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## **Who owns Ananse? The tangled web of folklore and copyright in Ghana**

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### **Abstract**

In this article, I explore the interface between law and cultural creativity; focussing on Ghana, I examine the efficacy of copyright as a mechanism for the protection of folklore and the potential impact of that protection on Ghana's playwrights. In 2005, Ghana introduced a copyright act that makes access to Ghanaian folklore by nationals and non-nationals contingent on gaining consent from the National Folklore Office and paying an undisclosed fee prior to use. I argue that this acts as a significant barrier to Ghanaian artists who wish to draw upon Ghanaian folklore. Moreover, through analysing the ways in which the state historically encouraged and facilitated Ghanaian artists to engage with their cultural heritage in order to develop a new national identity following independence, I investigate why the Ghanaian state has now chosen to place all rights in folklore in the office of the president in perpetuity. Through a discussion of one of Ghana's best-known folk characters, the spider god Ananse, I argue that the law, as currently set down, has the potential to disrupt the development of folklore in Ghana and prevent Ghanaian playwrights from engaging with and developing from their own cultural heritage.

### **Key words**

Ghana, Folklore, Copyright, Theatre, Ananse, Anansesem

### **Introduction**

In Ghana, folklore retains a significant role as a resource from which artists regularly develop new artistic works. (Collins, 2003; Brempong, 2010; Boateng, 2011) For generations, artists across art forms have used and reused folklore in the creation of cultural expressions. This has led to the cultural products coming out of Ghana, from *kente* cloth to High-Life music to *Ananse* stories, being immediately identifiable as Ghanaian and so associated with a long cultural tradition (Boateng, 2011). This is particularly true of Ghanaian theatre, where playwrights have developed the derivative forms of *Anansegoro* and *Abibigoro* from the stories and storytelling techniques associated with Ananse tales. (Adams and Sutherland-Addy, 2007) However, the ability of Ghana's theatre makers to draw on folkloric characters, stories and performance techniques, in a manner consistent with that of previous generations of artists, is being jeopardised by Ghana's Copyright Act, through the inclusion of provisions for the protection of folklore. Specifically, the law restricts use of Ghanaian folklore by nationals as well as non-nationals for commercial purposes, (s.44) and so places restrictions on artists who seek to make a living from their work.

Ghana's current Copyright Act was developed in 2005 and came into force in 2010. Under the Act, the use of Ghanaian folklore for commercial purposes, by nationals as well as non-nationals, is subject to gaining permission and paying an undetermined fee to the National Folklore Board (s.64(1)). Furthermore, the fee is required prior to use, regardless of any potential revenue generated. This means that, since 2010, even Ghanaian nationals are legally required to seek permission to use Ghanaian folklore and pay a fee prior to beginning work. This is, naturally, particularly problematic for artists for whom the use of folklore is an integral part of their creative process.

The protection of folklore by copyright is not uncommon. Many states, particularly in the global South, now provide protection for folklore through copyright. UNESCO and the World Intellectual Property Organisation (WIPO) have, both jointly and separately, been involved in developing a framework of protection since the late

1950s.<sup>1</sup> There are significant variances, even within the West African region, in terms of who has the right to use folklore and under what circumstances. Crucially, Ghana is the only state in the region that prevents its own citizens from using Ghanaian folklore for commercial purposes without first registering intent to use and paying an undisclosed fee.<sup>2</sup>

There is increasing scholarly debate concerning the relationship between creativity, Intellectual Property (IP) and folklore in Africa. A recent addition to scholarly activity in the area of IP and intangible arts in Africa edited by Röschenhaler and Diawara (2016) raises key questions in terms of how artists negotiate the imposition of IP regulation on folklore and, crucially, highlights the tension between legitimate concerns of protection of community and national heritage and the ability of artists to contribute to sustaining the relevance and vitality of that heritage by engaging with it in the production of derivative works. As the editors suggest, this marks a move away from a discourse in which commentators primarily ‘censure their own malfunctioning state institutions’. (2016: 3) The broadening of the debate is very useful and here I undertake a focussed analysis of the place of folklore in post-independence Ghanaian literary theatre, in order to ask larger questions of the efficacy of using copyright as the mechanism of protection for folklore.

