World Heritage Convention, a treaty that brought international attention to the importance and vulnerability of cultural heritage.<sup>15</sup> The Convention acknowledges that a nation requires significant economic, scientific, and technological resources to protect its natural and cultural heritage.<sup>16</sup> Moreover, it recognizes the distinction between natural and cultural heritage. Cultural heritage includes monuments, groups of buildings, and archaeological sites. Natural heritage refers to physical, biological, geological, and physiographical formations.<sup>17</sup> Although the convention focuses on physical entities and therefore excludes folklore, it set the groundwork for future inclusion.<sup>18</sup>

### **WIPO/UNESCO Tunis Model Law (1976)**

Four years later, UNESCO joined WIPO to explore how copyright law could safeguard folklore. Both organizations acknowledged that developing countries have different needs for copyright protection and preservation of cultural heritage than industrialized nations. The *Tunis Model Law on Copyright for Developing Countries* asserts that national folklore is “susceptible [to]

economic exploitation”<sup>19</sup> and “constitutes not only a potential for economic expansion, but also a cultural legacy intimately bound up with the individual character of each people.”<sup>20</sup> The model law defines folklore as:

“[works created] by authors presumed to be nationals of the country concerned, or by ethnic communities.”<sup>21</sup>

The model law recommends that use of national folklore should be free for public entities when used for non-commercial purposes and that the protection of folklore should last in perpetuity.

This notion of perpetual copyright ownership for folklore is drastically different from the limited duration copyright granted to other copyright owners. Furthermore, the model law prohibits unauthorized imports of adaptations of folklore but does not offer any suggestions for an enforcement mechanism.<sup>22</sup>

### **WIPO/UNESCO Model Provisions (1982)**

By 1980, eleven developing countries had enacted national copyright legislation to regulate folklore: Tunisia (1967), Bolivia (1968), Chile (1970), Morocco (1970), Algeria (1973), Senegal (1973), Kenya (1975), Mali (1977), Burundi (1978), Ivory Coast (1978), and Guinea (1980).<sup>23</sup>

Consequently, in 1982, WIPO and UNESCO released a joint report titled *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* drawing on the example of the relevant legislation in the aforementioned eleven countries. The report urges developing countries to prevent commercial exploitation of folklore by “those outside their originating communities without any recompense to such communities.”<sup>24</sup> The 1982 Model Provisions acknowledge that folklore is a vital part of the cultural heritage and social identity for many developing countries. Industrialized nations,



due to their increased access to technology, are often better able to commercialize these free cultural works without any obligation of compensating the community where the works originated. The report also points out that this often leads to distortion of folklore for marketing purposes.<sup>25</sup> The Model Provisions suggest the following definition of folklore:

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

- i. Verbal expressions, such as folk tales, folk talks, folk poetry, riddles
- ii. Musical expressions, such as folk songs and instrumental music
- iii. Expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form.<sup>26</sup>

The report elaborates that folklore is by definition “created by authors of unknown identity but presumably being or having been nationals of the country.”<sup>27</sup> WIPO and UNESCO advise that the folklore restriction be waived for educational purposes, illustrative and incidental uses under fair practice (though the document does not define fair practice), and transformative works of their own creative expression through excerpts from folklore.<sup>28</sup> The provisions suggest that national governments enforce a tariff on adaptations made outside the country that are imported into the country and use the proceeds toward preservation and promotion of national folklore.<sup>29</sup> Lastly, the model provisions recommend that countries offer reciprocity for protection of folklore from foreign countries.<sup>30</sup> Under reciprocity, a country will not enforce copyright protection for folklore in a foreign work unless the country of origin enforces the copyrights in

their own national folklore. Without reciprocity, a country can only expect copyright protection for its national folklore within its own borders.

## **UNESCO 1989 recommendations**

In 1989, UNESCO released a follow-up report called *Recommendation on the Safeguarding of Traditional Culture and Folklore*. Although much shorter in length than the 1982 Model Provisions, the recommendation expanded the definition of folklore:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.<sup>31</sup>

The report advises member states to conduct national, regional, and international surveys in order to build their own national folklore inventories, and to archive folklore expressed in tangible forms for long-term preservation.<sup>32</sup> It insists that cultural communities be guaranteed access to their own folklore and that national folklore be widely disseminated for the sake of preserving cultural identity.<sup>33</sup> Lastly, WIPO and UNESCO acknowledge that there must be complementary protection of folklore outside of intellectual property rights.<sup>34</sup>

## **Conflicts in applying copyright to folklore**

There are inherent conflicts in applying copyright to folklore. Even the authors of the UNESCO/WIPO 1982 Model Provisions acknowledged, “Legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient.”<sup>35</sup>

These conflicts can be understood through the notion that copyright typically is granted only for tangible expression, and for a limited time, and few countries distinguish folklore from works in the public domain. Copyright law is inherently in conflict with folklore for three reasons.

First, copyright rewards creative expression fixed in a tangible medium (e.g., recorded, written, drawn, etc.). Conversely, folklore is often passed informally, such as by oral tradition, and therefore jointly created, communally expressed, and building upon the works of previous generations.<sup>36,37</sup> Copyright does not protect ideas, only the expression of those ideas. It can be difficult to separate the idea and original expression of folklore from a contemporary artist’s unique expression and transformation of that folklore. International cultural heritage law expert Janet Blake adds, “[Copyright] does not adequately address the most central concerns for safeguarding folklore—its integrity, its role in expressing the identity of the community for the community, its continued practice in traditional forms, and its valuing by the producer community itself.”<sup>38</sup> The 1982 UNESCO/WIPO model provisions acknowledge that copyright law alone cannot fully protect folklore.<sup>39</sup>

Second, copyright protection is typically granted for limited time periods as an incentive for artists to create original work. Conservation of folklore and other works of cultural heritage, though, rely on long-term preservation that lasts much longer than typical copyright terms. To accommodate this, UNESCO and WIPO have recommended perpetual copyright ownership for folklore, which is drastically different from the limited duration of copyright granted to other

copyright owners. Copyright perpetuity exacerbates the problem of determining where folklore ends and a contemporary artist's added creative expression begins.

