

# Protecting Ghana's intellectual property rights in *kente* textiles: the case for Geographical Indications

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## 1. Introduction

The Republic of Ghana recognizes the importance of the development of a system of Geographical Indications (GI) protection, a type of intellectual property right (IPR), for its food and non-food products. A benefit of developing GI protection in Ghana would be the promotion of sustainable rural development and trade in its traditional products on the local and international markets. One Ghanaian non-food traditional product that requires IPR protection is the *kente* textile. *Kente* consists of colourful, handwoven strips of fabric, combined by Ghanaian weavers in certain ethnic groups and communities.<sup>1</sup> Its colours and unique designs have made it the best known of all Ghanaian, and perhaps

and sold in other countries as originals. Further, *kente* cloth is in danger of being viewed as a generic African fabric, instead of being revered as the embodiment of the cultural history of the Ghanaian Ashanti and Ewe communities.

- Increasing threats to Ghana's *kente* textile have intensified the need for its urgent defensive intellectual property (IP) protection. While Ghana's Copyright Act, 2005 (Act 690) protects the *kente* styles and designs from being copied, it can neither address the problem of third parties producing *kente* imitations for sale, nor the cultural misappropriation of Ghana's textile tradition. Additionally, the world's largest free trade agreement, the comprehensive African Continental Free Trade Agreement (AfCFTA), has the potential to further damage Ghana's *kente* trade where it has no extensive IP protection. This article makes a case for why Geographical Indication (GI) protection should be an important part of a comprehensive IP strategy to protect Ghana's *kente*.
- From a global perspective, the African Union (AU) and European Union (EU) agreed to enhance cooperation through commitment to an AU-EU Continental strategy for Geographical Indications in Africa with an action plan to improve Africa's GI systems. Notably, the action plan identifies Ghana's *kente* as having GI potential. This article argues that supportive pan-African, regional and national GI policies are needed to link people, places and products, and calls for the enforcement of Ghana's Geographical Indications Act to preserve Ghana's traditional *kente* from wider misappropriation.

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## This article

- The commercial diversification of Ghana's traditional and unique *kente* cloth has resulted in its economic misappropriation in recent times. Lower quality *kente* textiles are being marketed

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<sup>1</sup> UNESCO Accra Cluster Office (Ghana Traditional Textiles Project) 'Safeguarding Ghana's Cultural Heritage Protection, Preservation and

Conservation of Traditional Woven Textiles' (2008) Project Code-24225106ACR (Safeguarding Ghana's Heritage) 9.

even all African textiles.<sup>2</sup> Although the origin and meaning of *kente* is the subject of an ongoing debate in Ghana, it is widely accepted that *kente* is the characteristic of the Akan and Ewe communities.<sup>3</sup> This article studies how *kente* could be registered as a Ghanaian GI to support its economic importance and protection from third-party misappropriation in view of the AU–EU Continental Strategy for Geographical Indications in Africa.<sup>4</sup>

## 2. Ghana's *kente* and GI legislation

What is *kente*? For those unfamiliar with this textile, it is a literal and figurative fabric of Ghana's cultural heritage dating back over 300 years, which embodies the history of specific Ghanaian communities.<sup>5</sup> Every design and colour has a distinct name and a meaning that is characteristic of the community in which it is produced.<sup>6</sup> Set out below are images which depict examples of the Ghanaian *kente* cloth.

Asante *kente* is locally produced by generations of the Asante community located in the Ashanti region of Ghana. The design depicted in Fig. 1 is known as '*Fahia kotwere Agyeman*', which means 'seek help from Agyeman'. It is a symbol of hope, faith, sharing and benevolence, because it alludes to the importance of friendship and community.<sup>7</sup>

*Kente* from another culturally significant Ghanaian group is depicted in Fig. 2.

This type of *kente* is produced by the Ewe community located in the South-Eastern part of Ghana and is referred to as *Adanuvo*. The figurative designs in the form of animals, human figures, flowers, trees and household chattels differentiate it from the Asante *kente*

and represent the way of life of the Ewe people. 24 small squares surround each symbol in the cloth. These squares depict the number of days it took the Ewe ancestors to elude King Agorkoli at Notsie in Togo and settle in Ketu in the Volta Region of Ghana.<sup>8</sup> Both the Asante and Ewe *kente* cloth are deeply connected to Ghana's people and land.

*Kente* has attained a reputation as a quality woven textile cloth, for which consumers are willing to pay a premium price, and this premium must be preserved.<sup>9</sup> *Kente*'s quality is attributed to the techniques used in its production. For example, the double-weave technique used by the Ewe communities creates a thicker and heavier quality *kente* cloth peculiar to the Ewe community.<sup>10</sup>

In 1994, exports of *kente* and other Ghanaian traditional textiles contributed approximately USD 179.7 million to Ghana's gross domestic product (GDP).<sup>11</sup> However, according to the Ghana Investment Promotion Centre (GIPC), the upsurge in mass production and copying of *kente* and other traditional textiles by countries such as the People's Republic of China (PRC) has resulted in a consistent annual decline of the contribution of the textile industry to Ghana's GDP.<sup>12</sup> By 2011, the revenue from Ghana's textile industry had reduced to about USD 53.5 million, which is approximately 30 per cent less as compared to 1994.<sup>13</sup> Due to the constant exploitation and imitation of *kente* both in Africa and beyond, Ghana and the local *kente* producers have not been able to achieve the maximum economic benefit from the sale of the textile. Also, on the international market, *kente* is not being granted due recognition as a product of uniquely Ghanaian origin and quality.<sup>14</sup>

2 Ghana Review, 'Kente-Ghana National Cloth' (*Black Economics*) <<http://blackeconomics.co.uk/wp/kente-ghana-national-cloth/>> accessed 5 September 2019.

