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HARMONIZING CULTURAL IP ACROSS BORDERS: FASHIONABLE BAGS & GHANAIAN ADINKRA SYMBOLS

*J. Janewa Osei-Tutu**

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ABSTRACT

Global copyright and trademark laws protect symbols, names, and literary and artistic works. However, when their primary significance is cultural, because they are neither individual original works nor symbols that are used as commercial identifiers, intellectual property laws do not protect these symbols or artistic works. This is true, even if these goods are protected under national laws as part of that nation's cultural heritage. Once these cultural goods cross borders, there is no international law that will enable the country from which these goods originate to assert its rights in other countries. This Article characterizes these cultural goods as trade-related cultural intellectual property and proposes that, with some revisions to existing international agreements, this gap in the law can be addressed.

I. INTRODUCTION

The Vera Bradley luggage company is an American company that sells handbags and luggage, with a variety of bold patterns and colors.[1] They have a line of products with a pattern called "Cuban Tile."[2] This Cuban Tile pattern includes a clear reproduction of a Ghanaian symbol that belongs to a family of symbols called "adinkra."[3] The adinkra symbol depicted on the Vera Bradley bags and other merchandise is called "Dwennimmen," or "Rams Horns."[4] The adinkra symbol represents: "a

1. The Vera Bradley website offers this company history:

> The best stories have the most unexpected beginnings - $500, a ping pong table as a work space, and a bright idea in 1982 has turned into a global success. First neighbors, then friends turned founders Barbara Bradley Baekgaard and Patricia R. Miller were disappointed at the absence of beautiful luggage in airports and decided to create their own. Their friendship and desire to bring beauty to the world continue to remain at the heart of the company.

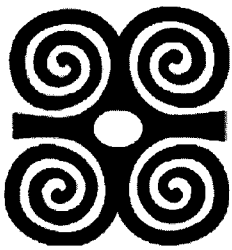
About Vera Bradley, VERA BRADLEY, https://www.verabradley.com/us/static/aboutus [https://perma.cc/X43Q-G89K] (last visited Nov. 22, 2017).

2. *Sneak Peak: Cuban Tiles*, VERA BRADLEY, https://www.verabradley.com/blog/2017/01/09/sneak-peek-cuban-tiles/ [https://perma.cc/AQU7-48YC] (last visited Mar. 30, 2018).

3. *West African Wisdom: Adinkra Symbols & Meanings: Dwennimmen*, ADINKRA.ORG, http://www.adinkra.org/htmls/adinkra/dwen.htm [https://perma.cc/VK6E-RNUT] (last visited Feb. 2, 2018).

4. *Id.*

symbol of humility together with strength. The ram will fight fiercely against an adversary, but it also submits humbly to slaughter, emphasizing that even the strong need to be humble."[5]





So, what is the problem? The adinkra Dwennimmen symbol, which is reproduced on the Vera Bradley backpack, is protected under the Ghanaian Copyright Act as part of Ghana's cultural heritage.[6] However, as discussed below, Ghanaian adinkra symbols are not protected under U.S. copyright law. This presents a dilemma for Ghanaians who may be dismayed at seeing the adinkra symbol represented on the Vera Bradley backpack. The differing legal regimes raise questions about the protection of goods that can be described as trade-related cultural intellectual property.

Ghana is a country in West Africa, with a rich and proud cultural heritage. Formerly known as the Gold Coast, Ghana was one of the first sub-Saharan African nations to gain its independence from colonial rule.[7] Adinkra symbols can be found on traditional Ghanaian buildings, for example, and are more than mere decorations. The symbols are closely linked to the identity and beliefs of the Asante people and have been handed down through the generations.[8] These artistic works are not intended to be used for purely ornamental purposes, but rather they are

5. *Id.*

6. Copyright Act (Act No. 690 § 76/2005) (Ghana).

7. Donna J. Mair et al., *Ghana*, ENCYCLOPEDIA BRITANNICA (Feb. 2, 2018), https://www.britannica.com/place/Ghana [https://perma.cc/489X-4USY].

8. *See* Boatema Boateng, *Adinkra and Kente Cloth in History, Law, and Life*, TEXTILE SOCIETY OF AMERICA 2014 BIENNIAL SYMPOSIUM PROCEEDINGS: NEW DIRECTIONS: EXAMINING THE PAST, CREATING THE FUTURE 932, 933 (2014); *see also Asante Traditional Buildings*, U.N. EDUC., SCI. AND CULTURAL ORG., http://whc.unesco.org/en/list/35 [https://perma.cc/6PNG-URY7] (last visited Feb. 2, 2018) ("As with other traditional art forms of the Asante, these designs are not merely ornamental, they also have symbolic meanings, associated with the ideas and beliefs of the Asante people, and have been handed down from generation to generation.").

symbols that are imbued with meaning in the context of Ghanaian culture.[9]

Given this background, it is no surprise that some Ghanaians may be upset that an American corporation reproduced a Ghanaian cultural symbol to create an attractive backpack which was sold for over 100 U.S. dollars.[10] From the perspective of Ghanaian law, this raises several issues. For example, did the American company seek or obtain consent from the Ghanaian government to use this symbol? Has any portion of the proceeds been shared with the Ghanaian people, on whose behalf the Ghanaian President holds the copyright? Are Vera Bradley executives or designers aware that they have chosen to decorate their bag with a reproduction of an adinkra symbol that is part of Ghanaian culture and that is also protected from unauthorized reproduction under Ghanaian law? There is nothing to indicate that any of these questions can be answered in the affirmative. Indeed, the Vera Bradley company would be correct if it pointed out that it has not violated U.S. copyright law or any other U.S. intellectual property (IP) law.

Some outraged Ghanaians assumed that this use of an adinkra symbol would be a copyright violation or a violation of some other IP law or international IP agreement. These upset citizens may have felt certain that the law must be on their side, aware that IP laws have been harmonized globally through the World Trade Organization (WTO) Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement) and other international agreements.[11] Unfortunately, the law is not on their side. From an international legal perspective, Vera Bradley has not violated any IP laws.

Indeed, there are international agreements that provide certain minimum protections for IP in most countries. The most relevant international agreements in this case are the Berne Convention for the Protection of Literary and Artistic Works (Berne or Berne Convention),[12] the Paris Convention for the Protection of Industrial Property (Paris

9. Boateng, *supra* note 8.

10. *Backpacks*, VERA BRADLEY, https://www.verabradley.com/us/browse/bags/backpacks-2714372579 [https://perma.cc/E4M2-LDX9] (last visited Mar. 30, 2018).

11. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; *see also* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S 221, S. Treaty Doc. No. 99-27 (1886) [hereinafter Berne Convention].

12. *See generally*, Berne Convention, *supra* note 11.

Convention),[13] and the TRIPS Agreement.[14] Yet, as this Article will explain, none of these agreements enable Ghana to sufficiently protect its cultural IP in the global sphere.

This Article contends that cultural symbols, such as adinkra, that have been protected under domestic law but commercialized by a foreign entity, are worthy of legal protection in the global arena.[15] Section II will introduce the concept of cultural IP, which is related to traditional knowledge (TK), but is a narrower concept. Sections III and IV then discuss some of the challenges in protecting the adinkra symbol across borders. Finally, the Article makes some modest suggestions for more immediate strategies that the Ghanaian government might consider, as well as long term options that would require modifications to the TRIPS Agreement.

II. WHAT IS CULTURAL IP?

The term "cultural IP," as used here, is related to TK, but it is not as broad. TK may include cultural IP, but TK is itself a more expansive concept. TK includes "knowledge, know-how, skills, and practices that are developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity."[16] The concept of TK thus encompasses cultural IP because TK includes the intergenerational knowledge as well as traditional cultural expressions, which may be symbols that are associated with TK.

The focus here is on this subset of TK that can be characterized as trade-related cultural IP. This is not to suggest that TK should not be protected, or that there is no need to address protection for TK. However, a discussion of the many complex issues relating to TK goes beyond the scope of this Article, which only considers trade-related cultural IP, such as the adinkra symbol that was reproduced on the Vera Bradley merchandise.