Third, prior to the WIPO/UNESCO recommendations, folklore was considered to be in the public domain along with other works whose copyright term had expired. Works within the public domain were no longer copyrighted and free for anyone worldwide to copy, perform, or adapt. The recommendations from WIPO and UNESCO suggest that folklore has higher cultural value than other public domain works, and should in fact be copyrighted in order to prevent foreign exploitation. It is, however, a challenge to determine whether a song from the 1800s, for example, is part of national folklore or simply a work whose copyright has expired. One could argue that folklore forms the most popular portion of the public domain, including the songs, poems, and dances that are commonly used for cultural heritage celebrations as well as daily life. This makes it particularly difficult to prescribe and enforce royalties for folklore.

### **COPYRIGHT LEGISLATION AND THE FOLKLORE SECTOR IN GHANA PRIOR TO 2005**

Ghana has not been immune to these struggles as it works to incorporate adequate protection of folklore into its copyright legislation. After independence from British colonial rule and prior to the 2005 legislation, Ghana passed two copyright acts. The first act in 1961 (Act 85) mimics U.S. copyright protection and does not include special protections for folklore under copyright. The subsequent act, in 1985, drew from the WIPO/UNESCO 1982 Model Provisions and applied a tariff on foreign-produced music based on Ghanaian folklore. Over the subsequent twenty years, the Ghanaian government attempted to safeguard its national folklore but their efforts yielded few results.

### **Copyright Act of 1961 (Act 85)**

The 1961 Copyright Act, the first post-colonial copyright act in Ghana,<sup>40</sup> set forth some basic principles of copyright that are similar to copyright law in the United States. For example, a work must be original and fixed in a tangible form in order to be eligible for copyright protection. Copyright was granted for a term of twenty-five years after the author's death for unpublished works and until the year of the author's death or twenty-five years after publication for published works.<sup>41</sup> The Minister Responsible for Information was given authority over licensing and regulation.<sup>42</sup> Though the act does not explicitly mention the public domain or folklore, any work for which the copyright had expired (e.g., works published prior to 1935) could be freely copied, performed, or adapted. This included works of folklore.

### **Copyright Act of 1985 (P.N.D.C. Law No. 110)**

The 1985 act draws from the WIPO/UNESCO Model Provisions for folklore protection and attempts to distinguish folklore from public domain works. The 1985 act defines folklore as:

“[A]ll literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore.”<sup>43</sup>

Similar to the 1961 act, PDNCL 110 recognizes that copyright protects expression, not the ideas inherent in folklore. It recognizes that individual artists who apply their own originality to transform a piece of folklore are granted copyright in the elements of creative expression that they have added to the original work.<sup>44</sup> The 1985 act also includes a provision to collect royalties on the use of folklore by Ghanaians:

No person shall without the permission in writing of the Secretary import into Ghana, sell, offer or expose for sale or distribute in Ghana any copies of the following works made outside Ghana -

- (a) works of Ghanaian folklore; or
- (b) translations, adaptations, or arrangements of Ghanaian folklore.<sup>45</sup>

This indicates that the royalty does not apply to work of Ghanaian musicians and artists residing within Ghana, but it is ambiguous as to whether the tax would apply to Ghanaians abroad who use Ghanaian folklore in their writings or music which they export back to Ghana.

### **Applications of the 1985 law**

The folklore tariff has been enforced three times since 1985. In 1990, the American musician Paul Simon released an album called *Rhythm of the Saints* to follow his successful album *Graceland*, which was recorded with South African musicians such as Ladysmith Black Mambazo. *Rhythm of the Saints*, though often cited for its use of Brazilian folk music and musicians, includes a song titled “Spirit Voices,” which is based on a Ghanaian folk song called “Yaa Amponsah.”<sup>46</sup> To determine the origins of “Yaa Amponsah,” Simon contacted the Copyright Administration Office. The office identified a previous recording in 1928, located the style of music to two decades prior to that, and ultimately deemed it to be part of Ghanaian culture heritage. Thus, in 1990, Paul Simon paid an initial royalty sum of \$16,000 to the Ghanaian Copyright Administration.<sup>47</sup> Over the last nineteen years, the song has brought in a total of over \$80,000 in royalties for the government of Ghana.<sup>48</sup>

There are only two other documented instances of folklore royalties paid to the Ghanaian government under the 1985 law. The Japanese Company JVC released a film on traditional African music and dance, which resulted in approximately \$2,000 in royalties.<sup>49</sup> There was also

a small amount of money generated from an advertising company that used Ghanaian folk music in an advertising jingle.<sup>50</sup>

The earlier example of *Deep Forest* demonstrates how difficult it is to construct a legal framework to collect royalties from record sales overseas. Even though the 1985 act was in place before the release of *Deep Forest*, Sanchez and Mouquet did not break the law due to the fact that “the only thing Ghana’s legislation regarding ‘expressions of Ghanaian national folklore’ applies to is the release of *Deep Forest* in Ghana or its importation into that country.”<sup>51</sup> Herein lies one of the greatest challenges in protecting folklore: copyright law is territorial and few countries offer reciprocal copyright protection for folklore. The 1985 tax on folklore applies only to works imported into or sold in Ghana, which is why the amount for “Spirit Voices” is a mere \$80,000 over nineteen years. If it had applied to sales worldwide, or even within the United States, the Ghanaian government would have earned much more in royalties.

### **Institutionalizing and enforcing copyright on folklore: National Folklore Board**

In 1991, the royalty money from *Rhythm of the Saints* was used to create a National Folklore Board. The board’s tasks included interpreting the definition of folklore provided in the 1985 act, identifying and compiling an inventory of works that qualify as Ghanaian folklore, monitoring their use, and handling requests to use the works. In the late 1990s, the Copyright Administration Office moved from the National Commission on Culture to the Ministry of Justice, an action which signaled that copyright infringement – of folklore or any other copyrighted works – is not only a threat to artistic integrity but a criminal offense as well.

## **COPYRIGHT ACT OF 2005 (ACT 690)**

As early as 1996, the Copyright Administration Office and the National Folklore Board began discussions to extend the folklore tax to Ghanaians. In spite of strong opposition by three of the National Folklore Board members, the Copyright Administration office began draft legislation for a new copyright law in 1997. In 2000, the copyright bill was introduced in Parliament where it was debated for five years, stalling due to vocal criticism from the domestic music industry. It passed the parliament in 2005.

