

THE DILEMMA OF COPYRIGHT IN SUB-SAHARAN AFRICA: GHANA IN FOCUS

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Abstract

A just, fair and equitable international copyright system is vital for the proper functioning of knowledge development and access. Thus copyright law has come to occupy the centre stage of international economic development and countries identify it as a powerful catalyst in fostering national economic growth. The terms of international copyright treaties, however, hamper the ability of sub-Saharan Africans to compete effectively with other countries. This research employs a single case study qualitative research design to examine Ghana's national copyright statutes and the influence on them of its international copyright agreements. Using Rawls' theory of justice as the conceptual framework for the analysis, this study argues that in spite of the efforts to ameliorate the equity of international copyright systems for developing countries such as Ghana, key features of those systems remain inherently unjust.

Dedication

To my parents – Kwasi Owusu-Ntansah and Victoria Gyapong.

Victoria Gyapong, your unfailing love and emotional support has been my source of strength throughout this journey.

All that I am today, and all that I hope to ever be, is due to your support, wisdom, and encouragement, Kwasi Owusu-Ntansah.

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Table of Contents

Abstract.....	i
Dedication.....	ii
Acknowledgements	iii
Chapter One: Introduction	1
Background of the Study	1
Theoretical Framework	5
Statement of the Problematic	6
Research Questions.....	7
Purpose of Study.....	8
Methodology	8
Structure of the Paper.....	9
Chapter Two: Literature Review.....	11
Rawls' Theory of Justice.....	11
The Political Economy of Copyright	15
Issues Related to Copyright in Sub-Saharan Africa.....	19
Ghana's Unique Case.....	23
Rationale of the Study	25
Research Significance	27
Chapter Three: Research Design and Methodology	29
Research Design	29
Sample.....	31
Data Collection	33
Data Analysis	35
Validity and Reliability	35
Chapter Four: Results and Analysis	37
The Ghana Folklore Tax.....	37
Protection of Literary and Artistic Works	41
Issues in the Trade Related aspect of Intellectual Properties in Sub-Saharan Africa.....	46
Conclusion	51
Chapter five: Conclusion.....	52

Summary of Findings	52
Importance of Research Findings	53
Implications of Research Findings	54
Conclusion and Recommendations for Further Research	56
References	58

Chapter One: Introduction

Copyright has come a long way since its inception in the 1880s. Today, copyright does not only serve its traditional role of protecting the rights of authors; it has become one of the major pillars upon which nations spur economic growth. After several decades of development, the system of international copyright has earned global recognition and acceptance as the benchmark by which nations regulate information dissemination. Varying degrees of development among member states, however, present a myriad of problems when it comes to balancing the need to protect national interests while meeting required international standards. For African countries this can be a dilemma, primarily because of their distinct cultural background, as well as their notorious struggle with poverty. A balanced system of international copyright that serves the interests of all member states equally is needed to facilitate maximum economic benefits for all. This research paper details the level of fairness and equity of international copyright regimes in relations to their influence on the national copyright legislations of sub-Saharan African nations as they apply to Ghana.

Background of the Study

The World Intellectual Property Organization (WIPO) defines copyright as the right granted to the author or creator of a literary and artistic work to be the sole copier, producer, distributor, performer, and/or translator of that work (WIPO, 2012). Fundamentally, copyright is the law that gives persons ownership over their creation. Through the institution of copyright laws, a means of compensation is provided to creators by granting them a time-limited monopoly right of reproduction and distribution, after which the work enters the public domain for unrestricted access. Copyright is a subset of Intellectual Property Rights (IPRs). IPRs consist of statutorily recognized rights, which provide incentives for people for the creations of their minds

in order to foster moral and commercial values (World Trade Organization, 2013). Intellectual property rights, since their inception in the 1700s, have received a lot of attention and criticism. In recent times especially, the subject of intellectual property rights is one of the few which has generated the most literature and controversies with an ever rising profile (Fisher, 2001; Sikoyo, Nyukuri, and Wakhungu, 2006). As one sub-set of intellectual property laws, international copyright law, since its inception in 1886, has generated a large literature on the critiques of the challenges it poses to access to information (Ibid).

Among the challenges that emerged as a result of the creation of international copyright laws was the “developing country¹ perspective” on copyright (WIPO, 1997). This challenge concerns the equity of international copyright arrangements (Sikoyo et al., 2006). The major concern of developing countries regarding international copyright law has been its inappropriateness for supporting their cultural, educational and developmental goals (WIPO, 1997). Economic factors limit developing countries from accessing information protected by restrictive intellectual property laws (Nicholson, 2006). In the past, revisions have been made to the Bern Convention² (such as the 1971 revision) to accommodate the concerns raised by developing countries. However, these did not entirely resolve the contradictory perspectives that developed and developing countries have on the functions and utility of international copyright law for their respective interests. As the main exporters of literary works and the place of origin

¹ A developing country, also known as a less-developed country, is a nation with a low living standard, undeveloped industrial base, and low Human Development Index as compared to other countries (Sheffrin, 2003). The term “Developing/Less-developed countries” is used in this context to refer to both “developing countries” and “least developed countries”. The United Nations Conference on Trade and Development (UNCTAD) differentiates “Least Developed Countries” from “Developing Countries” by classifying “Least Developed Countries” as countries that show the lowest levels of socioeconomic development (UNCAD, 2012). In this context, however, they are all classified as developing countries with varying degrees of development.

²The Bern Convention is “the world’s first broadly multilateral copyright treaty, which still acts as the cornerstone of international copyright today” (Bannerman, 2011, p. 32).

of copyright law, developed countries have regarded copyright as a fundamental right and have advocated for stronger protection of these rights in international copyright agreements (Post, 1998).

In the case of Ghana, the development of the *Ghana Copyright Act, 2005 [Act 690]* was influenced by the World Intellectual Property Organization (WIPO)'s recommendation for equity in folklore laws. The WIPO's recommendation for developing countries to protect their folklore from possible exploitations by developed countries as a result of their commercial technological advantages was considered in the development of the *Ghana Copyright Act, 2005 [Act 690]*. The folklore law section of the *Ghana Copyright Act, 2005 (Act 690)*, however, was very poorly received by local artists. Article 64 of the *Ghana Copyright Act, 2005 [Act 690]* forbids musicians to use folkloric melodies and rhythms in their music unless they get authorization to do so and pay for the use. The *Ghana Copyright Act 2005 (Act 690)* defines folklore as:

The literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes Kente and Adinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore. (Article 76, para. 13)

Folklore copyright in Ghana is owned by the President on behalf of Ghanaians. In cases where the work is made by or under the direction of the President himself, copyright vests in an international body on behalf of and in trust for the people of the Republic of Ghana or a specified international body [*Ghana Copyright Act 2005 (Act 690)*]. The right of reproduction, communication with the public by performance, distribution by cable or other means, adaptation, or translation of Ghana's folklore therefore resides with the President or a delegated international body on behalf of the Republic of Ghana. Ghanaians have argued that the folklore copyright law poses economic barriers to local musicians (WACC, 2003). They view a law that vests copyright

for Ghana's cultural resources (such as traditional beliefs, practices, customs, stories, jokes and songs) in the Republic's president being oblivious to the economic challenges of local artists as neither just nor efficient. This controversy and debate began in 1996 when the regulation was introduced and continued until 2005 when the Bill was enacted into law (Ibid).

In the field of literary works, advocates have argued that copyright poses a major barrier to education in less developed countries because of their massive dependence on imported materials (Nicholson, 2006). In the case of Ghana, there are a number of issues that directly affect access to information and educational development. These include the payment of yearly servicing and subscription fees for digital content in libraries; the inability to make complete copies of foreign books that are either inaccessible or unaffordable; the inability to convert materials into readable formats (large prints, audio, Braille) for the visually impaired; and the inability to access certain Internet sites for free, as per the requirements of international copyright laws (Mensah Darkey & Akussah, 2009). This is the plight of other African countries as well (Nicholson, 2006). Section 22 of the *Persons with Disability Act 2006, (Act 716)* of Ghana's copyright law requires only that "a public library shall as far as practicable be fitted with facilities that will enable a person with disability to use the library" (*Ghana Copyright Act, 2005 [Act 690]*). This does not encourage the provision of accessible formats of copyrighted materials for the visually impaired.

The merging of trade and intellectual property through the World Trade Organization (WTO)'s Trade-Related Aspects of Intellectual Property Rights agreement (TRIPS) has posed more barriers to trade in intellectual property goods especially for developing countries. Recently, the Ghanaian Minister of Trade and Industry, Hannah Tetteh, announced the development of a *National Intellectual Property Policy Strategy* (NIPPS) document. The new

policy is supposed to bring Ghana's intellectual property regime in line with its international commitment under the World Trade Organization on the trade-related aspects of intellectual property rights (Vibe Ghana.com, 2012). This means that the policy will ensure the "protection, administration and management, enforcement, generation and commercialization of intellectual property systems of the country" (Vibe Ghana.com, 2012, para. 4). This should be good for the country's economic development in terms of the foreign exchange that will be derived from the payment of royalties by foreign users. However, the policy makes no exemptions for local users of the folklore, for instance, and now more than ever will place Ghanaian artists under stern scrutiny. In short, great importance is attached to meeting international standards but little consideration is given to domestic priorities.

Theoretical Framework

In accordance with this study's focus on the fairness of international copyright systems, Rawls' theory of justice provides an appropriate lens through which to conduct the analysis.

According to Rawls' theory of "Justice as Fairness" "the most just basic structure for a society is the one you would choose if you did not know what your role in that society's system of cooperation was going to be" (Lovett, 2011, p. 19). A system is considered to be fair, according to Rawls, insofar as the individual members would have chosen it without any prior knowledge as to how it would affect their personal interests (from behind "a veil of ignorance").

Aside from the veil of ignorance, Rawls also posits that all members of societies are equal. As such each one should have an equal right to the most extensive basic liberty compatible with a similar liberty for others (Rawls, 1971). Where equal distribution of societal benefits is impossible, social and economic benefits should be arranged so that "they result in

compensating benefits for everyone, and in particular for the least advantaged members of society.” (Ibid, pp 14-15).

Analogously, the basic structure of international copyright organizations would be considered to be just and fair if countries that are party to them would still choose to be members without knowing how the system would affect their countries’ interests. Each member nation of the organization should have equal rights to economic benefits from copyright systems as others. Where equal distributions of rights are impossible, the unequal distribution should be in the favour of the least advantaged members.