The term cultural IP, as used here, refers to a narrow category of intangible cultural goods that could be protected under modern IP law, more specifically, copyright or trademark law, if temporal limitations or

13. Paris Convention for the Protection of Industrial Property, art. 6ter, Mar. 20, 1888, 13 U.S.T. 2, 828 U.N.T.S. 107, as revised at Stockholm on July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

14. *See* TRIPS Agreement, *supra* note 11, at arts. 9-23.

15. *But see* Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2005 (2007) (criticizing cultural property).

16. WORLD INTELL. PROP. ORG., TRADITIONAL KNOWLEDGE (2018), http://www.wipo.int/tk/en/tk/ [https://perma.cc/8P59-QXQ2].

commercial requirements were removed. The adinkra symbols would be protected by copyright law if, for example, they were independent artistic creations made by a living person or an author who died less than 50 years ago, or under trademark law if they were symbols used for commercial, rather than cultural, purposes.[17] Thus, cultural IP includes literary and artistic works that would now be considered public domain, or distinctive symbols that have cultural significance but that are not necessarily used in commerce. In the case of the adinkra symbols, for instance, the symbols are old and are not used for commercial purposes. However, they are protected intangible cultural property under Ghanaian law.[18]

Cultural IP, as defined here, has two important characteristics. First, it is a type of intangible cultural good that significantly overlaps with traditional IP. Second, it is protected under national law as a form of cultural heritage. This concept of cultural IP extends to those cultural goods that could be protected by copyrights, trademarks, or geographical indications (GIs) if they were used in commerce, or that would have been protectable under copyright law at one point in time. This Article contends that this trade-related cultural IP should be protected under international law. At this time, however, the legal regime is inadequate for the reasons discussed below.

III. CHALLENGES TO PROTECTING CULTURAL IP ACROSS BORDERS: RELEVANT NATIONAL LAWS

Without internationally enforceable minimum standards, concerns about the use of adinkra symbols outside of Ghana cannot be solved in the straightforward manner that the ordinary offended Ghanaian citizen may assume. One must consider both the applicable international agreements and the relevant domestic law. The result, unfortunately, is rather disappointing for those concerned about the unauthorized use of adinkra symbols.

There are a few reasons why, from a legal perspective, it is difficult to prevent Vera Bradley from using Ghanaian adinkra symbols for its

17. *See* Berne Convention, *supra* note 11, at art. 7. Trademarks are about distinguishing one's goods and services from those of other enterprises. *See* TRIPS Agreement, *supra* note 11, at art. 15. It is clear that the trademark confers the right to exclude others from using that mark in the commercial context. For example, TRIPS Agreement, art. 16 states:

> The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.

18. Copyright Act (Act No. 690 § 4/2005) (Ghana).

Cuban Tile line. First, IP laws are territorial. This means that Ghana's IP laws only apply in Ghana and do not extend to the United States.[19] Ghana may protect its folklore under its own copyright law, but U.S. law does not recognize Ghanaian folklore.[20] The extraterritorial application of law is a complex question that goes beyond the scope of this Article; however, it is briefly raised here, and discussed below, for the purpose of considering the narrow question of cultural IP.

Second, leaving aside the specific protection for folklore under Ghanaian law, adinkra symbols have been around for generations.[21] As a result, these symbols would not be subject to copyright protection as literary or artistic works under U.S. law.[22] Third, it does not appear that the government of Ghana has taken other measures, such as registering adinkra designs as GIs or adopting them as official marks.[23] Finally, and most importantly, there is no international agreement that requires other countries to recognize and protect Ghanaian cultural IP, or to prevent unauthorized uses outside of Ghana.[24] The Berne Convention, for instance, does not mandate copyright protection for cultural IP, and the World Intellectual Property Organization (WIPO) has not made progress in reaching an agreement on TK or Traditional Cultural Expressions, which would likely include protection for cultural IP.[25] Despite the lack of international protection, Ghanaian law protects cultural IP, such as adinkra symbols.

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19. The principle of territoriality limits the reach of state action, that is, a state's laws exist only within its borders absent some international agreement. This principle is customary international law and has been regarded as such since the *Lotus* case. *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.I.C.J. (ser. A) No. 10, ¶ 45 (Sept. 7, 1927) ("[T]he first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State . . . . jurisdiction is certainly territorial; [power] cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.").

20. *See* Copyright Act (1976), *amended by* 17 U.S.C. § 102(a) (2017), which states that "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression" and includes literary, musical, and dramatic works as well as pictorial works and sculptures.

21. Boateng, *supra* note 8, at 932.

22. *See* Copyright Act, 17 U.S.C. § 302, which provides protection for the life of the author plus 70 years. ("[Copyright] endures for a term consisting of the life of the author and 70 years after the author's death.").

23. *See* Ghana Geographical Indications Act (Act No. 659/2003) (Ghana) http://www.wipo.int/wipolex/en/text.jsp?file_id=223004 [https://perma.cc/7C9P-FEFF]. The country does not appear to have taken measures to protect GIs.

24. *See infra* Section IV.

25. *See* WORLD INTELL. PROP. ORG., INTERGOVERNMENTAL COMMITTEE (2018), http://www.wipo.int/tk/en/igc/ [https://perma.cc/U7UC-A7GX].

A. Ghanaian Copyright Law Protects Adinkra in Ghana

Under the Ghanaian Copyright Act of 2005 (Ghana Copyright Act), adinkra symbols are protected as part of the cultural heritage of Ghana.[26] The Ghanaian Copyright Act defines folklore as:

> [T]he literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs is not known, and any similar work designated under this Act to be works of folklore.[27]

The President of Ghana holds the copyright in the folklore on behalf of the people of Ghana.[28] Further, there is no term limit for the protection of folklore.[29] Thus, adinkra symbols, including the symbol used on the Vera Bradley merchandise, are expressly protected as folklore under Ghanaian law. The same is true for kente cloth, which is a recognizable intricate pattern of silk woven cloth that originates from the Akan region of Ghana.[30] Kente cloth designs are increasingly found on various bags and fashion items in North America and have, for example, been incorporated into the graduation attire at some historically black colleges and universities in the United States.[31]

As protected works, adinkra symbols should not be reproduced, communicated to the public, adapted, or otherwise transformed without authorization.[32] Yet, outside Ghana, these protected symbols of Ghanaian culture have been used and reproduced for commercial purposes without any apparent permission. It is, however, possible to seek and obtain authorization to use or reproduce these Ghanaian cultural symbols through a National Folklore Board that was established under the Ghanaian Copyright Act.[33] If a person or entity wants to use Ghanaian

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26. Copyright Act (Act No. 690 § 4/2005) (Ghana).

27. *Id.* § 76.

28. *See id.* § 17 ("The rights vested in the President on behalf of and in trust for the people of in the Republic in respect of folklore under section 4 exist in perpetuity.").

29. *Id.* § 76.

30. *See* Boateng, *supra* note 8.

31. *See, e.g.*, *Graduate Information*, HOW. UNIV., https://commencement.howard.edu/graduate-information [https://perma.cc/67RX-3XHW] (last visited Feb. 2, 2018).

32. Copyright Act (Act No. 690 § 4/2005) (Ghana) states: "An expression of folklore is protected under this Act against (a) reproduction, (b) communication to the public by performance, broadcasting, distribution by cable or other means, and (c) adaptation, translation and other transformation."

33. *Id.* § 59 states:

(1) There is established by this Act a National Folklore Board referred to in this Act as the

folklore, such as the adinkra symbol, that person or entity can apply to the National Folklore Board for permission.[34]

According to Ghanaian law, such permission should be sought unless the use falls within the fair dealing exception under Section 19 of the Ghanaian Copyright Act.[35] Fair dealing includes, among other things, exceptions for personal use, quotations from newspapers and other publications, use for teaching, and political commentary.[36] The Vera Bradley use of the adinkra Dwennimmen symbol for commercial purposes does not fall within any of the non-infringing uses outlined in Section 19 of the Ghanaian Copyright Act. Such use would, absent the necessary permissions, be an infringing use under Ghanaian law. Permission, therefore, is clearly necessary in Ghana, even if it is not a requirement for individuals or companies outside Ghana.