The 2005 act maintains the same definitions of public domain and folklore introduced in the 1985 act. The law places folklore within the trusteeship of the President in perpetuity and offers protection against “reproduction, communication to the public by performance, broadcasting, distribution by cable or other means, and adaptation, translation and other transformation.”<sup>52</sup> It maintains the definition of folklore from the 1985 act and identifies two examples of folklore: the kente and adinkra designs.<sup>53</sup> The law officially entrusts the National Folklore Board with the protection of folklore, expressly extends the folkloric royalty to Ghanaians, and mandates jail time or fines for non-compliance. The law requires written permission from the National Folklore Board and royalties with an amount to be decided on a case-by-case basis for the commercial use, sale, or distribution of works or adaptations of Ghanaian folklore that are sold in Ghana, regardless of whether those works are produced domestically and internationally, by Ghanaians or non-Ghanaians.<sup>54, 55</sup> The revenue generated is earmarked for the promotion of Ghanaian folklore and indigenous arts.<sup>56</sup> The law incorporates strict penalties for non-compliance: a fine of 150 to 1,000 penalty units<sup>1</sup> per offence, 25 penalty units for each day the offence continues, and up to three years jail time.<sup>57, 58</sup>

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<sup>1</sup> In 2005, a penalty unit equaled 120,000 Ghanaian cedi.



The 2005 act also codifies the role and structure of the National Folklore Board of Trustees. The nine-member board is appointed by the President and consists of a chairperson, the Copyright Administrator, and seven other members. Members serve for renewable terms of four years and meet quarterly.<sup>59</sup> The Board is also in charge of managing the National Inventory of Ghanaian folklore through coordination with the Copyright Administrator at the Ministry of Justice. The act relies on the expertise of the members of the National Folklore Board, often scholars, musicians, and artists, to determine whether a given work qualifies as folklore.

### **Comparison with the 1985 law**

There are important similarities and differences in the regulation of folklore between the 2005 law and its predecessor. The definition of folklore, its exclusion from public domain, and its ownership are nearly identical in the 2005 and 1985 laws. The 2005 law, however, shifted administrative and enforcement powers and imposed higher penalties. These changes signal stricter enforcement on illegal uses of folklore. In addition, the 2005 act specified that the use of the folklore royalties should go towards the preservation and promotion of folklore and indigenous arts instead of promotion of the arts in general. The chart below summarizes where the 1985 and 2005 acts intersect and diverge.

**Table 1. Comparison of the protection of folklore between the 1985 and 2005 Ghanaian copyright acts**

|   | <i>1985 (PNDC Law 110)</i>  | <i>2005 (Act 690)</i>   |
|---|---|---|
| Department responsible for copyright administration | National Commission of Culture  | Ministry of Justice   |
| Definition: folklore                                | “all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or | “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 |

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|---|---|--|
|   | by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore.” <sup>60</sup>   | 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” <sup>61</sup> |
| Definition: public domain                 | “works whose terms of protection have expired; works whose authors have renounced their rights; and foreign works that do not enjoy protection in Ghana.” <sup>62</sup> | Same as 1985 <sup>63</sup>   |
| Ownership (folklore)                      | Republic of Ghana <sup>64</sup>   | President on behalf of the Republic of Ghana <sup>65</sup>   |
| Duration (folklore)                       | Perpetuity <sup>66</sup>  | Same as 1985 <sup>67</sup>   |
| Enforcement (folklore)                    | Provisional National Defence Council Secretary Responsible for Information <sup>68</sup>  | National Folklore Board <sup>69</sup>  |
| Royalties (folklore)                      | Applies to the importation of works or adaptations of Ghanaian folklore made outside Ghana <sup>70</sup>  | Applies to commercial use of “works of [Ghanaian] folklore made in or outside the Republic” <sup>71</sup>  |
| Use of revenues from royalties (folklore) | “for the promotion of institutions for the benefit of authors, performers, and translators” <sup>72</sup>   | “for the preservation and promotion of folklore and for the promotion of indigenous arts” <sup>73</sup>  |
| Offences (copyright in general)           | 10,000– 1 million cedi per offence, 5,000 cedi – 50,000 cedi for each day the offence continues, and up to two years jail time. <sup>74</sup>                           | A fine of 6 million – 1.2 billion cedi per offence, 3 million -12 million cedi for each day the offence continues, and up to three years jail time. <sup>75</sup>  |
| Offences (folklore)                       | 10,000 – 1 million cedi per offence, 5,000 cedi for each day the offence continues, and up to two years jail time. <sup>76</sup>  | A fine of 18 million – 120 million cedi per offence, 3 million cedi for each day the offence continues, and up to three years jail time. <sup>77</sup>   |

The most notable change in the 2005 law is the new classification of royalty-free and royalty-eligible uses of Ghanaian folklore. The 2005 law, as written and currently interpreted, would collect a royalty for sales within Ghana on the commercial use by foreign musicians, commercial use by Ghanaian musicians, and commercial use by indigenous populations within Ghana. There would be no royalty charged for non-commercial use in Ghanaian classrooms.<sup>78</sup> The law does not expressly allow for any other non-commercial use of folklore. However, in workshops and sessions held by the government, and in most interpretations of the law, any non-commercial use would be royalty-free.<sup>79</sup> Since the President is identified as the copyright holder on behalf of the government,<sup>80</sup> government use and adaptation are seemingly exempt from royalties, though this is not explicitly stated in the law.

### **Analysis with respect to international law and norms**

The 1985 and 2005 laws do not define the purpose of copyright within Ghanaian law. The Ghanaian purpose of copyright, therefore, can be best inferred from the *Universal Copyright Convention* (1952, ratified by Ghana 1961) as to “ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts.”<sup>81</sup> This definition is similar to European copyright law and combines an economic incentive structure with the moral rights of the author. The 2005 law, however, creates a disincentive for Ghanaian artists to build upon literature, science, and artistic works that would be considered folklore. Ghanaian artists would still be entitled to build freely upon the works in the public domain, but works designated as folklore or cultural heritage are now removed from the public domain and require royalties for commercial use. Although the funds gathered from royalties are expressly intended for the

promotion of folklore and indigenous arts, as the law is written, there is no expressed protection for indigenous populations against fines or jail time for commercial use of folklore.