Though scholars, most notably John Collins and Boatema Boateng, have discussed the potential impact Ghana’s 2005 Copyright Act has had on various areas of Ghana’s cultural industries, the relationship between the law and theatre makers in Ghana (and generally) remains under-explored. This is curious because, following independence from Britain in 1957, Ghana’s playwrights played a significant role in developing expressions of a new national identity in-line with the cultural policies of Ghana’s first president, Kwame Nkrumah. As I discuss below, Nkrumah actively encouraged

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<sup>1</sup> According to WIPO, currently 141 countries provide protection for either Traditional Cultural Expressions or Traditional Knowledge. This figure is slightly misleading as some states (the UK, for example) simply include a protection for anonymous and pseudonymous works, which does not necessarily compel them to protect folklore. For a full list see: [http://www.wipo.int/tk/en/databases/tklaws/search\\_result.jsp?subject=&issue=&country](http://www.wipo.int/tk/en/databases/tklaws/search_result.jsp?subject=&issue=&country). Accessed 2/6/14.

<sup>2</sup> Cote d’Ivoire, for example requires citizens to pay for the use of folklore but that payment is in the form of a royalty based on profit. (1998, s.8), so if the resultant work is commercially unsuccessful, there is no addition to the artist’s production costs. Nigeria has no such restrictions and ‘the borrowing of expressions of folklore for creating an original work’ (Nigeria Copyright Act, Second schedule, s.2(1)(d)).

Ghana's artists to explore, create from and reimagine Ghanaian folklore and many Ghanaian artists did precisely this. The provisions in the 2005 Act now appear to prevent artists from continuing this work by drawing on Ghanaian folklore in the creation of new works.

Thus, with this article, I would like to take the opportunity to explore a disconnect, and possibly an outright contradiction, between the aims of copyright as an incentivising mechanism on the one hand, and its application to folklore on the other. I focus my analysis on Ghana for two reasons: firstly, because of the way in which folklore has been established as a central element in the creative industries following independence, and, secondly, because the state has chosen to extend the obligation to seek permission and pay to use folklore to nationals.

***“Folklore”: a note on terminology.***

Throughout this article I use the term “folklore”, which is both imprecise and controversial. Though “folklore” is a commonly used term, what constitutes folklore and how it is encoded into legal documents is a complex, contentious and unresolved area. The issue is so problematic that initial attempts to provide copyright protection for folklore did not actually include the term as it was considered ‘too difficult to define’. (Bergstrom, 1967: 307)

Since discussions concerning the copyrighting of folklore began, there have been several different definitions and several different terms employed in legal discourse to encapsulate what constitutes folklore. These include ‘traditional culture’, ‘intangible cultural heritage’, ‘indigenous knowledge’, ‘intangible heritage’ ‘expressions of folklore’, and ‘traditional cultural expressions’. (Bergstrom, 1967: 307; Blake, 2001: 10; Gobin, 1977: 2; WIPO, 2003, 2004) Though in this article, I refer to what the WIPO currently describes as ‘traditional cultural expressions’, I employ the term ‘folklore’. I do this for two reasons: firstly because much of the literature concerning the work of Ghanaian playwrights refers to their use of “folklore”. Secondly, because the number of terms employed since discussions around the protection of folklore first

began, highlights that a satisfactory term is yet to be established and so a consistent term is useful.

***Copyright and folklore: some incompatibilities.***

The question of whether copyright law is the appropriate mechanism for the protection of folklore is not a new one. Indeed, serious debates on the subject have been taking place since the copyright protection of folklore was first proposed. (WIPO, 1999) The complexities associated with the protection of folklore through copyright are attested to by the fact that, despite over fifty years of work at the international level, a satisfactory solution is yet to be reached. Part of the reason for this is that there are several structural incompatibilities between folklore as the object of protection and copyright. (Lewinski, 2008; Goldstein and Hugenholtz, 2010) For example, copyright is designed to protect the rights of the author for a term related to that author's life, whereas folklore is partly defined by the absence of a known author and is, potentially, the trans-generational collective work of several unknown authors.