Admittedly, it may not always be apparent how or where to seek permission to use cultural IP. But in this case, if the U.S. company had wanted to seek permission, it would have been able to do so. Further, any logistical challenges for companies seeking to identify protected cultural IP—for public relations purposes if not legal purposes—could be minimized by maintaining a central repository at WIPO or similar institutions. Of course, like any IP holder, governments that have protected cultural IP in their laws should be vigilant in monitoring and enforcing their rights to the extent possible.[37] If governments and other entities do not assert their rights over their cultural IP, they run an increased risk that it will become more difficult to claim that the protected symbol is associated with their identity and their cultural heritage. It is challenging to effectively protect cultural IP across borders under existing laws. However, by asserting its rights to the adinkra symbol, Ghana will

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"Board."

(2) The Board shall consist of (a) a chairperson, (b) the Copyright Administrator, (c) a person nominated by the National Commission on Culture; and (d) six other persons who shall be appointed by the President in consultation with the Council of State.

34. *Id.* § 64 states:

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

(2) There shall be established by the Minister with the approval of the Accountant-General a fund for the deposit of any fees that may be charged in respect of the use of folklore.

(3) The fund shall be managed by the Board and shall be used (a) for the preservation and promotion of folklore, and (b) for the promotion of indigenous arts.

35. *Id.* § 19.

36. *Id.*

37. *See* Jake Linford, *A Linguistic Justification for the Protecting of 'Generic' Trademarks*, 17 YALE J.L. & TECH. 110, 144 (2015) (discussing the concept of semantic shift and how the change in the meaning of a trademark can have legal consequences for the trademark owner).

at least put users on notice that there is some claim to the cultural IP, even if the legal claim is not recognized in the jurisdiction where the cultural IP is being used or reproduced.

Although it is not compliant with Ghanaian law, the Vera Bradley reproduction is not an infringing use in the United States. Because IP laws are territorial, and because there is no international agreement to protect cultural IP, the use of the adinkra symbol by the Vera Bradley company can violate Ghana's copyright law without violating U.S. copyright law.[38] Ghana's copyright law applies in Ghana, but it does not extend to U.S. citizens conducting business in the United States. As a general rule, Vera Bradley, an American company operating in the United States, will only be subject to Ghanaian law if it is engaged in some kind of activity in Ghana, or if there is a sufficient nexus between its activities and Ghana.[39] In order to prevent the Vera Bradley company from using protected Ghanaian adinkra symbols, there would need to be some violation of U.S. law, most likely one that would have been triggered by an obligation under an international agreement.[40] The next section will explain why one cannot prevent the unauthorized use or reproduction of Ghanaian adinkra symbols under U.S. copyright law.

B. U.S. Copyright Law does not Protect Adinkra in the United States

Under U.S. law, copyright extends to literary and artistic works that are "original works of authorship fixed in any tangible medium of expression."[41] For example, if someone creates a simple but original pattern that meets the minimum threshold for creativity, it will be protected under U.S. copyright law.[42] Indeed, the author need not be located in the Unites States to benefit from the protection of U.S. copyright law, but need only be a national or a resident of a Berne Convention member country or a national of a WTO member state.[43] Copyright protection arises upon the creation of the work, so the artistic

38. *See, e.g.*, Berne Convention, *supra* note 11, at arts. 5(2), 5(3), which indicate that copyright protection is governed by the laws where protection is claimed and that protection in the country of origin is governed by domestic law.

39. *But see* Google Inc. v. Equustek Sols. Inc., 2017 SCC 34, [2017] 1 S.C.R. 824 (Can.) (explaining that the Supreme Court of Canada upheld an order that Google should de-index infringing sites globally).

40. *See, e.g.*, Berne Convention, *supra* note 11, at art. 5.

41. Copyright Act (1976), *amended by* 17 U.S.C. § 102(a) (2017).

42. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.").

43. *See* Berne Convention, *supra* note 11; TRIPS Agreement, *supra* note 11.

work would be protected under the law, although registration may be necessary before it is possible to enforce copyright in some jurisdictions.[44]

Adinkra symbols would meet the requirements for creativity and fixation under U.S. copyright law, and at some earlier point in time, they would have met the requirements for originality.[45] Section 102(a) of the U.S. Copyright Act states "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression."[46] Among other things, this includes literary works, as well as pictorial, graphic, and sculptural works. However, at this time, the symbols are no longer original independent creations, but reproductions of works that were created several years ago. While this may be part of Ghana's cultural heritage, U.S. copyright law does not protect creative works that have been in existence longer than 70 years after the death of the creator.[47]

In this respect, Ghana's copyright law diverges from U.S. copyright law. Without international harmonization on such matters, it becomes difficult for Ghana to police the use of an adinkra symbol by companies, such as Vera Bradley, in the United States or anywhere outside of Ghana. Despite the gaps in global copyright law with respect to protecting cultural IP, there are some ways the existing laws can protect certain kinds of cultural IP.

C. *Geographical Indications and Government Marks*

The existing international IP protections that are most closely related to cultural IP are GIs and the prohibition against the registration of official marks. The TRIPS Agreement requires all member states to protect GIs.[48] A GI is an indication that identifies a good as "originating in the territory of a Member, or a region or locality in that territory, where a given quality,

44. Berne Convention, *supra* note 11, at art. 5; Copyright Act, 17 U.S.C. §§ 411, 412.

45. *See Feist Publ'ns,* 499 U.S. at 345:

> The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author . . . . Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be . . . . Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.

46. Copyright Act (1976), *supra* note 41.

47. *See* Copyright Act, 17 U.S.C. §§ 101-22 (2012) (subject matter and scope of copyright).

48. *See* TRIPS Agreement, *supra* note 11, at art. 22.

reputation or other characteristic of the good is essentially attributable to its geographical origin."[49] GIs can be described as a form of cultural IP because of the connection to geographic regions.[50] Because of the connection between GIs and territory, GIs can be used to protect some indigenous works, for example.[51] Scholars have recognized that GIs can, therefore, provide some form of protection for intangible cultural property.[52] Ghanaian kente cloth, for example, could be registered as a GI because it has a reputation and characteristics that are essentially attributable to its geographic origin.

In addition to GIs, adopting symbols as official government marks could be a way to protect cultural IP. Official government marks are protected from misuse because the Paris Convention requires nations to prohibit others from registering official symbols as trademarks. Article 6ter of the Paris Convention prohibits the use of marks that have been adopted by governments and international organizations as their official marks.[53] The relevant provision requires convention signatories to:

> [R]efuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them. . . .[54]

If the Ghanaian government chose to adopt and use the adinkra symbols as official marks of the government of Ghana, this would prevent other entities and individuals from adopting and using these symbols as trademarks.

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49. *Id.*

50. Chidi Oguamanam & Teshager Dagne, *Geographical Indication Options for Ethiopian Coffee and Ghanaian Cocoa*, 77-108, INNOVATION & INTELLECTUAL PROPERTY: COLLABORATIVE DYNAMICS IN AFRICA (Jeremy de Beer et al. eds., 2014).

51. *See* Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV., 1, 19-20 (2001):

> The mark or the indication can be used to refer to a tribe, an artist, or a combination of both. This also has the flexibility to be used for all forms of folk art, including folk medicines. Geographical indications are not author specific nor do they require an element of innovation. Like trademarks, they are meant to protect the producers or the manufacturers of goods. Geographical indications are also better for echoing the communal sense, as it is based on its location and method of production.

See also Daniel Gervais, *Traditional Knowledge: Are We Closer to the Answer(s)? The Potential Role of Geographical Indications*, 15 ILSA J. INT'L & COMP. L., 551, 563 (2009).

52. *See, e.g.*, Gervais, *supra* note 51, at 558.

53. Paris Convention, *supra* note 13.

54. *Id.* at art. 6ter(a).