The 2005 law also may 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 “recognize[d] the right of everyone to take part in cultural life.”<sup>82</sup> In the same year Ghana ratified the *International Covenant on Civil and Political Rights*, which states: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>83</sup> The 2005 law threatens fines or jail on Ghanaian citizens for unauthorized commercial use of their own folklore which may be interpreted as a part of their “cultural development.”

The 2005 act also surpasses the WIPO/UNESCO 1982 Model Provisions, which stated that developing countries should prevent commercial exploitation of folklore by “those outside their originating communities without any recompense to such communities.”<sup>84</sup> By adding the folklore tax as a barrier to commercial use by Ghanaians, it does not uphold the 1989 WIPO/UNESCO recommendation that cultural communities be guaranteed access to their own folklore.<sup>85</sup>

## **Domestic reaction**

The national government was seemingly the only vocal proponent of the 2005 act. The government maintained that the National Folklore Board would yield greater adherence to the WIPO/UNESCO model provisions recommendation for a supervisory authority.<sup>86, 87, 88</sup>

Meanwhile, the most vocal criticisms came from the domestic music industry, especially folk

musicians. Active opposition groups included the Ghana Association of Composers, Authors, Performers (GHASCAP), Ghana Old Musicians Welfare Association (GOMAWA), Ghana Songwriters and Composers Association (GSCA), and the Coalition of Concerned Copyright Advocates (COCCA). Several organizations in the music industry predicted negative impacts on the consumer market in Ghana due to the crowding out of domestic musicians stemming from the increased cost of production caused by the folklore tax. These predicted consequences include a preference for free Western cultural works (e.g., works whose copyright term has expired or have licenses that allow public use), increased piracy, decreased tourism, the stunting of oral and informal cultural creativity, and alienation of young Ghanaians from their roots.<sup>89</sup>

The critics also identify ambiguities and potential conflicts in three areas. The first and greatest challenge is separating older Ghanaian folklore that would have otherwise been in the public domain from public domain works within Ghana. Second, it remained unclear whether the National Folklore Board, and thus the government in general, should be the custodian of all Ghanaian cultural heritage when some are region-specific (e.g., the adinkra symbol is indicative of the Asante tribe).<sup>90</sup> Lastly, it can be difficult to distinguish Ghanaian folklore from those of neighboring countries. For example, Ghana, Togo and Benin all practice the Agbadza and Gahu traditional drum-dances, and both Ghana and Cote d'Ivoire make use of the kente cloth design.<sup>91</sup> This issue could lead to conflict in Ghana because the country does not offer reciprocal protection for folklore from foreign countries.<sup>92</sup>

### **Enforcement status**

Despite the strong language contained in the 2005 act, it appears that the domestic folklore tax has met tremendous enforcement challenges. There is little documentation concerning the

consequences following the passage of the 2005 act. The Ghanaian government has not published information on government revenue generated, court cases resulting from the law, the folklore inventory, or even the current roster of the National Folklore Board.<sup>93</sup>

In 2006, twenty musicians and music scholars, including members of COCCA, presented the President with a petition with their concerns about the domestic folklore tax. Consequently, President Kufuor decided to allow further discussion and delayed attaching a legislative instrument to the 2005 act.<sup>94</sup> Under Ghanaian law the President attaches a legislative instrument (LI) to amend or enact acts of parliament and to provide additional details on how the act will be regulated.<sup>95</sup> An LI serves as subsidiary legislation<sup>95</sup> that is permanent but subject to amendment.<sup>96</sup> In mid-April 2008, a Ghanaian newspaper reported that the President had yet to sign the LI for the 2005 act but intended to do so within a week.<sup>97</sup>

In December 2008, John Collins, a former member of the National Folklore Board, provided additional details regarding the implementation of the 2005 copyright act. Collins confirmed that the President had not yet signed the LI, stating, “The President wanted further public discussions on the whole matter.... [A] number of meetings were planned for the general public to discuss the matter...cancelled, then planned again. [T]he planners did not really want anyone to know so it became a stalemate.”<sup>98</sup> Despite the strong punishments laid out in the 2005 act, no Ghanaian has been fined or jailed for the commercial use of Ghanaian folklore. This may be attributed to the inactivity of the National Folklore Board. According to Collins’, “It was the Ghana National Folklore Board that was making an inventory of folklore.... [They] never got very far as it took years to even try and define folklore in the Ghanaian context (i.e., folklife)... I think [the National Folklore Board] no longer operates.”<sup>99</sup>

It also appears that no royalties, from either tariffs or domestic production, have been collected since the passage of the 2005 act.

### **POLICY RECOMMENDATIONS**

There are some clear areas of concern that need to be addressed for Ghanaian copyright law to be effective. Some of those policy concerns and measures include the following:

First, the legal definition of folklore is too vague. The 2005 act defines it in relation to cultural heritage and ethnic communities, both of which are ambiguous terms. Furthermore, the use of “literary, artistic and scientific expressions” in the definition is too broad. The 1982 UNESCO/WIPO Model Provisions offer a more comprehensive definition of folklore with examples (e.g. folk tales, folk songs, folk dances, artistic rituals, musical instruments) that could be adapted for the Ghanaian context.

Second, there is no clear distinction between acceptable non-commercial use and royalty-eligible commercial use. Due to the lack of expressed protection for the commercial use of folklore by indigenous populations, the 2005 law could replace foreign exploitation with domestic exploitation by requiring that indigenous populations pay royalties on any commercial use of folklore. The only use of folklore explicitly identified as royalty-free is non-commercial use within a classroom setting. Government use should also be explicitly stated as royalty-free. The president’s LI should add language allowing for exemption of the folklore tax for works developed by ethnic communities who have been identified as collective creators of the given folklore. The legislation could borrow the language from the 1982 UNESCO/WIPO Model Provisions, which advise that the tax applies only to uses by “those outside their originating communities.”<sup>100</sup>

Third, the Ghanaian government should remove the domestic tax on Ghanaian folklore. The law is a misinterpretation of the WIPO/UNESCO Model Provisions with potential to do more harm than good to Ghanaian cultural heritage. The law should include an exemption on imports by translations or adaptations of folklore by any Ghanaian citizen whether living in Ghana or abroad.