The term of protection for folklore is an area that has real significance for artists wishing to utilise folklore. A limited term of protection acts to incentivise others to engage with, revisit and reimagine works that have fallen into the public domain, thus enabling works to be passed down and influence new generations of artists. Though ordinarily works are protected for the lifetime of the author plus between 50 and 80 years following their death, as Alan Story notes, the Berne Convention only mandates a minimum term of protection, not a maximum. (2009: 35) In Ghana (and elsewhere where folklore is protected by copyright) folklore is protected in perpetuity. One of the issues raised by this, as Michael Brown suggests, is that 'permanent copyright could stunt creativity by throwing up walls around ideas'. (2003, 55) So, perpetual protection has implications for the ability of any works, including folkloric works, to grow and develop rather than ossify and stagnate.

When the term of protection expires a work falls into the public domain and is then free to be utilised and reimaged. In terms of folklore, Long suggests that '[i]f knowledge is passed through generations from the Western Copyright point of view, that knowledge is in the public domain', (2005, 321) Indeed, the Intergovernmental

Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) noted in 2003 that ‘the public domain status of cultural heritage is [...] tied to its role as a source of creativity and innovation [...] as it allows the regeneration and revitalization of cultural heritage’. Moreover, they suggest that ‘neither members of a cultural community nor the cultural industries may be able to create and innovate based on cultural heritage if exclusive private property rights were to be established over it’. (2003, 3-4) This effectively means that not only can an artist from a country that protects folklore in perpetuity no longer use his or her national folklore for free, but no artist from that state will *ever* be able to do so.

Copyright is an incentivising mechanism. Fundamentally, it protects the moral and economic rights of the author. That is, it ensures that an author is acknowledged in any further uses of that work and can collect a fee based on use or sales. It is there to make sure that authors or artists, or anyone who creates an original artistic or scientific work, is able to benefit from use of that work. Though this is not an uncontroversial area, as Ruth Towse convincingly argues in a number of works, the link between incentive and creativity is complex. Indeed, she suggests that copyright ‘is more valuable to the creative industries’ than to the individual creator. (2011: 135) However, WIPO maintains that one of the core principles of copyright is that the economic and moral rights it affords to creators of artistic works act as an incentive to create further works. Thus, there is a clear contradiction between the aims of copyright and how it is currently being applied to the protection of folklore in Ghana.

### ***Ananse and anansegoro: folklore and Ghanaian theatre***

One of the fundamental ironies of the current situation in Ghana is that its modern theatre is characterised by the infusion of folkloric narratives, characters and performance styles. In order to appreciate the significance of folklore to theatre artists in Ghana, and so to understand what is potentially at stake in this debate, it is necessary to discuss some of the ways in which Ghanaian playwrights researched and reimagined Ghanaian folklore for the modern stage. Importantly, the impetus for this engagement came not from the theatre makers themselves, but from the state.

Following independence, Ghanaian artists were encouraged by Nkrumah to engage with, reclaim and reimagine African folk culture, which he suggested had been used

during the colonial era to ‘reinforce the picture of African society as something grotesque, as a curious, mysterious human backwater, which helped to retard social progress in Africa and prolong colonial domination’. (Obeng, 1997: 128-9) At the opening of the Institute of African Studies at the University of Ghana in 1961, Nkrumah spoke of his hope that it would ‘serve the needs of the people by helping to develop new forms of dance and drama, of music and creative writing, that are at the same time closely related to our Ghanaian traditions’. (Obeng, 1997: 135) At independence and in the years following, there was a clear sense that the Nkrumah government supported artists’ engagement with their folk heritage in order that they could develop new and distinctly Ghanaian forms. One of the areas in which the success of this policy is most apparent, is in the development of Ghana’s theatre industry.