While GIs and official marks offer helpful partial solutions, these existing forms of IP may not be effective in preventing Vera Bradley from reproducing the adinkra symbol as part of the Cuban Tile adinkra patterned bag. In the case of GIs and government symbols, the prohibition would be limited to trademark use and registration. Significantly, if the symbol is not used by the alleged infringer (in this case, Vera Bradley) as an indicator of source or used in a manner that causes confusion, there may be no basis under existing IP law for prohibiting its use.[55] For instance, the GI provision under the TRIPS Agreement requires WTO members to enable the GI owner to prevent the use of designations that would "suggest that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good."[56]

If adinkra symbols were protected GIs, one could argue that the use of the adinkra symbol suggests that the good originates in Ghana, even though it does not. Furthermore, the title "Cuban Tile" is, arguably, misleading. This would require that the consuming public would somehow be confused by the use of the adinkra symbols by non-Ghanaian entities.[57] Here, Ghanaians may have been confused, but it is not clear how many others may have been confused. To address this challenge, it would be more effective if adinkra symbols could obtain the kind of protection available to wine and spirit GIs under the TRIPS Agreement.

Article 24 of the TRIPS Agreement affords special protection to wine and spirit GIs. These special GIs are protected even if there is no public confusion about the origin of the good. WTO Member states have agreed to protect GIs for wines and spirits by preventing their use on wines and spirits "not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind,' 'type,' 'style,' 'imitation' or the like."[58] This means that even where the public is not confused, the owner of the GI can prevent those who are not authorized to use the wine GI from such use. Cultural IP, such as adinkra, could effectively be protected by similar legal provisions.

However, an effective system for protecting GIs can be costly, which can be an impediment to developing countries seeking to protect their

55. TRIPS Agreement, *supra* note 11, at art. 22.
56. *Id.*
57. *Id.*
58. *Id.* at art. 23.1.

cultural heritage.[59] The costs involved are related to the need to establish systems for registration and examination, as there should be some regulation and supervision to maintain the integrity of the GI. Furthermore, while the adoption as a government mark or the registration as a GI would be helpful measures in protecting adinkra, neither measure would clearly prohibit the reproduction of the adinkra symbol in the way the Ghanaian Copyright Act does. Companies and individuals could still use the symbols without authorization, claiming that adinkra is already in the public domain. From a copyright perspective, adinkra symbols would be treated as part of the public domain because of the time limitation on copyright protection.[60] With respect to GI protection, the adinkra symbols would be in the public domain because they had not previously been protected as GIs and could be considered symbols already in common usage.[61] Wine GIs do not have to be protected, for instance, if "the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member."[62]

Adinkra symbols are not customary in American language. Yet, by using the adinkra symbol on the backpack, as Vera Bradley has done, it renders the symbol part of the public domain and common parlance. Importantly, international IP law offers no mechanism for the Ghanaian government to prevent the very actions that render the symbol part of the common usage and therefore generic. From the Ghanaian perspective, this creates a serious dilemma.

D. Extraterritoriality

As discussed earlier, laws do not normally apply outside of the nation where they were made. This important principle is consistent with respect for national sovereignty.[63] Nonetheless, as discussed below, there have been some attempts to extend the application of trademark laws across borders.[64] This raises some interesting questions. Is there a case for the extraterritorial application of Ghanaian law to a U.S. company?

59. *See* WORLD INTELL. PROP. ORG., GEOGRAPHICAL INDICATIONS (2018), http://www.wipo.int/geo_indications/en/ [https://perma.cc/FDR7-K9E7].

60. Berne Convention, *supra* note 11, at art. 18.

61. TRIPS Agreement, *supra* note 11, at art. 24.6.

62. *Id.*

63. Graeme Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 717 (2009).

64. *See, e.g.*, Belmora LLC. v. Bayer Consumer Care AG, 819 F.3d. 697, 702 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1202 (2017). For a more comprehensive discussion of cases where courts have stretched the boundaries of the concept of territoriality see Dinwoodie, *supra* note 63, at 735.

Alternatively, is it possible for Ghanaians to assert some kind of claim based on U.S. law?

For example, in *Belmora LLC* v. *Bayer Consumer Care*, the question arose as to whether a company, Bayer—that had no registered trademark in the United States—could prevent the use of its foreign mark in the United States.[65] Bayer had been selling pain medication under the brand name "Flanax" in Mexico and other parts of Latin America for several years.[66] Bayer's U.S. equivalent to Flanax was sold under the name "Aleve."[67] Bayer had not registered the Flanax name in the United States.[68] An unrelated company, Belmora, subsequently registered Flanax as its trademark for a pain medication in the United States and used packaging similar to Bayer's Flanax.[69] Even though Bayer had not sold or registered Flanax in the United States, it successfully had Belmora's Flanax trademark cancelled on the basis that consumers, particularly Mexican Americans, were being deceived into thinking that the U.S. trademark was the same Flanax with which they were familiar in Mexico.[70]

The district court concluded that Bayer could not rely on the U.S. trademark legislation—the Lanham Act—since it had never used or registered its trademark in the United States.[71] However, on appeal, the court concluded that an unfair competition claim under section 43(a) of the Lanham Act does not require that Bayer had used the mark in the United States, but rather that Bayer was "likely to be damaged" by Belmora's use of the Flanax trademark in the United States.[72] The court went on to conclude that Bayer would need to show economic or reputational injury flowing directly from the defendant's advertising and the deception of consumers that would lead them to "withhold trade" from Bayer.[73] The *Bayer* decision thus opens the possibility of making claims of reputational or economic injury from use of a trademark registered elsewhere—even if the claimant does not have a trademark in the United States. Because the question is whether, in effect, the plaintiff's business has been damaged, this case is not applicable to cultural symbols that are not being used in a trademark sense and for commercial purposes.

65. *Belmora*, 819 F.3d. at 705.
66. *Id.* at 702.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 704.
71. *Id.* at 705.
72. *Id.* at 706.
73. *Id.*

U.S. courts have also been willing to apply U.S. trademark law to situations occurring outside of the United States. For example, in a recent dispute involving Trader Joe's and a Canadian company, Pirate Joe's, the U.S. courts concluded that U.S. trademark law could apply, even though much of the activity occurred outside of the United States.[74] Pirate Joe's, located in Canada, sold Trader Joe's products in Canada from its Pirate Joe's store.[75] Trader Joe's does not have stores in Canada, nor has it registered its mark in Canada.[76] The defendant purchased Trader Joe's products in the United States and transported them to Canada for resale. As a result, Trader Joe's commenced an action for trademark infringement and unfair competition.[77]

Since Trader Joe's chose to pursue the litigation in the United States, the U.S. courts had to determine whether it was possible to justify the extraterritorial application of U.S. law to activities in Canada. In determining whether U.S. trademark law should apply, the court used a test that asked two questions.[78] The first question was whether the use of the trademark infringed in a way that affected American commerce, and the second question was whether the use caused the plaintiff a cognizable harm under the Lanham Act.[79] The court noted that reputational harm could constitute "some effect" on U.S. commerce.[80] Like the *Bayer* case, however, this would not be applicable to a dispute about the use of Ghanaian adinkra symbols in the United States.

These U.S. judicial decisions are based on U.S. law and therefore offer interpretations of the reach of U.S. trademark law. Clearly, neither decision has any bearing on the extraterritorial application of Ghanaian law or the law of any other nation. Neither the *Bayer* case nor the *Trader Joe's* case provide any legal basis for Ghana to claim protection for cultural IP in the United States or elsewhere. Conceptually, however, these decisions lend themselves to a helpful analogy.

For example, these cases could perhaps bolster *theoretical* arguments that commodifying cultural IP by placing it into the marketplace in the United States affects global commerce. Alternatively, there may be some basis to support claims that selling goods bearing adinkra symbols that have no connection to Ghana or West Africa cause some reputational

74. *See* Trader Joe's Company v. Hallat, 835 F.3d 960 (9th Cir. 2016).
75. *Id.* at 963.
76. *Id.*
77. *Id.*
78. *Id.* at 969.
79. *Id.*
80. *Id.* at 971.

injury to Ghana. This is not to suggest that U.S. legal standards should be adopted or that other countries should embrace the U.S. approach to territoriality. Rather, the question is whether there are plausible theoretical arguments that U.S. commercial activity that would be infringing outside of U.S. borders should be regulated.[81]

Once a U.S. company commodifies cultural IP from another country, this arguably becomes commercial activity that has a transnational impact. Certainly, this rationale could be applied to all commerce, thus eliminating the concept of territoriality altogether. That is not, by any means, the suggestion here. Still, the concept of "trade-related" IP implies that sales of infringing goods have an effect that transcends borders and therefore need to be regulated.[82] Arguably, the same is true for cultural IP.