Fourth, the National Folklore Board and folklore inventory are seemingly inactive. Since the supervisory body tasked with monitoring the usage of Ghana folklore is inactive, the Ghanaian government is unable to police and benefit economically from the use of its folklore. Paradoxically, the lack of recent royalty revenues makes it hard to fund and therefore justify the presence of the National Board of Folklore.<sup>101</sup> Since royalty revenues alone are not a stable funding source, a base government subsidy and the royalty revenues should jointly fund the National Folklore Board. The LI should explicitly state that a portion (e.g. 50%) of the royalties that are used for “preservation and promotion of folklore and for the promotion of indigenous arts” be put in an endowment for the National Folklore Board. The National Folklore Board should reconvene and resume work on the national inventory of folklore. The national inventory requires more work up-front in building the inventory than maintaining it. It may therefore be necessary to convene the Board for prolonged meetings in the near future and then continue on a seasonal (e.g. quarterly) basis once the inventory is built.

Fifth, since the national inventory of folklore is closed, it is difficult for foreign musicians who wish to abide by the law to determine if they are using music or other works that would be defined as Ghanaian folklore. In the current system, musicians must know that they have to contact the Ghanaian Copyright Administration who then forwards the request to the National Folklore Board. Although only foreign musicians who sell their music within Ghana would be



required to pay the royalty, this would also make it easier for foreign musicians who sell their music outside Ghana to show respect for the folkloric origins through proper acknowledgement and/or voluntary donation.

The folklore inventory, regardless of the revenue potential from royalties, has great symbolic potential to be an artifact of Ghanaian cultural heritage that could be shared both domestically and internationally. Essentially, the inventory should inform Ghanaians and artists who sell their creations in Ghana which works are protected and which ones they are allowed to use. In order to build a comprehensive inventory and truly promote traditional and indigenous arts within the country, the Ghanaian government should bring its citizens into the process of building the folklore inventory. The government should convert the existing closed folklore inventory to open, central repository for the identification and preservation of folklore. The government could then solicit its citizens for suggestions of works to include in the inventory. There is significant incentive for their participation since Ghanaians will no longer be expected to pay the royalty themselves and would potentially bring in revenue for the promotion and preservation of the works identified. Therefore, since internet access is rare for most Ghanaians, there must be alternative methods for Ghanaians to suggest works for the national folklore inventory, such as by mail or phone. For internet usage, bandwidth, demand for online content, and mobile broadband, are increasing in Ghana, especially among the youth, so these alternate methods may not be necessary in the future. A publicly searchable online database would enable musicians abroad who wish to incorporate Ghanaian folklore into their creative works to abide by the folklore royalty on any sales within Ghana. Most importantly, this accessible, central repository would also have great symbolic power to connect Ghanaians around the world with

their national folklore, which would assist in the preservation of Ghanaian cultural heritage, the objective of the 2005 act.

Lastly, the 2005 law implements reciprocity for protection of folklore from foreign countries and this should be safeguarded. The 1982 Model Provisions, and even the Assistant Copyright Administrator in Ghana, acknowledge the need for reciprocity in order to safeguard folklore.<sup>102</sup> If nations do not cooperate on reciprocal protection of folklore, then a nation can only protect folklore on sales within their jurisdiction. Considering that most foreign adaptations of Ghanaian music are sold outside of Ghana, the lack of reciprocity means royalties lost.

## CONCLUSION

The Ghanaian case demonstrates the delicate balance between safeguarding national folklore, promoting cultural heritage domestically, and discouraging foreign profiteering and misrepresentation of a nation's cultural heritage. In 1985, Ghana became one of several developing countries that allow special protection for folklore in their copyright regime. Ghana's subsequent copyright act in 2005 created a controversial policy that would tax Ghanaians for the commercial use of their own national folklore. Even though the 2005 law was passed by the parliament, the resulting stalemate demonstrates that a domestic folklore tax is politically difficult and even more challenging to implement.<sup>103</sup> The law was passed before the country had an effective system for enforcing the tax on Ghanaian folklore imports into Ghana.<sup>104</sup>

The President has yet to attach the legislative instrument to enact the 2005 copyright act. In order to strengthen the 2005 act, the legislative instrument should clarify the definition of folklore, remove the domestic folklore tax, distinguish royalty-free and royalty-eligible uses of

folklore, reconvene the National Folklore Board, and open the national folklore inventory to public searches and submissions. These changes would increase the government's ability to enforce the folklore tax on foreign adaptations of Ghanaian folklore as well as further the preservation of Ghanaian cultural heritage.

## END NOTES

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<sup>1</sup> Collins, John. July 2006. "Copyright, folklore and music piracy in Ghana," *Critical Arts* Volume 20, Issue 1: 166. <http://dx.doi.org/10.1080/02560040608557784> (accessed November 30, 2008)

<sup>2</sup> Ibid, 161

<sup>3</sup> Ibid, 159

<sup>4</sup> All amounts represented with a dollar (\$) sign refer to U.S. dollars. Amounts expressed in GHC refer to Ghanaian cedis.

<sup>5</sup> Ibid, 162

<sup>6</sup> Collins, "Copyright, folklore and music piracy in Ghana", 162

<sup>7</sup> Ibid, 159

<sup>8</sup> Ibid, 162

<sup>9</sup> Ibid, 163

<sup>10</sup> Guilbault, Jocelyne. 1993. "On Redefining the 'Local' Through World Music." *The World of Music* Volume 35, Issue 2: 33-47.

<sup>11</sup> Connell, John, and Chris Gibson. 2004. "World music: deterritorializing place and identity" in *Progress in Human Geography* Volume 28, Issue 3: 342-361, <http://phg.sagepub.com/cgi/content/abstract/28/3/342> (accessed March 28, 2009).

<sup>12</sup> Collins, John. 2009. "Ghana and the World Music Book." *Collegium: Studies across Disciplines in the Humanities and Social Sciences* Volume 6: 57-75. [http://www.helsinki.fi/collegium/e-series/volumes/volume\\_6/006\\_06\\_Collins.pdf](http://www.helsinki.fi/collegium/e-series/volumes/volume_6/006_06_Collins.pdf) (accessed September 1, 2009)

<sup>13</sup> Hafstein, Valdimar Tr. 2004. "The Politics of Origins: Collective Creation Revisited," *Journal of American Folklore* Volume 117, Issue 465: 304. [http://muse.jhu.edu/journals/journal\\_of\\_american\\_folklore/v117/117.465hafstein.html](http://muse.jhu.edu/journals/journal_of_american_folklore/v117/117.465hafstein.html) (accessed December 10, 2008)

<sup>14</sup> Ibid.