Though there are notable exceptions, Ghana’s post-independence playwrights regularly engaged with and developed works from folklore. Specifically, they drew upon the traditional story telling art *Anansesem*. Dzifa Glikpoe, former Director of The National Theatre of Ghana Players (Abibigromma), suggests that ‘the beginning of [Ghanaian] theatre as we know it today comes from folklore, because all the stories that were told or performed at the early stages, at the developmental stages, were all from folklore’. (Collins, 2009: 54) Many of these stories, she suggests, focused on ‘Kweku Ananse, the trickster, the spider’. Two strands of Ghana’s literary theatre: *anansegoro* and the later *abibigoro*, are, to some extent, anchored in Ghana’s folk culture. Indeed, there are several plays in the Ghanaian canon that have Ananse as the main character. Moreover, playwrights include former Artistic Directors of the National Theatre of Ghana, Government Ministers and new playwrights such as Nii Quartey and Nii OkaiKoi Okai. Ananse’s familiarity and utility moves beyond divisions of status, class and education; he is popular and populist, constantly reinvented and consistently familiar. (see, for example: Sutherland, 1975; Owusu, 1987; Asare 1994; Agyapong, 2014)

*Anansesem* is, as the playwright and instigator of much of Ghana’s modern theatre, Efu Sutherland, points out, ‘both the body of stories and the story-telling art itself’ (1975: v) and takes the form of ‘an evening pastime [in which] young as well as the old come together to tell stories that revolve around Ananse.’ (Ben-Daniels, 2009: 63)

The narratives, story-telling aesthetics and community feel present in *Anansesem*, and the character of Ananse himself, were sited as central elements in Ghana's modern theatre. Sutherland, through her research in the 1960s and 1970s in the village of Atwia, developed and classified *anansesem* as *anansegoro*, the most influential iteration of which is her 1975 play *The Marriage of Anansewa*. Sutherland developed *anansegoro* as a framework of aesthetics and theatrical devices that consist of a combination of traditional songs, rhythms and dances, which move the action of the play forward. Added to this is a narrator who provides the performance with a link to traditional village storytelling by speaking directly with the audience and encouraging them to speak back. Sutherland termed the combination of elements 'mboguo', a term borrowed from *anansesem*. (1975: v)

The character of Sutherland's *anansegoro* was explicitly folkloric and her development of *mboguo* is a useful illustration of how firmly rooted her work was in Ghana's folkloric traditions. In traditional *anansesem*, David Donkor notes that there is an 'embodied interactivity that is distinct about performance'. (2007: 40) This interactivity, he suggests, is formalised within the *mboguo*, which is a contribution made by the audience to both the storyteller and the story. Donkor further suggests that the function of the *mboguo* in *anansesem* is to unsettle the 'authorial knowledge and authoritative knowledge' of the storyteller. (2004: 44) The intervention can affect the narrative direction of the performance and so test the storyteller's skill. For example, through *mboguo* 'the audience halts the narration and contributes a song, mimed action or comic playlet'. (2004: 43) So the *mboguo* (literally translated as 'a kicking inside') 'prevents a story from being closed by manufacturing a subversive narrative opening'. (2004: 44) By providing a bridge from one story to the next and so preventing the storytelling event from ending, the *mboguo* acts as both a formalised and a spontaneous intervention, bringing the audience actively into the creation of the story's narrative and the storytelling performance.

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

People come to a session to be, in story-telling parlance, 'hoaxed'. [...] Hence in the course of a particularly entrancing story it is normal for an appreciative

listener to engage in the following exchange:

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

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

Sutherland suggests that ‘the formula is practically a form of applause, an encouragement to the Storyteller to sustain his artistry’. (1975: vii) These conversational formulas between the storyteller and the audience are an intrinsic element of the storytelling event of *anansesem*. As Owusu Brempong suggests (whilst using a slightly different spelling), the ‘*mmoguo* [...] is always a part of a folktale [and] can introduce a tale or can occur in the middle of a tale’. (2009: 22) Rather than ‘a kicking inside’, Brempong states that etymologically the term “*mmoguo*” breaks down into two roots: ‘*mmo* (from *bo*), meaning “hit” and *guo* meaning “fall”. In a sense, then, the *mmoguo* performer hits the folktale with a song to begin it or interrupt it (make it fall)’. (2009: 22) The various spellings of *mboguo*, and the various etymological extrapolations, suggest that though the device is common to storytelling events across Akan communities of southern and central Ghana, its function within those events is subject to some regional variation. Sutherland’s incorporated it, with some modifications, into the fabric of her plays and it can be seen, along with the character of Ananse and his exploits, in the works of many of the playwrights that followed her. (see, for example: Owusu, 1999; Asare, 2006)

Sutherland was concerned with capturing and transposing the live performed experience from the traditional arena of the village to the stage. (Adams and Sutherland-Addy, 2007) To achieve this, she took performed elements from folklore and encoded them into her plays. By so doing, she established these elements as key components of Ghanaian theatre. Consequently, it is arguable that even playwrights who do not explicitly include Ananse as a character or rework a traditional story, may still fall foul of the law if they include some of the performance elements developed by Sutherland.