In this research, the theory of justice is applied by identifying the veil of ignorance in the member nations’ choice of their membership to international copyright organizations. An equal distribution of economic benefits for all members is identified. Ghana as a least advantaged member of international copyright organization is established. Finally, the extent to which the unequal distributions of economic benefits from copyright in international copyright organizations are to the advantage of Ghana is explored.

Statement of the Problematic

Regardless of their nationality, intellectual property owners become, for a period of time, the sole exporters of their literary materials (Pugatch, 2004). The commercial benefits that this copyright monopoly provides for the countries which are net exporters of such products encourage them to participate in international intellectual property systems. This means that “the more capable a country is in the realm of intellectual property, the more likely it is to increase its net benefit by entering such a system” (Pugatch, 2004, p. 49). The first countries to advocate international copyright were the two major exporters of literary property - Great Britain and France (Post, 1998). In Post’s view, this demonstrates that copyright legislation, since its

inception “from the very first French-Belgian treaty and the early American refusal to undertake international copyright obligations, has been a protectionist card that nations play according to their current notion of what arrangements will best promote the national interest” (Ibid, para. 19). Economic benefits, rather than the public interest, appear to have been the main motivation for national positions on international copyright. Members of international copyright organizations, in short, have not chosen them from an ignorant point of view. This raises suspicions about whether these organizations meet Rawls’ test for fairness including his view that justice is more important than economic efficiency. According to Rawls’ theory, “social and economic inequalities ... are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.” (Lovett, 2011, p. 29). Less-developed countries, being mainly importers of literary and artistic works, are bound by regulations of international copyright regimes that are economically disadvantageous to them, and contrary to Rawls’ theory, these economic inequalities do not appear to be to the advantage of the least favoured – developing countries.

Legislation such as Article 64 of *The Copyright Act, 2005 (Act 690)* and the *National Intellectual Property Policy and Strategy of Ghana* raise questions about the fairness of international intellectual property systems and how they support the very basic freedom and right of less developed countries (such as Ghana) to choose what system to adopt to protect their intellectual property in accordance with domestic circumstances.

Research Questions

In light of the foregoing, two major questions arise:

1. How do developing countries' international intellectual property obligations influence their national copyright regimes?
2. To what extent is this influence consistent with the equity, fairness, and/or justice of international intellectual property systems?

Purpose of Study

The purpose of this study is to explore the equity of the influence that international copyright regimes have on copyright legislation in sub-Saharan African countries; focusing on Ghana. In doing so, this research examines the basic structure of international copyright agreements, applying Rawls's theory of "Justice as Fairness", taking into consideration the differing levels of development and individual circumstances of the countries that are parties to international copyright regimes.

Methodology

This study employs a qualitative research design because it answers a "how" question. It is a case study of a single country – Ghana. In order to address the research questions, Ghana's national copyright statutes and international copyright agreements are examined. The examination analyzes the influence that international copyright regimes have had on the legislation of Ghana's domestic copyright laws. The analysis applies Rawls' theory of justice to explore the fairness of the influence of international copyright systems Ghana is party to.

The analysis is grouped into three major themes – The Ghana Folklore Tax, Protection of Literary and Artistic Works, and Issues in the Trade Related aspect of Intellectual Properties in Sub-Saharan Africa. The findings drawn from the various themes provide multiple evidences that reveal the equity of international copyright systems.

The findings of this study illustrate the extent to which international copyright systems are fair in terms of their economic impact on Ghana and the sub-Saharan African region as a whole. This information may provide policy decision makers in Ghana ideas on how best to manage their current challenges in copyright system in order to make the most benefit possible. At the international front, it may also provide a direction on how best to bring international copyright systems to an equitable level. With regards to the field of communication, this research contributes to the paucity of literature available in copyright issues in sub-Saharan Africa. The findings of the case study of Ghana provide suggestive insights into the copyright issues that affect sub-Saharan African countries.

Structure of the Paper

The remaining four chapters of this paper have been organized as follows. Chapter two provides a review of the literature on copyright in literary works and gives a general background of the rationale for copyright legislation. The chapter traces the origins of national and international copyright regimes (such as the Bern Convention) and discusses their rationale. The chapter then assesses the fairness of these regimes using Rawls' theory of justice. This lays the foundation for an exploration of the fairness of the effects that international copyright agreements have on national copyright legislation in developing countries (Ghana, in this case study).

Chapter three provides an outline of the Case Study research design and methodology and justifies why this design is considered the most appropriate for the study. It gives a step-by-step guide on how the research has been conducted to demonstrate the validity and reliability of the research design.

Chapter four explores the major contemporary challenges that Ghana faces with its national copyright regime and how international copyright agreements' influence on those challenges reflects the fairness of the basic structure of international copyright regimes. In assessing the relationship between Ghana's international copyright obligations and its national copyright regime, the effect of the Bern convention and the UNESCO/WIPO Model Provisions on the country's domestic copyright law is examined. The scope is expanded to include some comments on African regional copyright trade challenges, including the Swakopmund Protocol's correspondence to TRIPS.

Chapter five concludes the analysis with a summary of the main findings of the research. It also makes a number of suggestions on how Ghana can improve its copyright regime in order to maximize potential benefits from the existing international copyright system. Other recommendations that will be helpful for the entire sub-Saharan African region have also been proposed. Although the focus on Ghana for this case study may not capture all the issues related to copyright in the entire sub-Saharan Africa region, it is meant to provide an insight into some issues common to each country in the region.

Chapter Two: Literature Review

As has been indicated in the previous chapter, attempts made so far to solve the issues of international copyright still fall short of what is required. Some members of international copyright organizations continue to be unfairly treated. In this chapter, a succinct account of the plight of some of the nations of sub-Saharan Africa under current multilateral arrangements is provided. The unique case of Ghana is explored in more detail. Rawls' theory of justice is applied to explore the equity of current arrangements. An overview of this theoretical lens is provided to reveal exactly how the questions raised in this study have been addressed.

Rawls' Theory of Justice

A Theory of Justice was developed by an American political philosopher called John Rawls (1921 – 2002) in the 1950s. He then wrote a book with this title in the 1960s which was published in 1971 (Pogge, 2007). It is important to understand the context in which the theory was developed. The early 1950's was the so-called McCarthy Era in American politics. With the Cold War between the U.S.A. and the U.S.S.R. at its height, fear of communism was widespread and Senator Joseph McCarthy and the House Un-American Activities Committee in the House of Representatives aggressively investigated and accused many Americans for being communists and of treasonously betraying their country to the Soviet Union. Many of these accusations were made recklessly and without supporting evidence (Fried, 1997). They resulted in many people, especially government workers, losing their jobs and some being imprisoned (Ibid). This triggered massive interests in the importance of individual rights. At the same time, welfare-state institutions introduced during the 1930's were finally becoming accepted as permanent feature of the American society; raising issues of inequality and government's role in redistributing income and economic opportunities. Rawls' theory was therefore a timely philosophical response to

these events which sought to provide a theoretical basis for individual rights and socioeconomic justice (Lovett, 2011). Moreover, Rawls' *Theory of Justice* was a critique of two of the then most dominant traditions in moral and political philosophy – Utilitarianism³ and Intuitionism⁴ - but more particularly, Utilitarianism. The summary of Rawls' critique of Utilitarianism is that, each individual is a significant member of society who contributes a quota to the overall welfare of the society. No individual's happiness is hence more vital than another's. All are equally important in society. As such, it is not acceptable for a society to be deemed as just because the sum total happiness of the people is maximized at the expense of the happiness of a minority. Rawls also rejects the Intuitionist moral philosophy (which had been dominated by Utilitarianism any way) on the basis that individuals' perceptions are influenced by their forms of socialization as well as their current expectations which could bias their judgements. Also, because two or more common sense principles could conflict in a particular situation, intuitionism made it difficult to determine the most appropriate moral action to take.

According to Rawls' theory of justice, "the most just basic structure for a society is the one you would choose if you did not know what your role in that society's system of cooperation

³ Utilitarianism is a moral philosophy that was developed by an English Philosopher called Jeremy Bentham (1748 – 1832) in the late eighteenth century. It is the principle which approves or disapproves of every action according to the tendency which it appears to have to augment or diminish the sum total happiness of people, counting each individual's happiness as equal (Posner, 1979). The moral philosophy of Utilitarianism is based on the consequences of actions. Something is judged as right or wrong depending on the consequences. If it pleases more people than it displeases, it is right; otherwise it is wrong. Utilitarianism answers two fundamental questions – "What is good" and "what is right". Something is good if it generates happiness/contentment; and something is right if it helps to maximize happiness. As such, in a society where there are more men than women, if it makes the men happy/content to have their wives stay home as house wives, then the concept that all married women should be housewives would be right.

⁴ Intuitionism is the moral philosophy which believes that people can judge what is good from what is bad through direct awareness of reality without any external intervention. There is no need to resort to reasoning processes such as deductions or inductions (Frazier, 2012). It is a tentative theory that does not provide guidelines on how the basic structure of the society should be organized in order to properly resolve disputes. Intuitionism is simply reliance on common sense.

was going to be” (Lovett, 2011, p. 19). A truly just society is the one which rational people would choose from behind a “veil of ignorance” (a position where one is ignorant how one’s choice will affect one’s personal well-being). Rawls vests the power to decide on what is just into the hands of the parties involved; assuming that once individuals see themselves as equals with other members of the society (which being unaware of how your own situation would be affected encourages you to do), they are not likely to choose a principle which offers a greater sum of advantages to a majority group at the expense of a minority group when they do not know which group they will fall within. Rawls (1971) divides the *Theory of Justice* into two major principles:

First: Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all. (p. 60)

In the first principle, Rawls attacks the “greatest good to the greatest number” principle of Utilitarianism and advocates that every individual should have inviolable basic rights that should not be over-ridden even if that might promote the welfare of the society as a whole. This stand is somewhat connected to the notion that society is a system of cooperation where everyone has unique talents and capabilities which they all put to use for their mutual benefit (Lovett, 2011). As such no one member of the society is better than the other. This makes it compulsory for the happiness of every single member of society to be considered, and not ignored on the grounds that the sum total happiness of the entire society is being maximized.

The second principle of Rawls’ theory is grounded in the fact that individual members of the society are different and not naturally equal. There are differences in personal circumstances and even in preferences. As such, a fair distribution may not always be an equal distribution of items in terms of numbers. Items could be unequally distributed between two parties; so long as

the unequal distribution does not leave either of them worse off and is mutually advantageous.

“Conceptions of justice are to be ranked by their acceptability to persons so circumstanced.”