IV. CHALLENGES TO PROTECTING CULTURAL IP ACROSS BORDERS: INTERNATIONAL AGREEMENTS

Some scholars have criticized international IP standards, including copyright standards, under the Berne Convention, for their individualistic approach to creative works, and rejected the existing copyright framework as reflecting western values to the exclusion of other perspectives.[83] As discussed below, this limitation of copyright is partially due to the need for an identifiable author, rather than a community, and the time limited

81. U.S. law has been used to regulate the conduct of U.S. citizens outside the territory. For instance, there is a prohibition on taking bribes or engaging in illicit activities with minors, even if the conduct occurs outside the United States. *See* 18 U.S.C. § 2423(b) (2012) ("[A] United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.").

82. Daniel Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INT'L & ENT. L. J. 929, 939-40 (2002) ("Indeed, during this phase, the face of international intellectual property changed rapidly due to pressure from perceived trade imbalances stemming from unequal intellectual property regimes. Several studies showed the enormous importance of intellectual property rights . . . in economic development.").

83. Chidi Oguamanam, *Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge*, 11 IND. J. GLOB. LEG. STUDIES 135, 137 (2004):

> An acceptable sui generis mechanism for the protection of local knowledge must be rooted in indigenous episteme. Western IPRs' inability to address the epistemic dichotomy between Western and indigenous ways of knowing is at the root of its failure to meet indigenous peoples' yearnings and aspirations for the preservation of their knowledge and its cultural integrity. This is the basis of the 'crisis of legitimacy in the intellectual property system.

See also Olufunmilayo B. Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights*, WORKS. BEPRESS, p. 25 (2007), https://works.bepress.com/o_arewa/9/? [https://perma.cc/8PUE-XDAW].

protection. These copyright requirements make the protection of cultural IP more difficult.

A. *The Berne Convention for the Protection of Literary and Artistic Works*

The Berne Convention protects literary and artistic works, which include writings and drawings.[84] The Berne Convention creates most of the substantive international obligations for copyright, and the TRIPS Agreement incorporates the Berne Convention and builds slightly on the Berne obligations.[85] The minimum required term of copyright protection for a literary or artistic work, such as a symbol, is the life of the author plus 50 years.[86] The adinkra symbol, as a writing or drawing, would be protected by copyright. However, as indicated, there is a limited term of protection. Under Berne standards, any copyright that may have subsisted in this symbol would have terminated long ago, leaving the symbol in the "public domain."[87] This means that unless the symbol is subject to some other protection, such as trademark, it would be available for anyone and everyone to use freely.[88]

Furthermore, the copyright normally extends to an identifiable author who is the national of a Berne member country.[89] In the case of

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84. Berne Convention, *supra* note 11, at art. 2(1), states:

> The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain . . . such as books, pamphlets and other writing; lectures, addresses sermons and other works of the same, dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; . . . works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works . . .; works of applied art; illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science.

85. TRIPS Agreement, *supra* note 11, at art. 9.1 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.").

86. Berne Convention, *supra* note 11, at art. 7(1); TRIPS Agreement, *supra* note 11, at art. 12.

87. Berne Convention, *supra* note 11, at art. 7.

88. *See* Lee B. Burgunder, *The Scoop on Betty Boop: A Proposal to Limit Overreaching Trademarks*, 32 LOY. L.A. ENT. L. REV. 257, 258 (2012):

> The Ninth Circuit panel was right to be concerned about extending trademark protection to media characters such as Betty Boop. After all, unless something is done, the Walt Disney Company ('Disney'), for example, will be able to use the trademark system to prevent companies from displaying images of Mickey Mouse long after its copyright expires.

89. Berne Convention, *supra* note 11, at art. 3:

> The protection of this Convention shall apply to: (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not; (b) authors who are not nationals of one of the countries of the Union, for their works first published in one of

cultural works such as kente or adinkra symbols, the intention is not to give protection to an individual, but rather to give protection to a community. Even if the author were identifiable, Article 5 of the Berne Convention requires national treatment for authors, which means that a Ghanaian author claiming copyright protection in the United States need only be given the same treatment that the United States gives its own nationals.[90] But, as discussed above, the United States does not protect cultural IP.

Finally, while some nations may protect folklore, the Berne Convention does not require countries to extend copyright protection to cultural heritage or folklore. Even if the Berne Convention did protect folklore, this could not be used as a basis to file copyright claims in the United States because U.S. copyright law expressly excludes any reliance on the Berne Convention as a basis to assert rights under U.S. law.[91]

B. The Paris Convention for the Protection of Industrial Property

Like the Berne Convention, the Paris Convention does not require any protection for cultural property. If the adinkra designs were to be used as trademarks, however, the Paris Convention, which has also been incorporated into the TRIPS Agreement, could provide some protection.[92] A trademark is any sign or symbol that is capable of distinguishing the goods or services of one enterprise from those of another. The Paris Convention addresses patents and trademarks, but it does not create extensive substantive obligations. One of the important principles from the Paris Convention is the principle of independence of rights, which means that each country can determine the conditions for filing a trademark application and registering a trademark.[93] Importantly, the

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those countries, or simultaneously in a country outside the Union and in a country of the Union.

90. *Id.* at art. 5:

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

91. Copyright Act, 17 U.S.C. § 104(c) (2017):

No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

92. *See* TRIPS Agreement, *supra* note 11, at arts. 2, 15-21.

93. Paris Convention, *supra* note 13, at art. 6.1 ("The conditions for the filing and registration

registration of a trademark in one country is independent from the registration of that mark in other countries.[94] So, even if certain adinkra symbols were registered as trademarks in Ghana, they would not necessarily be entitled to, or denied, trademark protection in other countries.

There is an exception to this general principle of independence for famous marks. Article 6bis of the Paris Convention requires countries to prevent well-known trademarks from being used on identical similar goods in a way that is likely to cause confusion. Further, the special protection for famous marks applies to marks used in commerce that have become well known in the relevant market, even if they are not registered there.[95] Trademarks of major corporations instantly come to mind: McDonalds, Nike, Coca-Cola, Apple, Microsoft, Disney, and many others. Even if these marks are not registered in a particular market, they may still be well known to that population in that market. Ghanaian adinkra symbols would not be protected by the famous marks provision of the Paris Convention because they are not used as sourced indicators. Even if they were used as trademarks, they are arguably not well known.

Since adinkra symbols are protected under Ghanaian law as part of Ghana's cultural heritage, a better option than attempting to use these symbols as trademarks would be for Ghana to adopt adinkra symbols as official government marks. As discussed previously, certain marks can be refused registration if they have been adopted as official marks of a government.[96] Government flags, insignia, and emblems cannot be

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of trademarks shall be determined in each country of the Union by its domestic legislation.").

94. *Id.* at art. 6.2:

> However, an application for the registration of a mark filed by a national of a country of the Union in any country of the Union may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin.

Id. at art. 6.3 states that "[a] mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin."

95. *Id.* at art. 6bis:

> The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

96. *Id.* at art. 6ter:

> The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State

registered as trademarks.[97] If the Ghanaian government adopted adinkra symbols as marks of the Government of Ghana, this would limit the ability of enterprises outside of Ghana to use these symbols, at least as indicators of source.

C. *The TRIPS Agreement*

As mentioned earlier, since copyrights, trademarks, and GIs are more closely related to cultural IP than patents, this discussion of the TRIPS Agreement will not include patents. The TRIPS Agreement contains few specific references to copyright, but instead leaves most of the requirements for copyright as they existed under the Berne Convention. It incorporates articles 1–21 of the Berne Convention, except the obligation to protect moral rights.[98] In addition, the TRIPS Agreement requires copyright protection for computer programs as literary works and for compilations of data and other arrangements which, "by reason of the selection or arrangement of their contents constitute intellectual creations."[99] However, the TRIPS Agreement does not make many substantive changes to the international copyright regime that predated it.