One of the issues here is that the success of Sutherland's *anansegoro* is attested to by the fact that so many of Ghana's playwrights returned and continue to return to the conventions established by Sutherland. For Sutherland, Ananse is 'a kind of everyman, artistically exaggerated and distorted to serve society as a medium for self-examination'. (1975: v) For Donkor, the enduring appeal of Ananse to artists lies in the fact that he is 'an excessive subversive who arouses affection and admiration while posing the problems and possibilities of his morphological and moral ambivalence'. (2007: 46) This is the significant point: that the appeal of Ananse endures. Ananse inspired and continues to inspire; his relevance to artists and playwrights is undiminished and, to a large extent this is due to Nkrumah's post-independence cultural policy and his need for Ghana's artists to develop symbols of a vibrant, independent cultural identity.

### ***Folklore and Nkrumah's cultural policy***

Following independence, the use of folklore by theatre makers and other artists was actively encouraged by the state as a means of developing symbols of a postcolonial national identity. Nkrumah explicitly called upon Ghana's artists to actively engage in a 're-interpretation and a new assessment of the factors which make up our past'. (Obeng, 1999:131) So politically successful were Sutherland's endeavours that in 1965 Nkrumah established the Traditional and Experimental Theatre Division in the Ministry of Art and Culture with a remit to 'focus its lens on work already begun on the exploration of the dramatic possibilities of our folklore and the development of our traditional folk drama'. (Gibbs, 1997:23) Writing at the time, Felix Morrisseau-Leroy, head of the Division, stated that '[t]he playwrights, actors and producers of Ghana are agreed that traditional forms of drama should constitute the basis of a National Theatre'. (Gibbs, 1997:3) Though this opinion does not seem to have been unanimously held, Morrisseau-Leroy's statement underlines the fact that at the level of government, playwrights' use of folklore was regarded as central to the development of Ghana's theatre industry.

In 1961, Nkrumah personally attended the inaugural performance at Sutherland's Ghana Drama Studio. Prior to the performance he addressed the audience and gave a speech that articulated

the desire that a network of theaters be established throughout the land, the hope for a renaissance of the arts in Africa [and] most of all, [his] recurrent dream of pan-African unity, aided in this instance by the universal language of art. (July, 1987: 74)

That Nkrumah was in attendance at all gives a clear indication of the political economy of theatre in Ghana at the time. Moreover, that he vocally supported the development of more theatres throughout Ghana as a means of promulgating expressions of cultural unity demonstrates how central theatre was to Nkrumah as part of his on-going 'systematic effort to achieve cultural decolonization'. (Morrisseau-Leroy, 1968: 92)

Nkrumah's encouragement of the utilisation of folklore extended beyond theatre and influenced various aspects of Ghanaian culture. As an example of this, Kwabena Nketia suggested in an interview given in 2002 that:

We were very anxious to preserve, to collect and document [folklore] but that is not enough. Even while we were documenting and preserving, there was the challenge to use some of the materials. There was all the new political aspirations and the need to change protocols, to change the state – all the forms of ceremony and so forth – so the relation between research and its application came to us quite forcibly at the time of independence. (Wiggins and Nketia, 2005: 61)

Nketia suggests that there was also 'a deliberate attempt [made] to recontextualise [traditional] music in the new state'. (Wiggins and Nketia, 2005: 65) Thus, for Nkrumah, artists' and academics' engagement with and development of folklore was a key element in Ghana's political progress directly post-independence. It was this belief, coupled with the development of institutions that supported it, that embedded

folklore as a central resource for Ghana's playwrights. The development of the 2005 Act, which amongst other things inhibits Ghanaian playwrights' ability to use folklore in a manner consistent with the artistic practice established by Nkrumah, appears paradoxical. Here, then, it is useful to analyse the law in order to more fully understand what restrictions are being placed upon Ghanaian artists and why the state might regard the control of folklore as advantageous.