(Rawls, 1971, p. 17). The only way this can be done is to leave the decision to the parties involved (Lovett, 2011). They are more likely to reach a consensus that works for both of them without leaving either worse off than if the distribution is done according to certain formal standards. Rawls also adds that because individuals differ from each other in terms of capabilities, preferences, personal circumstances, etc., what each individual brings to the table may not always be equal. Individuals are naturally unequal. This means that, parties may not always be able to reach a consensus on a fair distribution if one party deems their goods to be more valuable than the other's. In this case, what Rawls suggests is that, an individual is made up of his natural competencies and talents together with assets that he did not earn on his own accord (such as an inherited wealth or sponsored education) (Ibid). These assets that are conferred on individuals through circumstances place individuals at different starting points in life and make some members of society less disadvantaged through no fault of theirs. From a moral point of view, Rawls believes that if an individual cannot read as well as his peers because his parents were not rich enough to send him to school, he cannot be held responsible for that. Rawls therefore posits a solution to this naturally unfair disparity in the second part of the second principle. What he suggests in such circumstances is for a distribution in favour of the least advantaged (Lovett, 2012). In summary, Rawls posits in his *Theory of Justice* that basic rights and duties should be distributed equally. However, in cases where an unequal distribution has to be made, it should result in benefits for all, particularly the least advantaged.

The Political Economy of Copyright

The concept of copyright legislation started in England in 1709 when the *Statute of Anne* introduced for the first time a codification of authors' rights in law in order to encourage learning. The title of the copyright Act, *An Act for the Encouragement of Learning and for Securing the Properties of Copies of Books to the Rightful Owners Thereof* (United Kingdom, 1709) underscores the primary reason for copyright protection as the encouragement of learning (Patterson & Lindberg, 1991). This has however not been accepted at face value. Many scholars have read deeper meanings into the rationale of copyright legislation; and the purpose for which it was actually intended has been interpreted differently by various scholars. Some scholars have presented copyright as a protection granted to authors to reward them for their creativity in order to encourage them and foster learning (Moore, 1997; Drassinower, 2003), and others see it as a natural law entitlement of authors viewing their works as a part of their personality (Goldstein, 2003; Aide, 1990). However, the majority of scholars have read deeper political meanings into the concept of copyright. Patterson (1968) suggests that the primary goal of the first copyright statute of England was not to cater to the rights of authors per se. According to him, its purpose was simply to neutralize the amount of control book publishers had in the book trade. It did this by vesting the copies of printed books in the authors of the books for a limited period and then making them freely available for all to access without monopoly after the copyright period had expired. The *Statute of Anne's* introduction of copyright protection for authors was to provide an incentive for people who were interested in investing in the manufacture of hardware for the book industry (such as copy and printing machines). By breaking the monopolies in the book trade, people could have easier access to information, which will in turn foster learning and encourage the creativity necessary for promoting science and technology (Randall, 2011;

McKeown, 2000). The argument, therefore, was that the first copyright statute was meant to promote industrialization in the book industry. The motivation is more evident in the second part of the Statute's title which sought to "vest the copies of the books to the rightful owners thereof" (Wilkinson & Gerolami, 2008). According to Wilkinson and Gerolami (2008), the emphasis on "copies", rather than on the authors' work itself, indicates that the real aim was to keep British publishers economically ahead of their European competitors. In their view, while copyright is usually presented as a law that seeks to reward authors for their creativity and promote learning through the dissemination of intellectual works, those reasons were merely masks to promote industrialization and monopoly control (Craig, 2006; Patterson, 1968).

Over time, the technology for producing literary works had advanced from hieroglyphics to typography. Typography made it possible for works to be reproduced on a large scale at lower cost than before. It was easy for anyone with printing press to print and sell copies of any author's works. There was a need for the English to protect publishers who were the real owners of literary works from pirate activities (De Vinne, 1969). There was no law against pirating (unauthorized printing and sale of someone else's work) at this time (Ibid). Copyright protection was therefore introduced simply as a useful tool for managing competition in the booming trade of the book industry by keeping printing under the control of the industrial elites⁵ (McKeown, 2000). This was only an extension of similar developments in other sectors such as transportation, communication and education. Some scholars have bluntly stated that copyright was "enacted for the protection of technology" (Smyth, 1984). In summary, "copyright began as an artificially created legal response to changing economies of England." (Bettig, 1996, cited in Wilkinson & Gerolami, 2008, p. 324).

⁵ Industrial elites are the people who controlled the presses.

Similarly, national economic interests have been posited as the motivation for international copyright regimes. The need for such regimes arose because piracy could only be completely controlled within national borders since literary works could be transported into other countries. There was the need to prevent piracy regardless of which national boundaries (Ricketson, 1987). The first international copyright statute – the *Berne Convention for the Protection of Literary and Artistic Works* – was enacted in 1886 to ensure that copyright holders of literary works were accorded the same rights and control over their works internationally as they had nationally. This secured the entitlement of copyright holders to the monetary benefits of their works even outside the borders of their country; enabling countries to establish monopolies of their works internationally. The convention required member states to abide by the same copyright rules for imported literary works as they did for their local ones. It did this by directing how national copyright laws of member states should be written to accommodate the rights of foreign works (Bern Convention for the Protection of Literary and Artistic Works, 1971). Again, protecting authorized publishers was a major motivation, as well as protecting authors.

When the Bern Union was founded, not all countries were willing to join; including countries that recognized copyright and had domestic laws enacted for it (Samuels, 2000). The United States, for instance, who once did not provide protection for the works of foreign authors while they were mainly importers of literary and artistic works, suddenly shifted to providing protection for foreign authors once they became major exporters of literary and artistic works. This demonstrates the economic rationale behind national policies on international copyright laws (Post, 1998). The initial refusal to enforce international copyrights enabled the United States to ‘free-ride’ on others’ efforts while growing their publishing industry (Ibid). Later, after

becoming major exporters of literary materials, the U.S.A. was an active advocate for the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Ibid).

Copyright was designed mainly because an opportunity was identified in the commoditization of knowledge. By commoditizing knowledge through copyrights, exporting countries of literary works sought to monopolize and control the dissemination of the knowledge contained in the works whose copyrights they controlled. Monopoly is an effective business tactic in any trade. By creating a monopoly the supply of good or service can be controlled and prices increased to improve the profit on each sale. Copyright protection removes knowledge products from the public domain and confers the right of ownership on specific people who can determine the accessibility and price of 'their knowledge'. Copyright owners can thus "charge prices that are in excess of what they would otherwise have charged in the absence of such protection" (Pugatch, 2004, p. 49). McChesney and Schiller (2003) share similar views. According to them, copyright protections are a "government-granted and enforced cartel that prevents competition; it leads to higher prices and a shrinking of the marketplace of ideas, but it serves powerful commercial interests tremendously" (p. 24).

The commoditization of knowledge through copyright protection is the key to understanding the politics of the book trade industry. It is a capitalist approach which strengthens private ownership rights over the production of literary works. These rights are strengthened and maintained through influence over policies opposed to broader public interests. The Center for Public Integrity (2001) alleges that,

Today the regulatory and policy-making process is arguably more corrupt than ever, as tens of millions of dollars have made members of Congress and regulators beholden to powerful corporate lobbies, and the overwhelming majority of the public has no clue that policies are being made in their name but without their informed consent. (Cited in McChesney & Schiller, 2003, p. 3)

Post (1998) draws our attention to the basic fact that the first countries to advocate for the principles of international copyright were the two major exporters of literary property - Great Britain and France. Since its inception “from the very first French-Belgian treaty and the early American refusal to undertake international copyright obligations, copyright has been a protectionist card that nations play according to their current notion of what arrangements will best promote the national interest” (Post, 1998, para. 19). This has triggered dissatisfaction with the international legislation that governs the dissemination of information.

Issues Related to Copyright in Sub-Saharan Africa

The main criticism of copyright legislation since its inception has been that it restricts easy access to information. This is true on the international level as well as the national level. Since its inception, the Bern Convention has been revised a number of times, providing exceptions in order to better balance the need to protect authors’ rights and the public interest. The issue which has aroused the most concern has been that of reconciling the needs of developed and developing countries (Olian, 1974). This has been the case since “different levels of copyright and intellectual property protection may be appropriate to countries at differing levels of development and in different domestic circumstances” (Bannerman, 2011, p. 41). For the most part, developing countries have been the chief critics of existing international copyright regimes.

In the field of literary works, copyright has been considered to pose a major obstacle to education in less-developed countries because of their massive dependence on imported materials (Nicholson, 2006; Akussah & Mensah Darkey, 2009; Strba, 2012). Teaching and reading materials are fundamental pillars of any education system. Attention has been drawn to the inadequate supply of textbooks, journals and other teaching and learning materials in tertiary

institutions in Africa (Nicholson, 2006; Akussah & Mensah Darkey, 2009). Even where a small supply exists, it is often inaccessible. Cost is a key barrier to accessibility (Strba, 2012).

Educational materials, whether in the form of text books or subscriptions to electronic resources (such as journals, computer programs, databases), must be affordable. Journal subscriptions for university libraries in Africa are often unaffordable given limited library budgets and the high cost of copyright royalty payments. The University of Ghana pays about £200,000.00 every year (about US \$400,000.00) to Elsevier⁶ to provide full text availability for the journals in the Science Direct database (Akussah & Mensah Darkey, 2009). The University of Addis-Ababa in Ethiopia, the University of Yaounde in Cameroon, and the University of Nigeria were compelled to cancel their subscriptions to Elsevier for 1200, 824, and 107 publications respectively (Damtew Teferra, as cited in Strba, 2012). The cost of subscribing to these academic journals is therefore a major problem for developing countries. However, access to electronic information may not be a primary concern in Africa since access to the Internet itself is limited. Africa has an Internet penetration of only 13.5% (which is about 20 percentage points below the world average); with only 7% of its population actually using the Internet (Internet World Statistics, 2012). This is the lowest rate in the world (Ibid). People in Africa who do have Internet access pay on average 250 USD to 300 USD per month for it. This is the highest cost in the world (Strba, 2012), which explains the low penetration rate. With the Internet penetration rate so low and cost so high, universities in Africa shy away from acquiring electronic information. Hard copy educational materials are the most preferred and used. However, copyright still makes even this option of accessing information an onerous one. Exemptions and flexibilities in international copyright law do not adequately cater to the special needs of developing countries. Educational institutions continue to battle with translation, reprinting, and photocopying restrictions in the

⁶ Elsevier is the world's leading publisher on scientific, medical and legal issues.

law (Armstrong et al., 2012; Nicholson, 2006; Strba, 2012; Akussah & Mensah Darkey, 2009). It is difficult to convert texts into readable formats for the blind. It is difficult to translate texts into the various indigenous languages that the Africans understand and use for teaching purposes. Having pursued my undergraduate degree at the University of Ghana, I had the opportunity to experience this first hand. Approximately one third (30.5%) of the world's languages are spoken in Africa (One World Nations Online, 2009). Yet most texts are published in non-African languages. Libraries cannot duplicate texts, even if they happen to be the only copy in the library. Since the libraries do not have a strong financial support, only a few books can be purchased. With a poor student – book ratio, books deteriorate relatively quickly.