The TRIPS Agreement makes more significant changes regarding patents and trademarks, and significantly, it requires WTO members to protect GIs. With respect to trademarks, the TRIPS Agreement clarifies that any sign that is capable of distinguishing the goods and services of one enterprise from those of another can be a trademark.[100] Trademarks are clearly commercial in nature and can be cancelled for non-use. Thus, symbols that are not used in commerce are not protected by the TRIPS Agreement. By comparison, GIs may be helpful in protecting cultural symbols.

A GI is a name or trademark that identifies "a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[101] GIs can lead to more effective protection for cultural IP than copyrights or trademarks. Some scholars have therefore proposed the use of GIs to protect TK, for

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emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

97. *Id.*

98. TRIPS Agreement, *supra* note 11, at art. 9.

99. *Id.* at arts. 10-12. There are additional provisions relating to matters such as rental rights and to the term of protection when it is not calculated using the life of a person.

100. *Id.* at art. 15.

101. *Id.* at art. 22.

example.[102] Adinkra symbols could be protected as GI's by the Ghanaian government as symbols that have their origin in West Africa and therefore have some quality, reputation, or characteristic that is attributable to the geographic origin.

D. International Attempts to Protect Intangible Cultural Heritage

The Convention Concerning the Protection of the World Cultural and Natural Heritage dates back to 1972.[103] This agreement is limited to physical property and natural physical sites.[104] It does not extend to intangible property, such as the adinkra symbols.

By comparison, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention), which concluded in 2003, encompasses representations and symbols, such as adinkra designs.[105] Several countries have signed and ratified the ICH Convention.[106] The United States, however, is not a signatory.[107] Moreover, the ICH Convention does not create any concrete obligations for the international recognition or protection of intangible cultural heritage.[108] For these reasons, the ICH Convention does not offer an effective solution that would allow Ghana, in this instance, to prevent the use of its cultural IP in the United States or elsewhere.

WIPO continues to negotiate an international agreement to protect TK and traditional cultural expressions.[109] This process has been ongoing

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102. *See* Oguamanam & Dagne, *supra* note 50, at 81.

103. Convention Concerning the Protection of the World Cultural and Natural Heritage arts. 1-2, Nov. 16, 1972, 1037 U.N.T.S. 151.

104. *Id.*

105. The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage defines intangible cultural heritage as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage." UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage art. 2.1, Oct. 17, 2003, 2368 U.N.T.S. 35.

106. *See States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage*, INTANGIBLE CULTURAL HERITAGE (2003), https://ich.unesco.org/en/states-parties-00024 [https://perma.cc/XE7Y-CBWU].

107. *Id.*

108. *See generally* UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 35.

109. WORLD INTELL. PROP. ORG., ASSEMBLIES OF MEMBER STATES OF WIPO FIFTY-SEVENTH SESSION (OCTOBER 2-11, 2017), AGENDA ITEM 18, MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, Decision (2017), http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf [https://perma.cc/ZAV6-UYB6].

for several years.[110] Discussions about protecting intangible cultural expressions date back to the 1960s, before WIPO commenced discussions about TK.[111] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000 to study the relationship between IP, TK, genetic resources, and folklore.[112] The WIPO committee is tasked with conducting negotiations with the objective of drafting an international legal instrument to "ensure the effective protection" of genetic resources, TK, and traditional cultural expressions.[113]

Despite nearly 20 years of discussions about TK at WIPO, the organization is still working to conclude an international agreement to protect TK.[114] This demonstrates how complex it is to reach international consensus on the protection of intangible cultural heritage, including cultural IP. The WIPO forum has produced draft texts for the protection of TK and traditional cultural expressions, and WIPO members have agreed to continue their negotiations on these texts.[115] The difficulty in reaching an agreement is largely due to the conflict between developed and developing countries. For instance, many developed countries resisted moving forward from the draft texts and failed to establish new binding

110. WORLD INTELL. PROP. ORG., THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, Background Brief No. 2, 1 (2015), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf [https://perma.cc/U95W-U9JF].

111. *Id.*

112. Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Doc. WO/GA/26/6 (Aug. 25, 2000).

113. Traditional knowledge and traditional cultural expressions are often seen as part of a single "integrated heritage." However, due to the specific legal and policy questions raised by traditional cultural expressions in the intellectual property context, WIPO has separate, but parallel, work programs for traditional knowledge and traditional cultural expressions. *See* WORLD INTELL. PROP. ORG., TRADITIONAL CULTURAL EXPRESSIONS (FOLKLORE) (2018), http://www.wipo.int/tk/en/folklore/ [https://perma.cc/R3H5-7MT3]. Traditional knowledge and traditional cultural expressions are related, and some early WIPO IGC documents have even defined traditional cultural expressions as a subset of traditional knowledge. *See* Intergovernmental Comm. on Intell. Prop. and Genetic Resources, Traditional Knowledge and Folklore: An Overview, ¶ 30, WIPO Doc. WIPO/GRTKF/IC/1/3 (Mar. 16, 2001).

114. *See* Intergovernmental Comm. on Intell. Prop. and Genetic Resources, Traditional Knowledge and Folklore: An Overview, ¶ 30, WIPO Doc. WIPO/GRTKF/IC/1/3 (Mar. 16, 2001).

115. WORLD INTELL. PROP. ORG., THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, Background Brief No. 2, 3 (2015), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf [https://perma.cc/U95W-U9JF].

treaties to protect TK, traditional cultural expressions, and genetic resources.[116]

V. WHY HARMONIZE PROTECTION FOR CULTURAL IP?

Ghanaians understand, for example, that one cannot use the Coca-Cola name or the Nike "swoosh" logo without permission from the companies that own these marks.[117] Most people understand that it is not legal to copy someone else's literary or artistic work. Advertising and education about IP appears to have been successful enough that Ghanaians are aware of IP, or at least about authentic and counterfeit goods.

Like many citizens of developing countries, the distribution of wealth is such that some Ghanaians can easily purchase brand name goods, while others may not be able to afford the higher prices of authentic products.[118] Counterfeit goods may be sold alongside authentic products, which may cost more than the imitation.[119] It is infringement, admittedly—not unlike what someone may find on the streets of New York or Miami at locations where counterfeit watches, bags, or other

116. Viviana Munoz Tellez, *The WIPO Negotiations on IP, Genetic Resources and Traditional Knowledge: Can it Deliver?,* S. CENTRE POL'Y BRIEF, Sept. 2016 at 6, https://www.southcentre.int/wp-content/uploads/2015/10/PB22_The-WIPO-Negotiations-on-IP-Genetic-Resources-and-Traditional-Knowledge-Can-It-Deliver_EN_rev.pdf [https://perma.cc/5YJ8-6MXE].

117. *See* TRIPS Agreement, *supra* note 11, at arts. 15, 16; *see also* Interview by Myra J. Tawfik with Professor Emmanuel Bobobee, Chairman, Nat'l Intell. Prop. Policy Comm. in Ghana, (Apr. 25, 2016), https://www.cigionline.org/articles/world-ip-day-ghana-establishes-ip-strategy-build-industries-and-address-unemployment [https://perma.cc/YZ6E-X6Z7] (discussing Ghana's development of an IP education strategy).

118. EDGAR COOKE, SARAH HAGUE, & ANDREW MCKAY, THE GHANA POVERTY AND INEQUALITY REPORT: USING THE 6TH GHANA LIVING STANDARDS SURVEY (2016). The consumption share of the wealthiest 10% rose slightly from 32.1% of national consumption to 32.5% between 2006 and 2013. Over the same period the bottom 10% increased their consumption share from 1.67% to 1.72%. *Id.* at 16. For example, the IMF reports Ghana's 2016 GDP per capita as 1.7 thousand dollars, while the U.S. GDP per capita is 61.7 thousand dollars. *See GDP Per Capita, Current Prices*, INT'L MONETARY FUND, http://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOWORLD/USA [https://perma.cc/YH3Z-K72T] (last visited May 14, 2018). GDP is used to measure living standards and may not always correlate to household disposable income, but it gives some indication about national living standards. *See OECD Insights, Statistical Insights: What does GDP Per Capita Tell Us About Households' Material Well-Being?* (Oct. 6, 2016), http://oecdinsights.org/2016/10/06/gdp-per-capita-households-material-well-being/ [https://perma.cc/P9PV-Q56N].