### *Ghana's 1985 and 2005 Copyrights Acts*

The legal protection for folklore was first introduced in Ghana in the 1985 Copyright Act (PNDC Law 110). The Act protected 'works of folklore' under s.5 (1). Folklore was defined as 'all literary, artistic and scientific works belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore'. (s.5(3)) Accordingly, 'works of folklore' were characterised as being either associated with an ethnic group or the product of an anonymous author. In both cases the identity of an individual author is unknown. Moreover, the work was implicitly understood to reside in the public domain prior to the coming into force of the 1985 Act.

The protection of these works within a copyright paradigm was achieved through a simple statement: '[w]orks of folklore are hereby protected by copyright'. (1985, s5(1)) The rights to works of folklore were vested in the state 'as if the republic were the original creator of the works'. (s.5(2)) These rights were administered by the Secretary of State for Culture (s.5(3)) and were deemed to exist in perpetuity under s.16. In terms of the restrictions placed upon users of Ghanaian folklore, s.46(1) of the Act stated that '[n]o person shall without permission in writing of the Secretary import into Ghana, sell, offer or expose for sale or distribution in Ghana any copies of the following works made outside Ghana (a) works of Ghanaian folklore; or (b) translations, adaptations, or arrangements of Ghanaian folklore'. Accordingly, s.46(1)(a) restricts the commercial exploitation of works of Ghanaian folklore (that is

works characterised by their association with one of Ghana's ethnic groups or the works of an anonymous Ghanaian author or authors made in antiquity) in Ghana. Section 46(1)(b) restricted the sale of translations, adaptations and arrangements of Ghanaian folklore made *outside* Ghana without the requisite permission from the Secretary of State. The intended target of the law was commonly understood to be non-nationals who use elements of Ghanaian folklore to create works that are then sold within Ghana without attribution or economic benefit accruing to the community or the state. An example would be musical works that incorporate traditional Ghanaian beats or melodies. (Collins, 2003)

The 1985 Act was repealed by the 2005 Act, which makes several changes to the scope and protection of folklore. Firstly, rather than 'works of folklore', the 2005 Act refers to 'expressions of folklore'. The 1985 Act defined folklore as works that '*were* created, preserved and developed by ethnic or by unidentified Ghanaian authors', whereas the 2005 Act defines them as 'the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which *are* created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author' (s.76). Thus the definition of folklore is slightly, but significantly, different in the two acts. Though the association with ethnic communities and unidentified authors is retained, under the 2005 Act the characterisation of folklore as belonging to antiquity no longer applies and a work can be designated as folklore as long as it satisfies the criteria of belonging to the cultural heritage of Ghana. Consequently, the law potentially extends the scope of protection to contemporary works. Rather than vesting the rights in folklore with the state, the 2005 Act states that the rights in an expression of folklore are 'vested in the President on behalf of and in trust for the people of the republic' (s.4(2)), and, like the 1985 Act, these rights are deemed to exist in perpetuity. (s.17)

In terms of what uses of folklore are permitted under the 2005 Act, s.44(1)(a) protects against the sale or distribution of all works of Ghanaian folklore, whether made in or outside Ghana. This significantly expands the scope of protection from the 1985 Act,

which protected against the sale of works of Ghanaian folklore made outside the republic and imported into it. However, the law does appear to allow space for the adaptation of folklore by Ghanaians for commercial purposes *within* Ghana. Section 44(1)(b) renders it an offence to sell, distribute and expose for sale translations, adaptations and arrangements ‘made outside the Republic’. This suggests that a derivative work made within the Republic falls outside the scope of the offence.