African countries also face challenges with access to information aside from academic purposes. People need to be informed about environmental and behavioural health risks to adopt healthy lifestyles. Manufacturing and invention of scientific technologies are also enabled by access to information (Bilsel & Oral, 1995). “Timely, reliable, comparable and available information on social, demographic, economic and environmental conditions are key factors for the planning of poor countries’ development” (Statistics Denmark, 2009, para. 1). Information is the key to generating sustainable development and “sustainable development... is gaining ever more recognition as the crucial objective for humanity to survive with a reasonable quality of life for everyone” (Moor, 1998, para. 1). Access to printed works is therefore fundamental for a number of important purposes (Schramm, 1964). However, information for non-academic purposes is as difficult to obtain as academic purposes. In South Africa, the distribution of information about HIV/AIDS to patients and the public at large has been hindered by copyright laws since a lot of money is required to pay the appropriate royalty fees (Nicholson, 2006; Strba,

2012). Copyright-related costs play a key role in making textbooks more expensive in developing countries than they are in developed countries (Strba, 2012).

In the field of artistic works, African countries are also confronted with legal, political, and economic challenges arising from copyright laws. A major contemporary challenge related to copyright in artistic works in Africa has been Africans' need to protect their folklore. Folklore is "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community" (WIPO-UNESCO Model Provisions).

Many opportunities for benefiting economically from traditional folklore have been missed due to the non existence of folklore copyright. With African cultural heritage in the public domain, it had become easily accessible and susceptible to exploitation by the Western world (Blake, 2009). Modern technology makes international access to and usage of folklore expressions much easier than in the past. With developed countries being more technologically advanced, it has been easy for them to tap into the folklore expressions of other origins, modify them to make them their own, and reap the economic benefits. This propelled the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) to take action. In the 1970s, WIPO and UNESCO recognized that developing countries needed to use copyright restrictions on their national folklore to protect it from illicit exploitation (Ludewig, 2009). A nation's cultural heritage is part of its identity (Ibid). Folklore protection is therefore essential not only for economic reasons, but also to prevent the misrepresentation of a nation's cultural values. The Tunis Model Law on Copyright for Developing Countries was therefore recommended as a model for African countries wishing to enact their own national folklore laws and policies (WIPO, 2010).

Ghana's Unique Case

Ghana was one of the few countries to implement the recommendations from WIPO and UNESCO about enforcing folklore copyright laws (Ludewig, 2009). Ghana passed its first copyright law on folklore in the *Copyright Law, 1985 (P.N.D.C. Law No. 110)* on 21st of June, 1985 (WIPO, 2013). In 2005, a new copyright law was passed (*Ghana Copyright Act, 2005 [Act 690]*) that extended the law on folklore royalties to domestically produced folkloric works. Local users of the nation's folklore for commercial purposes were charged as well as foreign users. This law received a lot of attention and got debated thoroughly between its introduction in the 1990's and its enactment (Ludewig, 2009). It appeared to many Ghanaians that the new law undermined the primary purpose of folklore protection. Rather than simply changing copyright fees for foreign commercial users of Ghanaian folklore, the 2005 law charged copyright fees to local commercial users as well. These fees imposed a significant burden on local artists. The average Ghanaian musician is paid 2,660 United States Dollars for a performance (Ghana Filla. Net, 2012). Amateur musicians are compelled to play shows for free just to garner marketing opportunities (Quesy, 2012). Clearly, most Ghanaian musicians cannot afford copyright fees. They also resent having to pay fees to use their own indigenous culture which they are unlikely to misrepresent.

The most relevant aspect of the Ghanaian folklore copyright debate to the scope of this study, however, is the fact that the law perverts the stated purpose of the WIPO/UNESCO 1982 Model Provisions (WACC, 2003; Ludewig, 2006). According to the WIPO/UNESCO 1982 Model Provisions, developing countries need to protect their folklore from commercial exploitations by those "outside their originating communities without any recompense to such communities" (WIPO/UNESCO 1982 Model Provisions, p. 4). There was no thought of

requiring local commercial users to pay royalties as this would deny cultural communities access to their own folklore (Collins, 2006; Collins, 2003; Nketia, 2001, WACC, 2003).

However, section 14 of the WIPO/UNESCO 1982 Model Provisions explicitly indicates that “expressions of folklore developed and maintained in a foreign country are protected under this [law] (i) subject to reciprocity, or (ii) on the basis of international treaties or other agreements” (p.13). This has been read to mean that countries are supposed to treat users of their folklore in other countries no less favourably than users in their own country. In other words, if fees are imposed on the former, they must be imposed on the latter. The Bern Convention requires every signatory country to recognize the copyright of works of authors of the other signatories in the same way as it recognizes the copyright of its nationals (Bern Convention, 1971). The Ghanaian government has taken the position that extending the folklore tax to national users is therefore implied by section 14 of the WIPO/UNESCO 1982 Model Provisions.

This reading of Section 14 seems to be at odds with the fundamental aim of the WIPO/UNESCO 1982 Model Provisions – to protect folklore expressions from illicit foreign exploitation as indicated in the Tunis Model Law’s assertion that developing countries’ folklore was “susceptible to economic exploitation” (UNESCO). It raises the question of whether such legislation truly caters to the needs of developing countries. Read in this way, it is an open question whether the 2005 Ghanaian law will do more harm than good for the Ghanaian cultural heritage and therefore needs amending (Ludewig, 2006; Collins, 2006; WACC, 2003; Collins, 2003; Nketia, 2009).

Ghana’s decision to apply a folklore tax on domestic users of the national folklore raises the question of whether its obligations under international copyright treaties influenced this national legislation. Can Ghana’s government exempt domestic users from paying royalties for

using indigenous folklore without abandoning the right to charge royalties to foreign users of that folklore?

Summing up, it is plausible to argue that copyright laws still favour developed countries more than developing countries, in spite of the many efforts that have been made to provide fairer treatments for the needs of developing countries in international copyright regimes. Developing countries did not contribute to the negotiation of the initial multilateral agreements on copyright (Irwin & Olian, 1974). It is therefore little wonder that their needs were not taken into account. Most became signatories to international copyright regimes as colonies of developed countries (Ibid). The fundamental fairness and justness of international copyright regimes to developing countries is therefore very much in question.

Rationale of the Study

The concept of international copyright, as has been seen earlier, was advanced by Great Britain and France to promote their interests as the main exporters of literary products. The United States, in contrast, did not provide protection for the works of foreign authors while they were mainly importers of literary and artistic works, but suddenly shifted to providing protection for foreign authors once they became major exporters of literary and artistic works. The intellectual property policies of all these countries were based on a conscious assessment of national interests rather than from behind a veil of ignorance.

Ghana's first copyright legislation, in contrast, was the Imperial Copyright Act of 1911, which became binding on Ghana by virtue of it being a British colony (Imperial Copyright Act 1-2 Geo, V, c. 46.). In other words, the international treaties to which the United Kingdom was party to were applied to Ghana (Fox, 1967). Ghana's interests were not considered in this decision. A consensus that works for all the members of international copyright systems without

leaving any worse off has clearly not been fully reached. Developing countries continue to advocate for accommodations of their needs in international copyright systems.

If people cannot be held responsible for the historical contingencies which have determined their current situations, then developing countries' current inability to compete effectively in the production of literary works as a result of their inherited economic challenges cannot justify unfair treatment of their interests as net importers of works protected by international copyright systems. Instead, they should receive favourable treatments under such systems, if a system which equally benefits all participants cannot be found.

Synthesizing all these points, questions of equity and fairness in international copyright systems abound. The history of the development of these systems and the interests they are designed to protect fundamentally raises basic questions about their justice as assessed using the tests proposed by Rawls.

With reference to the economic rationale behind international copyright system, exporting countries clearly need importing countries as customers for their literary and artistic works. Importing countries (who are mainly developing countries) always have the option not to enter or remain in international copyright systems and pay lower prices for the literary or artistic works they copy without paying copyright fees. It is therefore somewhat irrational for international copyright systems to consider only the economic interests of exporting countries. Despite this fundamental fact, the configuration of international copyright rules does not favour developing countries. Developing countries continue to face challenges with international copyright systems both nationally and internationally. There is the need to develop a system of corporation that will better benefit all members of international copyright regimes.

Rawls' theory of justice provides a good lens through which to examine the fairness of international copyright systems. Through that lens, this research study has sought to examine the equity, fairness, and/or justness of international copyright regimes. In doing so, it has focussed on the issues of the influence that international copyright systems have on national copyright legislation in developing countries. This choice was made to reveal the extent to which international copyright systems have accommodated the needs of developing countries in the templates they provide for national legislation in member states. Are developing countries able to enact copyright laws that serve their personal circumstances while adhering to the standards of international copyright laws?

Research Significance

The study of the First Amendment (Freedom of Speech) and general communication law and policy issues is one of the major fields in Communication Studies that has attracted research in recent times. More specifically, the ethical impact of legal decisions is an issue that continues to be explored extensively in the Communication and Law Policy Division; with the subject of Intellectual Property Rights generating one of the largest and most controversial literatures within this field (Fisher, 2001). Despite the general recent popularity of intellectual property rights as a subject, there is still a paucity of literature that examines the status of intellectual property rights policy and law in sub-Saharan Africa (Sikoyo et al., 2006). One of the major challenges that emerged as a result of the creation of international copyright laws was the “developing country perspective” on copyright (WIPO, 1997). Sub-Saharan African countries constitute the majority of developing countries globally (UNCTAD, 2012). Therefore examining developing countries' perspective on copyright issues within the sub-Saharan African region is

relevant for garnering an in-depth understanding of the overall issue of developing countries' perspective on copyright.