119. For example, during a recent trip to Ghana, I was given the option to purchase an authentic memory disk or an imitation disk at half the price. The seller advised that the authentic was worth the investment if I could afford it. Of course, it is possible that even the "authentic" was a counterfeit since, to my untrained eye, they all looked the same.

items are sold. If caught by local authorities, the counterfeiters will be shut down and the counterfeit goods confiscated in accordance with the law.[120]

Nonetheless, as a buyer, one may choose to take the risk that one is not buying "the original" (or this may be what the purchaser can afford), but the purchase is made with full awareness that the product may not function to a high standard. Authentic products are understood to be better, which is why they are more expensive. With this understanding of the essentials of IP law, an ordinary Ghanaian citizen could rationally assume that the unauthorized use of the adinkra symbol would, similarly, be a violation of IP laws. Yet, the answer to this question about the use of the adinkra symbol is not as straightforward as it may initially seem to the ordinary person, or even to a sophisticated consumer.

It is not, therefore, unreasonable for Ghanaians to be surprised to see adinkra symbols reproduced on bags sold by an American company. They have no reason to expect a U.S. corporation to appropriate, reproduce, and sell a protected Ghanaian symbol, especially without appearing to acknowledge that the symbol represents something or that it has any significance in West African culture. Yet, we cannot ascribe malice or bad faith to the company. The company may be unaware that they have committed any transgression. Indeed, their actions appear to be compliant with U.S. and international IP law.[121]

Without some minimum international standards, Ghanaian efforts to monitor the use of adinkra symbols outside of Ghana will be rendered ineffective. As discussed, it may be a copyright violation to use the adinkra symbol without authorization under Ghanaian law, but this does not mean that it is a copyright violation to use the adinkra symbol in the United States without permission.[122] Such inconsistencies in IP laws across borders was one of the reasons why IP minimum standards were harmonized under the TRIPS Agreement.[123]

The adinkra symbols on backpacks and the other goods that are available for sale through the Internet may indeed be a form of trade-

120. Note that countries do not always have the resources to direct towards policing infringement. For example, developing countries may have limited resources to distribute towards public services, such as maintaining roads, clean water supply, or the electricity grid. However, Ghana, as a WTO member state, does prohibit counterfeiting.

121. *See* Copyright Act (1976), *amended by* 17 U.S.C. § 102(a) (2017) (protectable subject matter) and §301 (2017) (term of protection); TRIPS Agreement, *supra* note 11, at art. 9 requires WTO members to comply with Articles 1-21 of the Berne Convention. Berne Convention, *supra* note 11, at art. 7 requires Berne member countries to provide a minimum term of copyright protection of life of the author plus 50 years for most works.

122. *See supra* Section III.A.

123. *See* TRIPS Agreement, *supra* note 11, at pmbl.

related IP. The bags and other products that reproduce the protected adinkra symbol can, and will, be sold and circulated across borders, possibly even eventually finding their way to Ghana. Arguably, the concerns about trade in goods among countries with differing IP standards are equally applicable to these symbols, which are protected under Ghanaian copyright law as part of the cultural heritage of Ghana.[124] The TRIPS Agreement arose, in part, because companies wanted to ensure that their IP-protected products could cross borders without worrying that others might somehow copy or use their IP.[125] The same argument can be extended to cultural IP.

If differing standards for traditional IP rights would cause trade distortions, why does a similar rationale not apply to cultural IP? Under the current system, private enterprises are free to send goods across borders, even where those goods bear marks or symbols that would infringe a nation's legally recognized cultural IP.[126] In principle, this is similar to the challenges posed by having differing IP standards across nations that are engaged in trade in goods and services. In light of the global flow in goods and persons, it makes sense to have some minimum enforceable standards for cultural IP.

Certainly, governments and private actors could encourage corporations to respect cultural IP in the same way the corporate social responsibility movement has called on multinational corporations to respect human rights, for example.[127] Nonetheless, the law still plays a critical role. Relying on corporations to engage in socially progressive behavior without the possibility of any legal remedy is not a satisfactory solution.

Having enforceable international standards was important for IP owners.[128] There are no natural boundaries for intangible goods—they are non-rivalrous and non-excludable, which is what creates the "free-rider" problem.[129] International legal protection was necessary, in part, because

124. Copyright Act (Act No. 690 § 4/2005) (Ghana).

125. *See* SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 8 (2003) ("In the TRIPS case, private actors pursued their interests through multiple channels and struck bargains with multiple actors . . . ."). Gervais, *supra* note 70.

126. *See* discussion *supra* Section IV.

127. John Ruggie (Special Representative of the Secretary General), *Guiding Principles on Bus. and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, at 13-16, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

128. *See* SELL, *supra* note 125, at 7-10 (providing an introduction to TRIPS).

129. J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363, 378-79 (1996):

> Professor Martin Adelman and his co-author, Sonia Baldia, take issue with Professor Oddi by arguing that economic analysis does justify strong international minimum standards of

the average person did not perceive any harm in reproducing or sharing copyrighted content, for instance.[130] Similarly, an international legal solution is necessary in this situation because of the difficulty in dealing with legal rights across borders and because not everyone is convinced that cultural IP should be protected. This perception of cultural IP is exacerbated by the fact that there is global protection for many kinds of intangible goods through the TRIPS Agreement and other international agreements, but no international agreement for the protection of cultural IP.[131]

When enterprises use the adinkra symbols without permission, it undermines Ghana's ability to reclaim control of the symbols. Trademark law is not particularly effective in this instance because trademark rights normally extend to the geographic region where the mark is used or registered, with a limited exception for well-known marks under the Paris Convention and the TRIPS Agreement.[132] Even with famous trademarks, such as Coca-Cola or Nike, the mark owner needs to demonstrate that the mark is well known in the geographic region where the claim is being made.[133] For reasons explained above, copyright law is also ineffective in preventing the use of adinkra symbols in the United States.[134]

Despite the absence of any international protection for this kind of intangible property, protecting folklore through national legislation, as

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> patent protection. In their view, a universal patent system will, on the whole, benefit the world community by eliminating the free-riders' disincentives to innovate in all market structures and by increasing the supply of needed inventions that would otherwise not have been made.

But see Mark A. Lemley, *Property, Intellectual Property and Free-Riding*, 83 TEXAS L. REV., 1031, 1051-52 (2005):

> The lessons of the previous subpart suggest that we should not therefore be particularly worried about free riding in information goods. It is not that free riding won't occur with information goods; to the contrary, it is ubiquitous . . . . As we have seen, there is no general reason to worry about uncompensated positive externalities. Indeed, part of the point of intellectual property law is to promote uncompensated positive externalities, by ensuring that ideas and works that might otherwise be kept secret are widely disseminated.

130. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Tingsrätt [TR][District Court] 2009-04-17 B 13301-06 (Swed.) (Pirate Bay criminal case) translation available at http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf [https://perma.cc/RZ3M-8E49]; Daniel Goldberg & Linus Larsson, *Pirate Bay Co-founder Peter Sunde: In Prison You Become Brain Dead*, THE GUARDIAN (Nov. 5, 2014), https://www.theguardian.com/technology/2014/nov/05/sp-pirate-bay-cofounder-peter-sunde-in-prison [https://perma.cc/6CY9-4LBM].

131. *See supra* Section IV.

132. Paris Convention, *supra* note 13, at art. 6bis; TRIPS Agreement, *supra* note 11, at art. 16.3.

133. *See* McDonald's Corp. v. Joburgers Drive-Inn Restaurant Ltd. 1996 (1) SA 1 (CC) (S. Afr.).