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

That said, the perception that the 2005 Copyright Act explicitly protects against the use of folklore by Ghanaians is evidenced by s.4(1) which states that ‘[a]n expression of folklore is protected under this Act against (a) reproduction, (b) communication to the public by performance, broadcasting, distribution by cable or other means, and (c) adaptation, translation and other transformation’. As such, s.4(1)(c) protects expressions of folklore against adaptation and so use by Ghanaian artists in the creation of a derivative work. Accordingly, anybody wishing to adapt a work or expression of folklore in order to create a derivative work, as apparently allowed for under s.44(1)(b), would be prevented from doing so under s.4(1)(c) and s.64 without first securing permission and paying a fee in advance of use.

Thus, though an analysis of the 1985 Act suggests a lack of clarity concerning who was and who was not permitted to utilise Ghanaian folklore, the 2005 Act potentially extends the scope of protection to include contemporaneous works and places further

limitations on who is permitted to use folklore. Most importantly, it appears to inhibit use by Ghanaian nationals within Ghana. Clearly, then, the restrictions placed on Ghana's artists following the introduction of the 2005 Act have far more potential to prevent Ghanaian artists from engaging with their folklore than the 1985 Act.

### *The need for protection of folklore*

One reason that the Ghanaian state may wish to gain greater control over regulating the use of its folklore is the increasing potential for unregulated commercial exploitation. As the folklorist Katherine Briggs suggests:

folklore is being invaded and captured by the mass media for commercialization [...] this is not the legitimate, spontaneous growth which we find in stories handed down from father to son or in customs that alter as they are practised, it is an ignorant and wilful debasement for the sake of money. (2002: 4)

This has also been noted by WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), which has stated that 'with the aid of modern digital technologies, works of national folklore [are] subject to commercial use at the global level, without due observance to the cultural and economic interests of the peoples creating them'. (WIPO, 2007: 98) John Collins suggests that the threat is most applicable to developing countries such as Ghana. In his 2003 paper, he suggests that 'the world is not a level playing field. There are rich and poor nations, and the rich ones are in a technological position commercially to exploit the folklore of developing nations'. (2003: 2) Thus, there is clearly an issue regarding the large-scale exploitation of folklore that provides no beneficial interest to the originating communities or bodies that hold folklore in trust.

To illustrate this point: this type of exploitation is particularly evident in pharmaceutical and agricultural industries. As the IGC noted at its first meeting in 2001: '[o]ver the past decade or so, biotechnology, pharmaceutical and human health

care industries have increased their interest in natural products as sources of new biochemical compounds for drug, chemical and agro-products development [...] This interest has been stimulated by the importance of traditional knowledge as a lead in new product development'. (2001, 2) Though the products resulting from the use of folklore and traditional knowledge are bio-chemical and agricultural rather than artistic, the underlying issue is the same. As the IGC identifies:

African countries and their local communities have contributed considerably to these industries. However, intellectual property rights of these communities are not often recognized and protected. In addition, indigenous and local communities do not share, at least in a fair and equitable manner, benefits arising from the appropriation of their knowledge and its subsequent commercial use. (2001: 2)

This situation clearly makes a compelling argument for the need for some form of protection that prevents, or at least regulates, the exploitation of folklore and traditional knowledge, and delivers some benefit to the rights holders.

Though this is clearly a pressing issue in the context of multinational pharmaceutical companies, and so justifies some form of regulatory mechanism, the accusation that folklore is subject to commercialisation and exploitation that removes it from traditional patterns of transmission could just as easily be levelled at the development of Ghana's post-independence theatre industry, where folkloric stories and storytelling devices have been transposed and translated from a traditional context to modern theatrical context. Nevertheless, the state has not only historically encouraged that process but also drawn significant benefits from it, both in terms of developing signifiers of a unitary cultural identity, and also in terms of developing vibrant, modern cultural industries. Accordingly it is important to consider whether the substantial contribution made by Ghana's playwrights and other artists towards the development of Ghana's political and cultural landscape qualifies as beneficial interest. If it does, then arguably the state, as the rights holder, has benefitted and continues to benefit from the use of folklore by Ghana's artists, and so it remains within the interest of the state to continue to allow use.