<sup>15</sup> Blake, Janet. "Safeguarding Traditional Culture and Folklore – Existing International Law and Future Developments." n.d. <http://www.folklife.si.edu/resources/unesco/blake.htm> (accessed March 27, 2009)

<sup>16</sup> United Nations Educational, Scientific and Cultural Organization. 1972. *World Heritage Convention*. <http://whc.unesco.org/en/conventiontext/> (accessed March 29, 2009)

<sup>17</sup> *World Heritage Convention (1972)*, Section 1, Articles 1 and 2

<sup>18</sup> Blake.

<sup>19</sup> United Nations Educational, Scientific and Cultural Organization and the World Intellectual

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Property Organization. 1976. *Tunis Model Law on Copyright for Developing Countries (1976)*: Commentary 17. [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=31318&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed March 2, 2009)

<sup>20</sup> Tunis Model Law, Commentary 39.

<sup>21</sup> Tunis Model Law, Section 1, Article 6

<sup>22</sup> Tunis Model Law, Section 6.

<sup>23</sup> United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization. 1982. *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*: Introduction, Article 5, <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> (accessed December 10, 2008).

<sup>24</sup> UNESCO/WIPO 1982 Model Provisions, Introduction, Article 4

<sup>25</sup> UNESCO/WIPO 1982 Model Provisions, Introduction, Article 2

<sup>26</sup> UNESCO/WIPO 1982 Model Provisions, II. The Model Provisions, Section 2

<sup>27</sup> UNESCO/WIPO 1982 Model Provisions, Introduction, Article 6

<sup>28</sup> UNESCO/WIPO 1982 Model Provisions, II. Model Provisions, Section 4

<sup>29</sup> UNESCO/WIPO 1982 Model Provisions, II. Model Provisions, Section 10

<sup>30</sup> UNESCO/WIPO 1982 Model Provisions, II. Model Provisions, Section 14

<sup>31</sup> United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization. 1989. *Recommendation on the Safeguarding of Traditional Culture and Folklore*, Section A. [http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_PRINTPAGE&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html) (accessed April 1, 2009).

<sup>32</sup> UNESCO, 1989, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, Section B-C.

<sup>33</sup> UNESCO, 1989, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, Section D-E.

<sup>34</sup> UNESCO, 1989, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, Section F. Neighboring rights may be used to protect the performances of folklore against unauthorized recording and performing.

<sup>35</sup> UNESCO/WIPO 1982 Model Provisions, Introduction, Article 10

<sup>36</sup> Collins, John. 2000. "High-technology, Individual Copyrights and Ghanaian Music." *Ghana: Changing Values/Changing Technologies: Ghanaian Philosophical Studies, II*, edited by Helen Lauer. Legon: The Council For Research In Values And Philosophy. [http://www.crvp.org/book/Series02/II-5/chapter\\_viii.htm](http://www.crvp.org/book/Series02/II-5/chapter_viii.htm) (accessed December 1, 2008).

<sup>37</sup> "Copyright, folklore and music piracy in Ghana," 159 - 160

<sup>38</sup> Blake.

<sup>39</sup> UNESCO/WIPO 1982 Model Provisions, Introduction, Article 20. Neighboring rights may be used to protect the performances of folklore against unauthorized recording and performing. See UNESCO/WIPO 1982 Model Provisions, Introduction, Article 12.

<sup>40</sup> British copyright law applied in colonial times.

<sup>41</sup> Act 85, Section 2, Article 2

<sup>42</sup> Act 85, Section 12, Article 1

<sup>43</sup> P.N.D.C. Law No. 110, Section 53

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<sup>44</sup> World Intellectual Property Organization, “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana,” <http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/ghana.pdf>, (accessed November 24, 2008)

<sup>45</sup> P.N.D.C. Law No. 110, Section 46, Article 1

<sup>46</sup> Collins, John. 2003. “The ‘folkloric copyright tax’ problem in Ghana,” *The World Association for Christian Communication*, <http://www.waccglobal.org/lang-en/publications/media-development/64-2003-1/649-The-folkloric-copyright-tax-problem-in-Ghana.html> (accessed December 1, 2008)

<sup>47</sup> Collins, “Copyright, folklore and music piracy in Ghana”, 165

<sup>48</sup> Collins, “The ‘folkloric copyright tax’ problem in Ghana.”

<sup>49</sup> Personal communication from John Collins in December 2008

<sup>50</sup> Ibid

<sup>51</sup> Hafstein, 305

<sup>52</sup> Act 690, Section 4, Article 1

<sup>53</sup> Act 690, Section 76

<sup>54</sup> Act 690, Section 44, Article 1, Clause b

<sup>55</sup> Act 690, Section 44, Article 1, Clause a

<sup>56</sup> Act 690, Section 64, Article 3

<sup>57</sup> Act 690, Section 44, Article 2

<sup>58</sup> In 2007, the Ghanaian cedi was balanced by dropping four zeroes. As of 2009, one penalty unit is 12 cedi, so I have extrapolated a figure of 120,000 cedi per penalty unit in 2005 for ease of comparison with the 1985 penalties.

<sup>59</sup> Act 690, Sections 59 and 60

<sup>60</sup> P.N.D.C. Law No. 110, Section 53

<sup>61</sup> Act 690, Section 76

<sup>62</sup> P.N.D.C. Law No. 110, Section 39, Article 1

<sup>63</sup> Act 690, Section 38, Article 1

<sup>64</sup> P.N.D.C. Law No. 110, Section 5, Article 2

<sup>65</sup> Act 690, Section 4, Article 2

<sup>66</sup> P.N.D.C. Law No. 110, Section 16

<sup>67</sup> Act 690, Section 17

<sup>68</sup> P.N.D.C. Law No. 110, Section 5, Article 3

<sup>69</sup> Act 690, Section 59

<sup>70</sup> P.N.D.C. Law No. 110, Section 46, Article 1

<sup>71</sup> Act 690, Section 44, Article 1, Clause a

<sup>72</sup> P.N.D.C. Law No. 110, Section 5, Article 4

<sup>73</sup> Act 690, Section 64, Article 4, Clauses a and b

<sup>74</sup> P.N.D.C. Law No. 110, Section 45.