134. *See supra* Section III.B.

Ghana has done, is helpful insofar as it contributes to a trend of protecting cultural heritage nationally. Ghana is not alone in protecting its intangible cultural property. For example, a handful of countries, including Nigeria, Tunisia, and China, also have national laws to protect their intangible cultural goods.[135] This is a clear indication that countries value intangible cultural heritage, and are willing to protect it, even in the absence of clear international consensus on the matter.

To reiterate, the phrase "cultural IP" as used here has two key characteristics. First, it shares a lot in common with classic IP. Second, it is protected under domestic IP law as a form of cultural heritage. Recognizing that there is no effective solution at this time, the next section offers some modest strategies that nations, such as Ghana, can adopt in an effort to minimize the unauthorized use of their cultural IP.

VI. PROTECTING CULTURAL IP

A. Options Available to the Government of Ghana under the Existing Regime

First, even though the Ghanaian government cannot prevent Vera Bradley from using adinkra symbols, nations facing similar situations may wish to advise the offending company that is engaged in the unauthorized use of the cultural IP and that their national law, like the Ghanaian law, protects the symbols or artwork at issue.[136] Legally, Ghana could protect its interests by registering and using kente cloth and adinkra symbols as GIs or as official marks as a way to further protect Ghana's cultural heritage.[137] For instance, kente cloth could be registered as a GI of a specific region of Ghana. In addition, the Ghanaian government should consider incorporating adinkra symbols for use as official marks of the Government of Ghana.

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135. *See Copyright Act: Protection of Expressions of Folklore*, NIGERIAN LAW INTELL. PROP. WATCH INC., https://nlipw.com/copyright-act-protection-of-expressions-of-folklore/ [https://perma.cc/962D-XTNU] (section 31 governs folklore protection) (last visited Feb. 2, 2018); Tunis Model Law on Copyright § 6 (1976) ("Works of national folklore are protected by all means . . . without limitation in time."); Copyright Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991, amended Oct. 27, 2001) art. 6 (China). http://www.lawinfochina.com/display.aspx?id=2108&lib=law&SearchKeyword=copyright%20law&SearchCKeyword [https://perma.cc/CPX3-FH5X] ("Measures for the protection of copyright in works of folk literature and art shall be established separately by the State Council.").

136. This Article is based on the understanding that the government of Ghana has not been in communication with the Vera Bradley company.

137. *See* TRIPS Agreement, *supra* note 11, at art. 22.

Second, in pursuing this route, it would be important to ensure that Ghana has an efficient mechanism for protecting GIs and government marks. If GIs and official marks were to be pursued as a strategy for protecting Ghanaian cultural heritage, there would need to be a clear and simple mechanism to allow ordinary Ghanaians, for whom the folklore is held in trust, to use the symbols and marks.

Third, there may be some value in establishing a Ghanaian online cultural heritage database. This would put the global public on notice that certain symbols and cultural artworks are part of Ghana's intangible cultural heritage. Further, such a site could advise the public that, at least with regard to adinkra symbols and kente, Ghanaian law requires individuals who seek to use this Ghanaian cultural heritage to obtain permission through the appropriate channels.

The suggestions offered above provide short-term solutions that are only partially effective. Even if the Ghanaian government takes the suggested actions, the unauthorized use of adinkra symbols cannot be effectively prevented in the United States because of the gaps within the existing international IP regime. At the same time, future claims to adinkra symbols as Ghanaian symbols are further undermined if uses outside of Ghana, such as the reproduction of the symbol on the Vera Bradley bag, are permitted to continue unchecked. The treatment and use of adinkra symbols as if they are a part of the public domain makes it more difficult to effectively protect this cultural IP. A long-term solution to this type of situation requires harmonization of minimum standards for trade-related cultural IP.

B. Long-term Solution: Amend the TRIPS Agreement to Include Protection for Cultural IP

Some minimal protection for cultural IP would not require a new international agreement, but rather a slight modification to the TRIPS Agreement. Since every WTO member is required to comply with the TRIPS Agreement this would be an effective way to provide international protection to cultural IP.[138] Protecting trade-related cultural IP, such as Ghanaian adinkra symbols, could be harmonized using a model that is based on the international protections that exist for GIs or governmental symbols. As discussed, adinkra symbols are attributable to a particular geographic origin and thus protectable as a GI, or alternatively could be

138. *See* TRIPS Agreement, *supra* note 11, at pmbl., art. 1.

claimed by Ghana as a symbol to represent the government of the nation.[139]

Adinkra designs are already protected under Ghanaian domestic law.[140] A system based on a model for protection for GIs and government marks could prevent the unauthorized use of adinkra symbols as a trademark or other indicator of source.[141] However, the law should protect the symbol, even if it is not being used in commerce as a source indicator. This is because, as in this case, Vera Bradley appears to have used adinkra symbols in a decorative fashion, rather than as a mark which indicates the source of goods. The cultural IP protection should prevent unauthorized reproduction and distribution that would normally be a violation of copyright. However, this protection would be made available for cultural IP, even if it is not an original work of art by an identifiable author. The protection would also extend to cultural IP that is not being used in commerce as a trademark or GI, and that has not been adopted as a government symbol.

In other words, the law would be similar to some combination of the protection offered through trademarks, GIs, government marks, and copyright protection. Trademark, GI, and government mark protection can continue indefinitely, so the indefinite term of protection for cultural IP should not be a cause for concern.[142] The international community has already accepted that some IP, such as GIs and trademarks, can exist forever.[143] While some types of IP, such as patents and copyrights, must eventually become part of the public domain, this is not true for all forms of IP.

Moreover, industrialized nations have been willing to expand the duration of copyright to protect their industries,[144] and to expand categories of IP rights to include protection for GIs and compilations of data, for example.[145] There should be little resistance, therefore, to providing something akin to copyright or trademark protection for a narrow category of cultural IP. Indeed, cultural IP is most closely related to the forms of IP that have very long terms of protection, in the case of

139. Paris Convention, *supra* note 13, at art. 6ter; TRIPS Agreement, *supra* note 11, at art. 22.

140. *See* Copyright Act (Act No. 690/2005) (Ghana).

141. Paris Convention, *supra* note 13, at art. 6ter.

142. *See* TRIPS Agreement, *supra* note 11, at arts. 22-24. There is no term of protection for GIs.

143. *Id.* at arts. 17, 22.

144. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended 17 U.S.C. §§ 108, 203, 301-304) (extending the term of protection for copyrighted works by 20 years).

145. TRIPS Agreement, *supra* note 11, at art. 10.

copyright, or potentially indefinite terms of duration, such as trademarks and GIs.[146]

This is not to suggest that governments should be able to obtain cross-border protection for anything that they define as cultural IP. So, what should be the scope of cultural IP, and how should it be limited? This protection does not need to be available for all artworks, symbols, or practices that are claimed as cultural heritage. It can be limited in scope by some of the principles that are already present under existing international IP agreements. This narrow category of cultural IP would extend to those cultural goods which could be protected by IP rights if they were not used in commerce as indicators of source. If copyright (or some other type of IP rights) subsist in the work under domestic law, or the work is protected as part of the cultural heritage of a nation, it should be protectable across borders. Further, rights would attach even if the government has not formally adopted the work as a GI or a government mark.

VII. CONCLUSION

This Article has offered some modest suggestions for harmonizing protection for cultural IP across borders. This could be limited to recognition for certain kinds of cultural IP, such as adinkra symbols or kente, that meet the general criteria for GI protection or official mark/government mark protection even if the symbols or marks are not being used in as classic trademarks or government marks.

The justifications for protecting trade-related IP can be applied to trade-related cultural IP as well. When protected cultural IP, such as adinkra symbols, are reproduced and sold in commerce in the United States, there may be both economic injury and reputational injury to Ghana. Such injury may be present, even if the cultural IP is not being used in commerce as required by trademark law, or no longer qualifies for copyright protection. This Article has argued, therefore, that some international protection for cultural IP is necessary to protect cultural symbols and works across borders.

146. *See id.* at art. 18.