As mentioned, it is not my intention to argue for the unregulated use of folklore, but to highlight the argument for the introduction of a legal mechanism that acknowledges the cultural and political significance of artists' use and reuse of folklore, and so accommodates the continuance of that contribution by contemporary Ghanaian artists. In terms of Ghanaian theatre, this would mean permitting playwrights to continue to retell and rework Ananse stories and so maintain and progress the distinctly Ghanaian theatrical forms that, though initially developed by Sutherland, have been expanded and extended by subsequent generations.

### **Conclusion**

There is a convincing argument that the exploitation of folklore demands some form of regulation, particularly when it comes to individuals or corporations exploiting folklore through the use of technology or access to markets that are simply unavailable to the originating communities. However, there are certain uses for which exceptions can and should be made and the use of folklore by national artists in the creation of derivative or composite works has been established as a use of both cultural and economic importance in Ghana. The use of folklore by Ghanaian playwrights since independence is one such example.

Taking into consideration the ways in which the state actively supported and encouraged theatre makers, amongst others, to engage with and make use of Ghana's folk heritage, it can be concluded that artists who are part of the nexus of a nation's creative industries, are necessarily contributing, through their endeavour, to the image of the country both at home and abroad. Furthermore, from an economic viewpoint, they are contributing to the health and vitality of Ghana's cultural industries, ensuring its survival for future generations. The state has demonstrably gained from their work and that gain is due in large part to artists working from folklore.

Throughout the Nkrumah presidency, the state proactively encouraged and facilitated the use of aspects of Ghanaian folklore, establishing what David Scott terms a ‘formalization and ritualization, characterized by reference to the past’. (Scott cited in Hobsbawm and Ranger, 1983: 4) This clearly resonates with the development of *anansegoro*, which draws its characterisation as an authentic form of African theatre from an ‘implied continuity with the past’. (Scott cited in Hobsbawm and Ranger, 1983: 1) Thus, from the perspective of the state, the success of Ghana’s theatre industry has contributed to the understanding of folklore as an important cultural asset with a considerable political and economic significance. So, rather than being anomalous, in fact, the protection of folklore against use by nationals in the 2005 Act can be read as a next, logical step, in the state’s management of its cultural resources.

However, the management of culture should not mean stifling its potential to develop. Perhaps the best example of this is Ananse himself. According to Akan mythology, Ananse won all stories in a bet with the sky god, Nyame, and under Ananse’s stewardship, the stories were told and retold, developed, and spread out to influence creation across cultural platforms. Since the introduction of the 2005 Copyright Act, currently, as Gertrude Torkornoo points out:

While persons outside Ghana can produce books, films and theatre using Ananse stories, Ghanaian citizens would be deemed to have infringed Sections 4, 64, and 76 of Act 690 if they produced works involving Anansi stories. (2012: 13)

So, currently, the only people in the world who are not permitted to write about Ananse without permission are Ghanaians writing for a Ghanaian audience.

Though there are clear practical issues concerning how something so complex as the use of folklore could be effectively policed, the fact of the law’s presence on the statute book means that it *could* be enforced. Indeed, in 2012 Abraham Henry Lemaire, the then Acting Director of the National Folklore Board, warned that ‘the [National Folklore] Board would begin prosecuting [those] that engaged in illicit use of the country’s folklore materials’. (Available at:

<http://ghanadistricts.com/news/?read=37130>. Accessed: 5/9/2014) To date, there have been no prosecutions concerning the use of folklore by Ghanaians in Ghana. However, the threat to Ghana's creative artists, both in terms of prosecution and the obligation to declare and pay for use of a hitherto free resource, has the potential to encourage Ghana's artists to move away from their own folk heritage in search of inspiration that does not add to their overall production costs.

Folklore remains a potent resource for artists and continues to act as the inspiration for new generations of playwrights in Ghana and elsewhere. This was acknowledged by the IGC in a paper published in 2002, in which it stated that 'cultural heritage is in a permanent process of production; it is cumulative and innovative'. (2002: 8) Accordingly, it is imperative that any future instrument for the protection of folklore acknowledges that one of the ways in which innovation occurs is through the reuse of folklore by artists. To disincentivise use risks both the abandonment of folklore by artists who will seek alternative inspiration and, perhaps most importantly within a postcolonial context, the ability of new artists to contribute to the continuing development of a national cultural identity in a manner that is consistent with established cultural practice.

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