This research is relevant for suggesting an angle from which developing countries' plight with respect to copyright could be addressed. The study also contributes to the scanty literature that is presently available on intellectual property issues in sub-Saharan Africa for future research within the field. The findings and recommendations of this study can also contribute to improving the copyright system in Ghana and the sub-Saharan African region as a whole. In all these ways, therefore, this research contributes new knowledge to strengthen the Communication and Law Policy division of Communication Studies.

Chapter Three: Research Design and Methodology

As stated in chapter two, the purpose of this study is to assess the fairness of international copyright regimes through the exploration of the influence they have on national copyright legislation in sub-Saharan African countries. This is to address the research question: How fair and/or just are international copyright systems? The steps which have been taken to answer the research question are explained in this chapter.

Research Design

A single case study research design was the methodology adopted for this qualitative research project with Ghana as the selected case. A case study research design is appropriate for projects in which the investigator needs or wants “(a) to define research topics broadly and not narrowly, (b) to cover contextual or complex multivariate conditions and not just isolated variables, and (c) to rely on multiple and not singular sources of evidence” (Yin, 2003, p. xi). By defining research topics broadly and not narrowly, case study research uses inductive rather than deductive reasoning (Sanders, 1981). This project uses evidence concerning Ghana’s Copyright issues to shed light on the challenges facing the entire sub-Saharan region. Ghana deals with issue of folklore protection through national copyright policies and laws. But Ghana is also a party to broader international copyright regimes which influence the standards and rules of its national laws. The variables for investigation are therefore multi-faceted, rather than isolated. The study also examined multiple sources of evidence as part of its analysis – the *Ghana Copyright Act, 2005 (Act 690)*, the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, the *Berne Convention for the Protection of Literary and Artistic Works* treaty, the *Agreement on Trade-Related aspects of Intellectual Property Rights*

and the *Model Provisions for National Laws on the Protections of Expressions of Folklore Against Illicit Exploitations and other Forms of Prejudicial Action, 1982*.

Case study researches are descriptive, qualitative, explorative, and explanative (King, 1985; Sanders, 1981; Smith 1988; Yin, 1989; McKinney, 1966). This study adopted the case study research design because it is qualitative in nature (it answers “how” and “what is” questions) as well as explorative. The study explores how national copyright legislation in Ghana is influenced by the international copyright regimes that Ghana is party to. The research also examines how just the terms of those regimes are. Explorative research is “a broad-ranging, purposive, systematic, prearranged undertaking designed to maximize the discovery of generalizations leading to description and understanding of an area of social or psychological life” (Vogt, 1999, cited in Stebbins, 2001, p. 3). This research is exploratory because the problem and remedies for it have not yet been clearly defined. The research project did not begin with a hypothesis to be tested. It has the more modest goal of familiarizing readers with the challenges that Ghana, and all sub-Saharan African countries, face in dealing with international copyright regulations in order to infer or make generalizations about specific problems. The findings of the study are therefore suggestive rather than definitive. For this reason, a case study was chosen as the appropriate methodological approach.

Another reason to employ a case study design is to focus on a particular unit of analysis of the studied phenomenon in order to achieve a deep understanding of it (Darke, Shanks, & Broadbent, 1998; Swanson & Holton III, 2005). Case study designs may be either single or multiple in nature (Eisenhardt, 1989). A single case study involves the collection of data and consequent analysis from one case, while a multiple case study involves the collection and analysis of data from several cases (Ibid). A single case study approach was chosen for this study to narrow the unit of analysis as much as possible in order to gain an in-depth insight into the issue within the limited scope of a

research paper. In order to strengthen the reliability of the research, a multiple case study would have been ideal. Examining the copyright regimes of two or more countries within the sub-Saharan African region would have made findings more representative. However, for the purpose of the requirements of this project, the focus had to be narrow to obtain the depth of insight desired. The findings of this research therefore only provide insight into the features of the issues confronting specific countries within the sub-Saharan Africa region and are thus suggestive rather than definitive for the larger region or for developing countries in general.

The case study approach recognizes the importance of prior theory to inform the research design (Perry & Coot, 1994; Yin, 2003, Miles & Huberman, 1994). The theoretical framework guiding this study – Rawls’ theory of Justice – has therefore been extensively explained in chapter 2 (literature review) to provide not only a guidance on how the research was designed, but also to enable a clear understanding on how this study generalized its results (Yin, 2003). Through the application of the theory, the preliminary concepts of the study – the fairness and equity of international copyright regimes as well as the relationship between international and national copyright regimes in Ghana – have been developed. It has also helped define the unit of analysis – the justness of the influence of international copyright regimes. The theory also guided the criteria for selecting the specific cases and variables that revealed the influence and fairness of international copyright regimes.

Sample

Sub-Saharan Africa was selected as the region for this study because the continent of Africa contains most of the developing countries in the world; with sub-Saharan region including the poorest among these (Hindman, 2010). Ghana is selected as the focus for this study because it is one of the few countries within the sub-Saharan African region that have recently updated

their copyright laws (WIPO, 2010). The *Ghana Copyright Act, 2005 (Act 690)* is expected to reflect the most contemporary issues regarding copyright facing the nation. As such it is likely to reflect modern challenges of copyright in neighbouring developing nations. Following the development of *The Ghana Copyright Act, 2005 (Act 690)*, the nation experienced a heated debate on the fairness of the statutes' folklore law amendment which was opposed by local music artists. A recent development arising from this controversy has been the country's decision to develop a national intellectual property policy and strategy aimed at ensuring a stricter protection and enforcement of the intellectual property systems of the country. Its stated purpose was to bring Ghana's copyright laws in line with its international commitment under the World Trade Organization on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Vibe Ghana.com, 2012). These recent developments provided intriguing fodder for this research.

Ghana has had firm roots in the African music industry for decades. It was the first country in West Africa to build its own recording studios and vinyl record manufacturing plants (Collins, 2006). The country has successfully fought piracy in the music industry (a drop from 90% to 15% of music piracy throughout the entire country) and was rated by the International Federation of the Phonographic Industry in 1996 as second only to South Africa in terms of fostering a viable music industry within African countries (Ibid). Ghana's credibility as an African nation that is efficient in copyright enforcement in the music industry makes the country's current folklore debate an attractive one for research.

Ghana also faces similar challenges to other African countries with copyright in the educational sector (Nicholson, 2006). Application of current domestic copyright laws poses challenges to librarians, educators and students (Mensah Darkey & Akussah, 2009). These have led to infringement of copyright laws in Ghana. Photocopying of copyrighted materials has

become commonplace with the argument that it “keeps Ghana’s higher education system functioning and ensures that vital educational standards are maintained” (Mensah Darkey & Akussah, 2009). The case of Ghana therefore demonstrates exemplary instances of the issues being studied – the challenges posed by copyright laws in Africa, and the influence on Ghana as a signatory to international copyright regimes to adjust its own laws to conform to their standards.

Data Collection

Multiple document sources were employed to analyze the research question from multiple perspectives. The study examined national documents such as the *Ghana Copyright Act, 2005 (Act 690)*, together with international documents such as the Agreement on establishing the World Intellectual Property Organisation (WIPO)’s *Berne Convention for the Protection of Literary and Artistic Works* treaty, the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, the World Trade Organization’s *Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, and the *WIPO/UNESCO Model Provisions for National Laws on the Protections of Expressions of Folklore against Illicit Exploitations and other Forms of Prejudicial Action, 1982*. These documents were selected for the following reasons: The *Ghana Copyright Act, 2005 (Act 690)* is the copyright statute of Ghana. It is therefore the document to consult for any examination of the country’s copyright laws. The *Berne Convention for the Protection of Literary and Artistic Works* is what is used as a template for national legislation on intellectual property rights in its member states. It is therefore useful for analyzing international influence on the national (*Ghana Copyright Act 2005 [Act 690]*) and regional (*Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property*

Organization) copyright legislation in sub-Saharan Africa. The WIPO/UNESCO Model Provisions is also an important document because it influenced the Ghana folklore tax law. The World Trade Organization's trade related Agreement (TRIPS) is the document governing the link between trade and intellectual property (WACC, 2002). It is therefore useful for examining how World Trade Organization rules influence trade in intellectual property among African nations. This analysis can help determine whether the African nations who are party to ARIPO are able to conduct intellectual property trade to suit their economic, social, and cultural needs. These primary documents are supplemented by secondary reference materials.

For collection of data on the heated debate that transpired in Ghana between the introduction and passage of Clause 25 of *The Copyright Act, 2005 (Act 690)*, the study has used websites such as *Freemuse*, *Modern Ghana*, and *GhanaMusic.com*. *Freemuse* is the first independent international organization to advocate for the rights of musicians and composers of member states in accordance with the United Nations Declaration of Human Rights (Freemuse, 2012). Their mission is to address practices in the music industries which pose obstacles to musicians and composers in receiving fair compensation for their works (Freemuse, 2012). This website is therefore a reliable source of information concerning the artist's perspective on contemporary challenges faced by musicians and composers within the music industries of member states. *GhanaMusic.com* is a website designed to offer the latest Ghanaian music videos, news, interviews, photos and shows (GhanaMusic.com, 2008). It has the largest viewership in Ghana for its music, news, and interviews (ibid). The *Industry News* section of their web page provides a podium for Ghanaian musicians to debate contemporary issues within the music industry; hence its selection as a source. Similarly, *Modern Ghana* is a reputable Ghanaian website that is a leading source of general news from across the country.

Data Analysis

Analysis of the data applies the arguments put forward by Rawls in his theory of Justice. Two major concepts within this theory are the veil of ignorance and criteria for assessing the fairness of the basic structure of society. These concepts are applied to the data collected and inferences are made. For example, the benefits that are available to member parties to international copyright regimes are examined depending on their status as net importers or exporters of works of literature and art. The differences between the basic structures of the member states' societies are also examined using Rawls' theory. Commonly occurring themes were grouped and discussion and results are reported simultaneously. Key generalizations from the analysis were synthesized and put within the context of the research questions and literature outlined in the introduction to draw conclusions.

Validity and Reliability

The integrity (validity and reliability) of this qualitative research was seriously addressed. Validity depends on checking "the accuracy of the findings by employing certain procedures," and reliability depends on making sure that "the researcher's approach is consistent across different researchers and different projects" (Gibbs, 2007, cited in Creswell, 2009, p. 190); so that other researchers can carry out the same studies and achieve similar results (Cassell & Symon, 1994). In order to test the validity of the study the research adopts the construct validity approach. Construct validity "testifies to how well the results obtained from the use of the measure fit the theories around which the test is designed" (Sekaran 1992, p. 173). One of the techniques used for achieving this is the employment of multiple sources of evidence to show how the results fit the theory (Marshall & Rossman, 1990). In this case study, evidence showing the fairness of the influence of international copyright regimes on Ghana's domestic copyright

legislation is derived by analyzing the folklore copyright law of Ghana, the terms of protection for literary and artistic works in Ghana, and the trade related aspects of intellectual properties within the sub-Saharan African region. A case study protocol was established during the data collection process as the technique for ensuring reliability in this research. A case study protocol is a set of guidelines that is compiled to direct the research plus the research instruments used for collecting the data (Yin, 1994). The guidelines have been explained in this chapter.