<sup>75</sup> Act 690, Section 43.

<sup>76</sup> P.N.D.C. Law No. 110, Section 46, Article 2.

<sup>77</sup> Act 690, Section 44, Article 2

<sup>78</sup> Act 690, Section 19

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<sup>79</sup> Bondzi, Jacquiline Afua. April 25, 2008. "Ghana: Music Industry and Challenges." *GhanaianChronicle*. <http://allafrica.com/stories/200804250980.html> (accessed November 18, 2008).

<sup>80</sup> Act 690, Section 4, Article 2

<sup>81</sup> Universal Copyright Convention (UCC) (1952). Accession 22 May 1961. Ghana has not ratified the updated UCC introduced in 1971.

<sup>82</sup> International Covenant on Economic, Social and Cultural Rights (1976), Section 3, Article 15. Ratified 7 September 2000.

<sup>83</sup> International Covenant on Civil and Political Rights (1976), Section 1, Article 1. Ratified 7 September 2000.

<sup>84</sup> UNESCO/WIPO 1982 Model Provisions, Introduction, Article 4

<sup>85</sup> *World Heritage Convention (1972)*, Section D

<sup>86</sup> "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana."

<sup>87</sup> UNESCO/WIPO 1982 Model Provisions, Section 9, Articles 72-79

<sup>88</sup> The parliamentary debates on the bill for the five-year period between its introduction in 2000 and its passage in 2005 are not publicly accessible.

<sup>89</sup> "Expert Criticises Copyright Bill." 19 April 2005. *GhanaMusic.com*.

[http://www.ghanamusic.com/artman/publish/article\\_1736.shtml](http://www.ghanamusic.com/artman/publish/article_1736.shtml) (accessed November 18, 2008)

<sup>89</sup> Collins, John. July 2006. "Copyright, folklore and music piracy in Ghana," *Critical Arts* Volume 20, Issue 1: 166. <http://dx.doi.org/10.1080/02560040608557784> (accessed November 30, 2008)

<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana."

<sup>93</sup> Former members of the board include University of Ghana ethnomusicology professor John Collins, musician Koo Nimo, and poet Kofi Anyidoho.

<sup>94</sup> "Copyright, folklore and music piracy in Ghana," 167

<sup>95</sup> Bennion, Francis. 1962. "Law-making under the Republic: Modes of Legislation" in *Constitutional Law of Ghana*: 267. <http://www.francisbennion.com/pdfs/fb/1962/1962-001-262-ghana-p262-269.pdf> (accessed March 27, 2009)

<sup>96</sup> Ibid, 265

<sup>97</sup> Bondzi.

<sup>98</sup> Personal communication from John Collins in December 2008

<sup>99</sup> Ibid

<sup>100</sup> UNESCO/WIPO 1982 Model Provisions, Introduction, Article 4

<sup>101</sup> The members of National Folklore Board receive an allowance (Act 690, Section 62).

<sup>102</sup> "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana."

<sup>103</sup> Collins, "Copyright, folklore and music piracy in Ghana", 165

<sup>104</sup> In a 2005 WIPO document "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore", the Ghanaian representative denied implementation problems by answering no to the question, "In the practical application of your national laws and regulations, has identification of the folklore to be protected presented any difficulties?"

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## **APPENDIX A. TIMELINE OF RELEVANT LEGISLATION AND POLITICAL EVENTS**

- 1956 – Ghana gains independence from British colonial rule
- 1961 – Parliament passes Copyright Act (Act No. 85)
- 1962 – Ghanaian accession of the Universal Copyright Convention (1952)
- 1971 – The Universal Copyright Convention is revised in Paris. Ghana does not sign.
- 1970s and 1980s – Foreign record companies lead strong anti-piracy campaigns in Ghana.
- 1972 – UNESCO presents the “World Heritage Convention” and a *Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage*.
- 1972 – WIPO and UNESCO release the *Tunis Model Law on Copyright for Developing Countries (1976)*
- 1982 – WIPO and UNESCO publish the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*.
- 1985 – Copyright Act (PNDC Law No. 110) repeals and replaces the 1961 Copyright Act
- 1989 – UNESCO releases a report entitled *Recommendation on the Safeguarding of Traditional Culture and Folklore*
- 1990 – Paul Simon releases his album *Rhythm of the Saints*. He pays \$16,000 to the Ghanaian government in royalties for his song titled “Spirit Voices,” based on a Ghanaian folk song called “Yaa Amponsah.”
- 1991 – The National Folklore Board is founded
- 1991 – Ghanaian accession of the Berne Convention for the Protection of Literary and Artistic Works (1886)
- 1992 - UNESCO holds an International Forum on the Protection of Folklore in Thailand
- 1996 – National Folklore Board passes a motion to extend the folklore tax to Ghanaians
- 1997 – The Copyright Administration begins draft copyright legislation
- 1998 – Change in membership of the National Folklore Board
- 2000 – Draft copyright bill is introduced in Parliament
- 2005 – Copyright Act (Act No. 690) repeals and replaces the 1985 Copyright Act

2006 – Twenty musicians and music scholars submit a petition to President Kufuor to prevent the passage of the legislative instrument necessary to regulate the 2005 Copyright Act

April 2008 – President Kufuor is rumored to intend to sign and enact the necessary legislative instrument for the 2005 Copyright Act; he does not.