Chapter Four: Results and Analysis

This chapter analyzes the fairness of the influence of international copyright systems on the domestic copyright system of Ghana. It commences with an analysis of the recent Ghana Folklore Tax debate to explore how fairly the WIPO/UNESCO Model Protocol influenced the Ghana Folklore Tax for domestic musicians. The definition of literary and artistic works in general, as covered under international copyright laws, is then brought under scrutiny to determine the equity of treatment of the varying cultures of the members belonging to international copyright organizations. The analysis is extended to the entire sub-Saharan African region to examine how the definitions of the terms in international copyright law affect the trade related aspects of intellectual property within the region. Conclusions about the fairness of international copyright systems are then drawn.

The Ghana Folklore Tax

With advances in technology, improper exploitation of the cultural heritage of nations became a significant problem. The folklore of nations was being commercialized on a world-wide scale without appropriate recognition of the rightful owners (WACC, 2003). Developing countries were the most affected. According to the *Model Provisions for National Laws on the Protections of Expressions of Folklore Against Illicit Exploitations and other Forms of Prejudicial Action, 1982*, expressions of folklore are generally considered to belong to the public domain in advanced countries (para. 3). They therefore had no incentive to protect against illicit exploitation of folklore. In fact, as the possessors of the most advanced forms of commercial technologies (particularly in sounds, audiovisuals, broadcasting, cinematography, etc.), they accounted for most of the improper exploitation of folklore from developing nations (WACC, 2003). The Government of Bolivia sent a memorandum to the Director General of UNESCO on

April 24, 1973 to request a solution (Model Provisions on the Protection of Folklore, 1982). In response to the memorandum, the Directors General of UNESCO and WIPO convoked the Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore to develop model provisions for national laws on the protection of creations of folklore. This was done to prevent further improper exploitation of folklore (Ibid). The committee met at the WIPO headquarters in Geneva, from June 28 to July 2, 1982, and adopted the “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions” (Ibid). The Model Provision is a protocol that is supposed to be attached to the Universal Copyright Convention to protect folklore on the international level for the members of the World Intellectual Property Organization (Ibid). The Model Provisions were, however, not mandatory for all members of WIPO. It was simply “designed with the intention of leaving enough room for national legislatures to adopt the type of provisions best corresponding to the conditions existing in a given country” (Model Provisions on the Protection of Folklore, 1982, para. 23). Developing countries, who were the main advocates for the provisions, were thus highly encouraged to adopt them. The model provided a template for legislation on folklore in interested nations and protected their rights on the international level as well; just like the Bern Convention.

Ghana took action on the issue. The *Ghana copyright Act, 2005 (Act 690)* amended its law on folklore to follow the template provided in the Model Provisions’ protocol. This decision was, however, not warmly received by the people of the Republic of Ghana. When the Bill was introduced in Parliament it was hotly debated. Musicians and musician associations within the country expressed intense dissatisfaction about the law’s requirement that they pay royalties for the use of the country’s folklore for commercial purposes. They argued they could not afford to

pay such royalties. Also, since the nation's folklore was their own cultural heritage, they argued they should be exempted from royalty payments. Some of the points raised are quoted below:

The new Ghanaian legislation is probably according to WIPO guidelines. But the application of the legislation seems twisted. I can't understand how the Ghanaian government can claim that tolls taken from bona fide performers of traditional music are in line with WIPO recommendations. (Malm, K., cited in Freemuse, 2005, para. 3)

It takes away our very basic freedom and right to choose what system to adopt to protect our privately funded and owned intellectual property. (COCCA, cited in Freemuse, 2005, para. 1)

The Coalition of Concerned Copyright Advocates (COCCA) added, in their book entitled *Copyright Bill is Inadequate*, that "the proposal has ... a tendency to increase the power of the (State) Copyright Office to the disadvantage of the Music Industry and other copyright owners" (Freemuse, 2005, para. 1). The president of COCCA, Mr. Sakyi, said at the launching ceremony which was held in Accra on the 13th of September, 2004 that "the Copyright Office and its Administrator have their favourites and therefore, decides whom to certify as rightful owners of a copy to the disadvantage of the unfortunate ones" (Modern Ghana, 2004, para. 3).

The Model Provisions, as mentioned earlier, was designed to enable national legislatures to adopt laws on the protection of folklore best corresponding to the conditions existing in each country by broadening the definition of literary and artistic works under international copyright law to include expressions of folklore.

The unique characteristic about expressions of folklore is how ownership rights apply to them. Ownership of the right for copyright protection of expressions of folklore belongs to an entire community rather than an individual (Model Provisions on the Protection of Folklore, 1982). In Ghana the president owns the right on behalf of the community (Ghana Copyright Act 2005 (Act 690)). Therefore, under copyright law, ownership of expressions of folklore is considered a joint authorship by all members of the community within which the folklore

originates. This makes commercial exploitation which does not compensate the co-authors unlawful. Ghana's adoption of the model in the 2005 copyright Act was therefore on the right path in terms of copyright legislation and non-misrepresentation of a country's folklore. WIPO's recommendation did not define the commercial exploitation as foreign commercial exploitation although foreign commercial exploitation was what motivated the development of the Model Provision.

The *Model Provisions for National Laws on the Protections of Expressions of Folklore Against Illicit Exploitations and other Forms of Prejudicial Action, 1982* is very fair and reflects equity. Although the provision of the protocol was inspired by developing countries' needs, the model was not limited to developing countries. It was designed to provide room for further regulation for nations that deemed it necessary. The protocol was designed such that irrespective of which group of nations a country may fall within its choice to adopt the Model Provisions cannot be unfair to other nations since it will not give them exclusive rights at the expense of others. It is consistent with Rawls' "veil of ignorance" test.

The Model Provision is also reflective of the first principle of Rawls' theory of justice which states that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (Rawls, 1971, p. 60). International copyright law did not originally define literary and artistic works to include folklore because folklore was not considered privately owned intellectual property in the countries that drew up such laws. However, it was realised that failing to allow nations to protect their folklore was unjust to other members of the organization. A provision was thus made to give affected members rights similar to those enjoyed by other members of the organization in order to protect their literary works according to a broader definition of what constitutes literary and artistic works. This is in line

with the first principle of Rawls' theory of justice. Hence, the WIPO's recommendations did not unjustly influence the decision to adopt the Ghana folklore tax.

Protection of Literary and Artistic Works

A more complicated problem, however, is that the Model Provisions apply only to expressions of folklore and not the entire oral tradition of Ghana. Aside from expressions of folklore, all other literary works are required to be fixed in a material form to be eligible for copyright protection. Article 2, paragraph 2 of the Bern Convention says that "it shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form" (Berne Convention for the Protection of Literary and Artistic Works, 1971). The present copyright law of Ghana thus requires works to be fixed to be eligible for copyright protection. The *Ghana Copyright Act 2005 (Act 690)* states that:

A work is not eligible for copyright unless (a) it is original in character, (b) it has been fixed in any definite medium of expression now known or later to be developed with the result that the work can either directly or with the aid of any machine or device be perceived, reproduced or otherwise communicated. (Article 1, Section 2, para. 1)

This standard requirement of the Bern Convention thus does not provide protection for the entire oral tradition of Ghana. Any type of verbal messages transmitted by word of mouth from the past beyond the present generation constitutes oral tradition (Jan, 1985). Folklores were developed by individuals. Before a song, poem, riddle, or proverb became recognized as belonging to the Ghanaian culture, it was simply someone's creation which he passed onto his descendants until it became widely known as a community song or poem or folktales or a riddle representative of their culture – an oral tradition. Oral tradition is the type of culture that developed in pre-literate societies as a result of the people's inability to write down their creations (Munro & Chadwick,

1933). The only mode of preservation at the time was to pass it on orally from one generation to another. The illiteracy rate in Ghana is still significantly high, particularly among seniors (Ibid). In such a context, many creative people are unable to pass on their ideas other than through word of mouth. Oral tradition is still an important part of literature, whether containing elements of traditional artistic heritage or not. Requiring that a literary work be fixed in a form that is reproducible with the aid of a machine or device therefore presents problems for those elements of Ghanaian culture passed on by oral tradition. Creators of works communicated orally, whether literate or not, deserve to be recognized and honoured for their creations. The Model Provisions only cater to a part of Ghanaian culture. They stunt the expansion of expressions of folklore by not allowing innovative oral creations to be recognized as cultural products for the purpose of copyright protection.

It may be argued that the Bern Convention allows the protection of oral works under Article 15, section four which states:

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (Article 15 (4), Bern Convention, para. 1)

This section of Article 15 makes provision for the protection of oral literary works, in that it allows unpublished works to be protected. However, it does not explicitly refer to individually-owned oral works or those developed and owned by a community as a matter of traditional heritage (such as folklore). It is therefore difficult to determine how long the designated competent authority can protect such works before they return to the public domain for use; assuming they belonged to an individual and were not necessarily part of a community's cultural heritage which should last in perpetuity. The Article may not even be referring to oral works at

all. The convention does not provide explicit enough direction to enable it to be applied to the oral literature culture of Ghana. It is therefore not sufficient to address that need.

Rawls posits that individuals' perceptions are influenced by their forms of socialization as well as their current expectations and this could make their judgements biased (Lovett, 2011). Intellectual property law, as we know, is largely European in origin. The definitions of what constitute knowledge, authorship, ownership, and other properties of the system are therefore based in European culture. If the primary rationale behind the concept of copyright is to reward authors for their creations, then evidence of creation or innovation is all that needs to be established for an author to claim rights. Documentation is an easy and reliable way to show evidence of ownership, but it is not the only one available. Notifying the appropriate body, that has been authorized by the state to administer the provisions of copyright, about the aspects of the literary work that require protection, for instance, should suffice. Even though such a notification will not necessarily constitute rights in itself, it provides evidence by the author of a literary work to determine who the right to seek copyright protection belongs to.

The requirement for literary works to be fixed to be eligible for protection in Ghana ignores the very essence of the Ghanaian oral literature tradition. It denies a lot of authors their rights to recognition and remuneration since oral literature constitutes the majority of Ghanaian literary works. Here, the Bern Convention's provisions for copyright remuneration are unfair to Ghana since they deny protection to some genuine creators of literary works. A definition of terms that works for all members has not been made. Ghana's oral tradition culture is not provided for – a violation of Rawls' theory of justice.

The biggest attempt that has been made by far to accommodate developing countries' concerns about the challenges of the international copyright system is the adoption of the

Stockholm conference revision work in the 1971 Paris Act of the Bern Convention. The revision allowed for developing countries to issue non-exclusive translation and reproduction rights to authors; reduce the term of copyright protection up to twenty five years, rather than the standard fifty years; and issue exclusive rights to authors to authorize the broadcast of their works. Once a country has identified itself as a developing country, in conformity with the established practice of the General Assembly of the United Nations, it could avail itself of these provisions, after notifying the Director General of the Bern Union, for as long as it remains a developing country (Article I, Bern Convention, 1971).

An identified problem, however, is that these provisions are only applicable to domestically produced literary works. According to the Bern Convention,

- (1) Any country of the Union may declare, as from the date of this Act, and at any time before becoming bound by Articles 1 to 21 and this Appendix:
 - (i) if it is a country which, were it bound by Articles 1 to 21 and this Appendix, would be entitled to avail itself of the faculties referred to in Article I(1), that it will apply the provisions of Article II or of Article III or of both to works whose country of origin is a country which, pursuant to (ii) below, admits the application of those Articles to such works, or which is bound by Articles 1 to 21 and this Appendix; such declaration may, instead of referring to Article II, refer to Article V;
 - (ii) that it admits the application of this Appendix to works of which it is the country of origin by countries which have made a declaration under (i) above or a notification under Article I. (Article VI, Bern Convention, 1971)

The Convention does not require all member countries to admit the application of the provision by developing countries to the works of which they are the countries of origin. The Convention only permits member countries to do so if they wish. For domestic purposes, the provisions of the Convention are highly beneficial. It helps developing countries to reduce their dependence on developed countries for imported literary materials by encouraging the production of domestic works. However, African countries are still very dependent on imported materials. Ghana imports about 80-90% of its literary materials (Cabutey-Adodoadji, 1984). In 2011 alone, Ghana spent \$1,797,575,210 on imported printed materials (Index Mundi, 2012). Until Ghana can

produce enough literary materials to depend less on imported materials, it will remain disadvantaged.

Referring to the epistemological roots of copyright legislation as outlined in chapter 2, the focus of copyright legislation has shifted from authors' interests to the interest of the entire nation. Recall how some developed countries today have in the past played copyright as a protectionist card according to their current notion of what arrangements will best promote the national interest. The more developed a country becomes the more likely it is to tighten its copyright protection for national economic gains (Asmah, 1999). Developed countries, especially, are therefore not likely to admit the application of the provision by developing countries to the works of which they are the countries of origin. In Ghana, educational institutions continue to battle with translation and reproduction limitations for foreign materials. Imported texts can still not be converted into readable formats for the blind (Akussah & Mensah Darkey, 2009). It is still difficult to reprint foreign books that are no longer available even if they are the only ones left in the library and are deteriorating (Ibid).

According to Rawls' theory of justice, "the most just basic structure for a society is the one you would choose if you did not know what your role in that society's system of cooperation was going to be" (Lovett, 2011, p. 19). A truly just society is the one which rational people would choose from behind a "veil of ignorance" (a position where persons are ignorant of whether they personally would benefit from the society's arrangements) (Ibid). The prerogative which Article VI of the Bern Convention vests in the hands of developed countries to decide whether to admit the application of the provisions to their works is not equitable. It gives the deciding country the chance to base its decision on how it would affect their interests. The "veil of ignorance" is absent here and this renders the system open to unfairness.

Issues in the Trade Related aspect of Intellectual Properties in Sub-Saharan Africa

A number of African countries, upon realising that effectively and continuously co-ordinating their laws, policies and activities in intellectual property matters would be advantageous, decided to form a grand coalition – The African Regional Intellectual Property Organization – that would study and promote intellectual property provisions which best serve the interests of Africans (ARIPO, 2004). On the 9th of August, 2010, at Swakopmund in Namibia, the organization adopted its first protocol to protect African traditional knowledge and expressions of folklore. The protocol is supposed to serve as a template to guide national legislation regarding intellectual property in traditional knowledge and folklore. More importantly, it is designed to harmonize and co-ordinate the laws and policies of member states on intellectual property in the areas of traditional knowledge and folklore for mutual benefit.

The African Regional Intellectual Property Organization works in collaboration with the World Intellectual Property Organization (WIPO) to ensure that the policies of the organization are in line with the standards of WIPO. The problem, however, is international intellectual property law is not always designed to accommodate traditional knowledge (United Nations Department of Economic and Social Affairs, 2009). Intellectual property law, being largely European in derivation, interprets knowledge, authorship, ownership, private property and monopoly privilege from the perspective of European culture and is not designed to take into account the definitions of other regions (such as Africa). The definition of traditional knowledge is cultural based (Ibid). This may not be problematic in domestic regulations, but it present very complicated issues with regards to the trade related aspects of intellectual properties; as an international consensus on rights of protection for indigenous knowledge is vital for determining due remuneration and recognition.

The African countries that are members of ARIPO are also members of the World Trade Organization (WTO) and are required to comply with the agreement on the trade related aspects of intellectual property rights. ARIPO did not provide any regulations for the trade related aspects of traditional knowledge and folklore within the African region together with the Protocol it issued for their protection. For this reason, a direct influence of TRIPS on trade regulation for literary works within Africa, legislated by ARIPO, cannot be identified. However, ARIPO's definitions of some concepts in the Swakopmund Protocol render TRIPS non-efficient in promoting the smooth trade of folklore and traditional knowledge of Africans; both regionally and globally.

The very scope of traditional knowledge, as defined by the Swakopmund protocol, is not in line with TRIPS definition of what constitutes counterfeit goods. The *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) (2010)* defines traditional knowledge as:

Any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.
(Section 2, para. 9)

Article 9, paragraph two of the TRIPS Agreement directly contradicts this definition of traditional knowledge. According to the TRIPS Agreement (1994), "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such" (Article 9, para. 2). Again, in paragraph 1 of Article 25, the Agreement provides a counterfeit goods check list stating that:

Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations. (TRIPS, 1994)

Procedures and methods of operation constitute the know-how and skills of an intellectual property owner within certain contexts. Yet procedures and methods of production are not included in the requirements for copyright protection. This aspect of the law is quite problematic. Ghana's traditional *kente*⁷ cloth, which is defined as part of its folklore for which copyright protection is sought, also has traditional knowledge embedded in its method of production (Asmah, 2008). If another country adopts that method of cloth production to manufacture a textual design different from *kente*, it would be unfair for it to claim copyright protection in folklore or industrial design for that product since the method of production would be stolen from the traditional knowledge embedded in Ghana's traditional textile design.

According to TRIPS regulations related to border measures, evidence required for reporting property infringements at ports of entry in order to seize counterfeit goods does not include the disclosure of the origin of the methodology. The interests of Africans would be better protected if TRIPS' border measures would require this as well as evidence of prior informed consent and compensation agreements. Beyond that, an international intellectual property system more considerate of Africans would define intellectual property in such a way as to recognize an indigenous right for the protection of traditional knowledge in skills and methods of production.

⁷ Kente is a silk and cotton fabric made of interwoven ceremonial cloth strips and native to the Ashanti people of Ghana that has achieved tremendous international recognition. Weavers make the weaving apparatuses themselves and weave the cloth manually with their bare hands. Kente is more than just a cloth. The visual art of the cloth symbolizes history, ethics, philosophy, oral literature, social values, religious beliefs as well as political thoughts. The apparatuses themselves have symbolic meanings and are accorded great respect (Kyei-Baffuor, 1997).

This would ensure that the rights of indigenous people to protect their traditional knowledge under copyright are adequately covered.

It is important for TRIPS to adopt such a recommendation because once a fabric is made using Ghana's traditional knowledge in *Kente* weaving method, for instance, it will be difficult for Ghana to detect what skills and know-how went into the production to report infringement. The intellectual property right is embodied in the process and not the end product.

South Africa's case alleging the "bio-piracy"⁸ of two of their plant species – *Pelargonium sidoides* and *Pelargonium reniforme* – by a German pharmaceutical company is a good reference⁹. It is important to note, however, that South Africa is "the Powerhouse of Africa" and is the most developed country in Africa" (Nicholson, 2006). South Africa is more technologically advanced than other sub-Saharan African countries and has the resources to identify and fight such infringements. Yet the German pharmaceutical company – Schwabe Pharmaceuticals – succeeded in monopolising the two plant species and making profit of over eighty million Euros (Vermuelen, 2011). Schwabe's patents were however later revoked as the use of *Pelargonium* for treating AIDS was not a new discovery. It was already known in South Africa. Novelty being a requirement for obtaining patent rights was what destroyed the case of the German company; and not the establishment of the plant species as being a traditional knowledge of native South Africans. McGown (2006) gives a succinct report on thirty six cases

⁸Bio-piracy is the acquisition of biological materials (plants, animals, microorganism, and their parts), or of traditional knowledge related to those biological materials, without obtaining the prior informed consent of the indigenous owners of those biological materials or that traditional knowledge (Ghana Web, 2006).

⁹ *Pelargonium sidoides* and *Pelargonium reniforme* are native plant species of South Africa and Lesotho. These plant species have been harvested in South Africa and exported to Germany where it has been used to manufacture a natural medicine called Umckaloabo for the treatment of respiratory tract infections (such as bronchitis). The German company - Schwabe Pharmaceuticals – was able to obtain patent from the European Patent Office on the extraction methods of the roots of the plant species as well as on the discovery that the plant could be used for treating AIDS (Vermuelen, 2011).

of “bio-piracy” of African traditional knowledge. A decision such as that described above is very problematic because it leaves Africans’ rights to the protection of their traditional knowledge on shaky ground. More specifically, for the direct purpose of intellectual property protection, it does not establish a right to very scarce intellectual properties from which they could generate foreign exchange.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was established primarily to reduce distortions and impediments to international trade. However, the TRIPS Agreement does not efficiently accommodate sub-Saharan African countries. The definition of what constitutes counterfeit goods does not protect Africa’s traditional knowledge, procedure and methods. As mentioned previously, this reflects European cultural dominance in the definitions of the terms of trade in international copyright laws. Africans have not had sufficient influence on the definitions of the terms to regulate trade. The protection of indigenous rights under international copyright law is thus inadequate. Varying cultural definitions of intellectual property has not been appropriately accommodated and African countries have suffered some losses as a result. This is an unequal distribution because the rights of Africans to claim copyright protection for all aspects of their intellectual property has not been fully recognized, while other member countries of the international copyright organizations are able to claim copyright protections for all aspects of their intellectual property. According to Rawls, this is an unjust outcome. The inequality in protection does not favour the least advantaged – Africans.