January 2009 – John Atta Mills is elected President of Ghana

## APPENDIX B. INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION

### TREATIES SIGNED BY GHANA

| <i>Treaty</i>   | <i>Administered By</i> | <i>Entry into Force (International)</i>     | <i>Date of Signature, Ratification, or Accession (Ghana)</i> | <i>Entry into Force (Ghana)</i> |
|---|------------------------|---|--|---------------------------------|
| <i>Paris Convention for the Protection of Industrial Property (1883)</i>              | WIPO <sup>105</sup>    | 1883  | Accession: June 28, 1976                                     | September 28, 1976              |
| <i>Berne Convention for the Protection of Literary and Artistic Works (1886)</i>      | WIPO                   | 1886  | Accession: July 11, 1991                                     | October 11, 1991                |
| <i>Universal Copyright Convention (UCC) (1952)</i>                                    | UNESCO <sup>106</sup>  | September 6, 1952<br>Revised: July 24, 1971 | Accession: May 22, 1962                                      | August 22, 1962                 |
| <i>Patent Cooperation Treaty (PCT) (1970)</i>   | WIPO                   | January 24, 1978                            | Accession: November 26, 1996                                 | February 26, 1997               |
| <i>Lusaka Agreement (1979)</i>  | ARIPO <sup>107</sup>   | December 9, 1979                            | February 15, 1978  | December 9, 1979                |
| <i>Nairobi Treaty on the Protection of the Olympic Symbol (1981)</i>                  | WIPO                   | 1982  | Signature: October 24, 1981                                  | n/a                             |
| <i>The Protocol on Patents and Industrial Designs (Harare Protocol) (1982)</i>        | ARIPO                  | April 25, 1984                              | April 25, 1984   | April 25, 1984                  |
| <i>Treaty on Intellectual Property in Respect of Integrated Circuits (1989)</i>       | WIPO                   | Pending                                     | Signature: May 26, 1989                                      | n/a                             |
| <i>Trade-Related Aspects Of Intellectual Property Rights (TRIPS Agreement) (1995)</i> | WTO <sup>108</sup>     | January 1, 1995                             | Accession: January 1, 1995                                   | January 1, 1995                 |
| <i>WIPO Copyright Treaty (WCT) (1996)</i>   | WIPO                   | March 6, 2002                               | Signature: May 23, 1997<br>Ratification: August 18, 2006     | November 18, 2006               |

|  |      |                |                           |     |
|--|------|----------------|---------------------------|-----|
| <i>WIPO Performances and Phonograms Treaty (WPPT) (1996)</i> | WIPO | May 20, 2002   | Signature: May 23, 1997   | n/a |
| <i>Patent Law Treaty (PLT)(2000)</i>                         | WIPO | April 28, 2005 | Signature: June 2, 2000   | n/a |
| <i>Singapore Treaty on the Law of Trademarks (2006)</i>      | WIPO | Pending        | Signature: March 28, 2006 | n/a |

## APPENDIX C. COMPARISON OF COPYRIGHT LAW IN GHANA AND THE UNITED STATES

There are many similarities between Ghanaian and United States copyright law in general. The chart below provides an at-a-glance comparison of U.S. Copyright law and Ghanaian copyright law.

| <b>Comparison of Copyright Law</b>     |  |   |
|--|--|---|
|  | <i>United States</i>   | <i>Ghana</i>  |
| Purpose of copyright                   | “to Promote the Progress of Science and the useful Arts” <sup>109</sup>  | “ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts” <sup>110</sup>                         |
| Type of works protected by copyright   | Literary, artistic, musical, audio-visual, choreographic, derivative and works, computer software, sculptural, and architectural <sup>111</sup>        | Literary, artistic, musical, audio-visual, choreographic, derivative and works, computer software, <sup>112</sup> sculptural, and architectural. <sup>113</sup> |
| Eligibility for copyright              | Awards originality, not effort; <sup>114</sup> does not protect ideas; must be fixed in a tangible medium <sup>115</sup>                               | Awards originality, not effort; does not protect ideas; must be fixed in a tangible medium <sup>116</sup>   |
| Length of copyright                    | 70 years plus the life of the author for individual works and 120 years from creation or 95 years from publication for corporate works. <sup>117</sup> | 70 years plus the life of the author for individual works and 70 years after creation or publication date for corporate works <sup>118</sup>                    |
| Retroactive term extension             | The 1998 Copyright Term Extension Act automatically extended the term protection of unexpired works.   | The 2005 Copyright Act automatically extended the term protection of unexpired works <sup>119</sup>   |
| Copyright notice                       | Encouraged but not required <sup>120</sup>   | Encouraged but not required <sup>121</sup>  |
| Copyright registration                 | Encouraged but not required <sup>122</sup>   | Encouraged but not required <sup>123</sup>  |
| Permitted use of copyrighted materials | Fair Use Doctrine identifies four factors necessary for lawful, limited use of copyrighted materials. <sup>124</sup>                                   | The law refers to “fair practice” but the phrase is not defined in the 2005 act. <sup>125</sup> The law allows the  |

|  |  |   |
|--|--|---|
|  | There are additional permitted uses for libraries and archives, ephemeral recordings, computer programs, secondary transmissions, and certain performances and displays. | use of “quotations from articles”, for teaching and informative purposes, and for exclusive personal use. <sup>126</sup> There are additional permitted uses for libraries and archives, ephemeral recordings, computer programs, and public interest events. |
|--|--|---|

<sup>105</sup> Summaries and official text of the WIPO-administered treaties are available from the WIPO website at <http://www.wipo.int/treaties/en/>.

<sup>106</sup> Official text of the UCC is available from the UNESCO website at [http://portal.unesco.org/en/ev.php-URL\\_ID=15241&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>107</sup> ARIPO is the African Regional Intellectual Property Organization. Official text of the ARIPO protocols are available at [http://www.aripo.org/index.php?option=com\\_docman&task=cat\\_view&gid=35&Itemid=30](http://www.aripo.org/index.php?option=com_docman&task=cat_view&gid=35&Itemid=30).

<sup>108</sup> A summary and official text of the TRIPS Agreement is available from the WTO website at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm).

<sup>109</sup> U.S. Constitution, Progress Clause (Article I, Section 8, Clause 8)

<sup>110</sup> Universal Copyright Convention (1952).

<sup>111</sup> U.S. Copyright Act of 1976, Section 102, Article a

<sup>112</sup> Act 690, Section 1, Article 1

<sup>113</sup> Act 690, Section 76

<sup>114</sup> Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)

<sup>115</sup> U.S. Copyright Act of 1976, Section 102, Article a

<sup>116</sup> Act 690, Section 1, Article 2

<sup>117</sup> U.S. Copyright Act of 1976, Section 304

<sup>118</sup> Act 690, Section 12

<sup>119</sup> Act 690, Section 78

<sup>120</sup> The Berne Convention Implementation Act of 1988 (BCIA)

<sup>121</sup> Act 690, Section 11

<sup>122</sup> U.S. Copyright Act of 1976, Section 408

<sup>123</sup> Act 690, Section 39, Article 4

<sup>124</sup> U.S. Copyright Act of 1976, Section 107

<sup>125</sup> Act 690, Section 18, Article 2

<sup>126</sup> Act 690, Section 19