Sub-Saharan African countries already face challenges with non-tariff barriers to trade that hamper their ability to compete effectively with developed countries on the global market. They experience geographical and physical infrastructure issues such as unreliable logistics

services (poor ports and roads), bribery and corruption at port of entry checkpoints, political instability, etc., particularly in landlocked countries, that hamper intra-regional trade (OECD, 2005). The technical regulations as well as the standards and assessment procedures that developed countries employ, while necessary for legitimate security and checking purposes, often also effectively serve as border-protection instruments (Ibid). The standards of developing countries will almost always fall short of those of developed countries'. As such, sub-Saharan African countries' ability to compete effectively in the global market is already constrained since they have to conform to standards that are defined by nations with a higher degree of development. Coupling these disadvantages with non-recognition of indigenous rights to the protection of traditional knowledge systems, further isolate Africans from the global market.

Conclusion

From the above analyses, it can be concluded that the international copyright system has improved in its efforts to make distributions of rights more just. The development of the *Model Provisions for National Laws on the Protections of Expressions of Folklore Against Illicit Exploitations and other Forms of Prejudicial Action, 1982* is by far one of biggest attempts to recognize the needs of African traditional culture in copyright issues. As has been seen, this development in isolation moved in the direction of justice. However, there are still unmet needs for broader copyright protection in Ghana and sub-Saharan Africa as a whole. The current international copyright system remains unjust. It has not met its full responsibility of ensuring that every single member of the organization has an equal right to the most extensive basic liberty for copyright protection compatible with a similar liberty for others. On the contrary, inequalities in the distribution of rights remain which are not in favour of the least advantaged – African countries.

Chapter five: Conclusion

This study sought to explore the fairness of international copyright systems. Through an examination of Ghana's national copyright statutes and its obligations under international copyright regimes, an analysis of the level of fairness in the influence international copyright regimes have on its national copyright legislation was made. The single case study methodology was adopted for this research and Ghana was selected as the case. With Rawls' theory of justice as the theoretical lens through which the analysis was made, it has been argued in this study that international copyright regimes have improved in bridging the cultural gap between Western countries and African countries that impedes the equal distribution of copyright rights. However, the improvements have not been sufficient to render international copyright regimes completely fair so that each member has an equal right to the most extensive basic liberty compatible with a similar liberty for others. Ghana and other sub-Saharan African countries differ culturally from developed countries in ways that have not yet been appropriately accommodated by international copyright systems. Their rights to protect certain important intellectual properties have still not been fully recognized.

Summary of Findings

To explore the fairness of the influence international copyright regimes have on copyright legislation in Ghana and sub-Saharan Africa as a whole, three major themes were examined in this study – The Ghana Folklore Tax, Protection of Literary and Artistic Works, and Issues in the Trade Related aspect of Intellectual Properties in Sub-Saharan Africa.

The analysis on the Ghana Folklore Tax was made by examining the *Ghana copyright Act 2005 (Act 690)* and the *Model Provisions for National Laws on the Protections of Expressions of Folklore Against Illicit Exploitations and other Forms of Prejudicial Action, 1982*. This analysis

revealed that some claims of unfair influence made in the Ghana Folklore Tax debate were unfounded. WIPO's protocol was actually a major attempt to improve fairness in international copyright regimes and effectively addressed the problem of Folklore exploitation.

The *Berne Convention for the Protection of Literary and Artistic Works, 1971* and the *Ghana copyright Act 2005 (Act 690)* were examined for the analysis of the second theme – Protection of Literary and Artistic Works. This analysis revealed that the prerogative which Article VI of the Bern Convention gives to developed countries to decide to admit the application of the provisions for developing countries to their works is not in line with Rawls' test of the veil of ignorance. It allows developed countries to protect national interests at the expense of developing countries and is thus inconsistent with a truly just system. Also, the Bern Convention's requirement for literary works to be fixed to be eligible for protection does not recognize Ghana's oral tradition culture. This denies Ghana its right to the most extensive basic liberty for copyright protection compatible with a similar liberty for others member countries and is therefore unjust.

The last section of the study expanded the geographical scope of the analysis a bit to examine the trade related aspects of intellectual properties and their influence on the trade of literary materials in sub-Saharan African region. Evidence concerning how the insufficient definition of counterfeit goods under TRIPS denies sub-Saharan Africans the right to protect intellectual property in traditional knowledge supported the conclusion of the earlier sections that the international copyright systems remain unjust.

Importance of Research Findings

The findings of this study are useful in three ways. First, this study has revealed that even though an attempt has been made to improve international copyright treaties to meet the needs of

developing countries such as Africans, much more remains to be done. The findings are useful in exposing the gaps in copyright coverage (such as traditional knowledge in skills and procedures) to policy makers in sub-Saharan African countries in order to alert them of the need to advocate reforms in these areas. Folklore in developing countries had to be unlawfully exploited before action was taken. If action is taken to protect traditional knowledge in skills and procedures, Africans will avoid losing valuable revenue.

Second, the findings from the analysis of the Ghana Folklore tax debate have revealed that many Ghanaians lack a fundamental understanding of the concept of copyright. This can be very problematic, not only because it leads people to violate copyright laws, but also because it acts as a barrier to constructive critiques needed for copyright policy reform in the country. The findings of this study are thus useful in identifying a need to better educate Ghanaians on copyright systems for the betterment of the nation.

Third, as mentioned previously, there have been few studies conducted on copyright issues within sub-Saharan African countries. The findings of this research therefore not only add to the paucity of literature that exists on copyright issues in sub-Saharan Africa, but also provide additional information to guide future research. Overall, the findings reveal the continuing injustice in international copyright regimes from the perspective of sub-Saharan African nations.

Implications of Research Findings

In order for Ghana to benefit as much as it can from the current international copyright system, while still remaining a developing country, there are some clear areas of concern that need to be addressed.

First, in order to neuter the dissatisfaction of Ghanaian musicians concerning the Ghana Folklore Tax, while still maintaining copyright protection for folklore, the law can be amended

to allow remuneration to be paid after rather than prior to commercial exploitation. This will make it less financially burdensome for Ghanaian musicians. Amateur musicians, for instance, who do not have the capital to invest in the production of music, whose cost has risen because of copyright tax, would be allowed to pay at a later date when they are expected to be reaping profits from their production. This would also curb driving the youth of Ghana to turn to Western music culture rather than developing their indigenous roots. Better yet, remuneration could also be paid in kind rather than in the form of a monetary fee as currently required under Article 64, Section 1 of the *Ghana Copyright Act 2005 [Act 690]*. Charity works and donations to the communities who own the expressions of folklore for instance could also be acceptable forms of payment. Such a provision is supported under Paragraph 3, Section 9 of the Swakopmund Protocol. However, authorization before use will still be required to ensure that any distortion, mutilation, or other modifications of the expressions of folklore is avoided, as well as proper recognition given to the relevant community owners.

Second, Ghana's copyright Act does not define Ghanaian folklore to include the traditional knowledge of the method of production of *Kente*. It simply mentions *Kente* and *Adinkra* signs as part of folklore. But the method of manufacturing *Kente* is widely known and accepted in the country as a unique cultural skill. Defining legally the traditional knowledge of *Kente* weaving as intellectual property which is protectable under copyright would expand the scope of intellectual properties from which Ghana can make foreign exchange. It will also help to preserve the indigenous culture of the country.

Third, Ghanaians need to be better educated on the concept of copyright. The national competent authority designated and charged with the responsibility for administering copyright laws in Ghana – the Ghana Copyright Office – should raise awareness, educate, and guide the

people of the Republic to properly understand how copyright works. This will not only prevent unfounded arguments, but promote constructive criticism that will improve the nation's copyright system.

Other measures that can also be adopted by all countries within the sub-Saharan African region to better benefit from international copyright systems include the following:

All countries within the sub-Saharan African region should admit the application of the flexible provisions provided for developing countries to the works of which they are the countries of origin, whether or not they decide to apply the provisions themselves. This will encourage reciprocity. They will then be able to broaden the pool of literary works from which they can translate and reproduce in accordance with the conditions of the provisions.

The problems that are faced by sub-Saharan African countries in their trade of intellectual properties are compounded, especially in West Africa, by the presence of roadblocks which cause undue delays which prevents markets from functioning properly (Department for Business Innovations and Skills, 2011). As mentioned earlier, high standards at checkpoints in developed countries are already disadvantageous to Africans. Sub-Saharan African countries need not compound the problem by erecting unnecessary barriers at their own borders. Issues at checkpoints that hamper trade need to be taken seriously and addressed to cut down on undue delays and promote trade of intellectual properties within the region.

Conclusion and Recommendations for Further Research

This research focussed on Ghana and utilized a single case study methodology to explore the fairness and/or equity of international copyright systems in terms of their influence on copyright systems in sub-Saharan Africa. One major limitation of this study is that sub-Saharan Africa is a vast region; where the majority of countries belong to the least developed categories

of countries. Ghana's case may not be fully representative of the problems other sub-Saharan African countries face with copyright systems. In many of these countries the situation may be worse. A multiple case study of at least three countries would be ideal to make more accurate inferences for the entire sub-Saharan Africa region. Here, it is important to note that Ghana's case has been examined only to provide an insight into the features of the issues confronting other countries within the sub-Saharan Africa region. A comparative study with other countries within the region (preferably least developed countries) would therefore provide a fuller understanding of the overall situation in the region.

According to Rawls, each individual is a significant member of society who contributes a quota to the overall welfare of the society. All persons are equally important in society and hence deserve an equal right to the most extensive basic liberty compatible with a similar liberty for others. Sub-Saharan African countries form part of the grand coalition of international copyright organizations and should be able to contribute to and benefit equally from a properly functioning international copyright system. Their unmet needs in copyright therefore violate Rawls' requirement for a just system. More consideration needs to be given to sub-Saharan African countries to ensure equity in international copyright systems; especially since sub-Saharan African countries are the least advantaged members of international copyright organizations.

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