3 Malika Kraamer, 'Origin Disputed. The Making Use and Evaluation of Ghanaian Textiles' (2006) 4 *Afrique: Archeologie & Arts* 53, 68.

4 African Union (AU) Commission—Department of Rural Economy and Agriculture, 'Continental Strategy for Geographical Indications in Africa 2018-2023' (2017) <[https://au.int/sites/default/files/documents/36127-doc-au\\_gis\\_continental\\_strategy\\_enng\\_with-cover-1.pdf](https://au.int/sites/default/files/documents/36127-doc-au_gis_continental_strategy_enng_with-cover-1.pdf)> accessed 13 October 2020; (AU–EU Continental Strategy).

5 Munyaradzi Mawere and Tapuwa R Mubaya, *Colonial Heritage, Memory and Sustainability in Africa* (Langaa RPCIG 2015) 295.

6 Julie Halls and Allison Martino, 'Cloth, Copyright, and Cultural Exchange: Textile Designs for Export to Africa at the National Archives of the UK' (2018) 31 *Journal of Design History* 236, 237.

7 Michael Osei Asibey, Kwasi Osei Agyeman, Vivian Yeboah, 'The Impact of Cultural Values on the Development of the Cultural Industry: Case of the Kente Textile Industry in Adanwomase of the Kwabre East District' (2017) 23 *Journal of Human Values* 200, 210.

8 Bob Dennis Ahiagble, *The Pride of Ewe Kente* (Sub-Saharan Publishers 2004) 52.

9 UNCTAD, 'Why Geographical Indications for Least Developed Countries?' (2015) UNCTAD/ALDC/2015/4,12.

10 Bob Dennis Ahiagble, *The Pride of Ewe Kente*. (Sub-Saharan Publishers 2004) 41.

11 Peter Quartey, 'The Textiles and Clothing Industry in Ghana' in Herbert Jauch and Rudolf Traub-Merz (eds.), *The Future of the Textile and Clothing Industry in Sub-Saharan Africa* (Friedrich-Ebert-Stiftung 2006) 139.

12 Ghana Web, 'Ghana's Textiles and Garments Industry to be Attractive Global Market' (*Ghanaweb*, 5 November 2020) <<https://www.ghanaweb.com/GhanaHomePage/business/Ghana-s-textiles-and-garments-industry-to-be-attractive-global-market-GIPC-1100953>> accessed 6 November 2020.

13 Ghana Investment Promotion Centre (GIPC), 'Textiles and Garments-The Market' (*gipcghana*, 2020) <<https://www.gipcghana.com/invest-in-ghana/sectors/textiles-garment/the-market.html>> accessed 9 November 2020.

14 Gertrude Torkornoo, 'Creating Capital from Culture- Rethinking the Provisions on Expressions of Folklore in Ghana's Copyright Law' (2012) 18 *Annual Survey of International and Comparative Law* 1, 39.



Figure 1. Asante *kente*. Credit: ejisubesease.org

The downgrading of *kente*, amongst other Traditional Cultural Expressions (TCEs), also known as 'expressions of folklore',<sup>15</sup> such as *Adinkra* symbols and *Kweku Ananse* stories, has encouraged Ghanaian appeals for its preservation and protection on national, regional and international levels.<sup>16</sup> At the national level, the National Folklore Board of Ghana<sup>17</sup> has been raising awareness for the promotion of legal protection for Ghana's folklore, including *kente*.<sup>18</sup> The government of Ghana has also instituted plans to establish a *Kente* Museum in the Ashanti Region for the preservation of the Asante *kente*.<sup>19</sup> According to the immediate past Minister of Tourism, Arts and Culture, Mrs Barbara Oteng-Gyasi, 'the government would invest heavily in the promotion of the *kente* textile just like other local products to prop up the tourism industry'.<sup>20</sup>

At the regional and international levels, the AU in collaboration with the EU, the African Intellectual Property Organisation (OAPI), the African Regional Intellectual Property Organisation (ARIPO) and other regional economic communities (RECs) have recognized the need for the development of IPRs, specifically, GIs for food and non-food products to promote sustainable rural development and promote traditional products on local and international markets.<sup>21</sup> Such recognition has led to the establishment of a policy



Figure 2. Ewe *kente*. Credit: IamFate, Opera News Ghana

framework for a continental strategy for GIs in Africa (the 'AU–EU Continental Strategy') and an action plan to be implemented from 2018 to 2023. The main aim of the continental strategy is to

develop sound GI promotion and protection strategies through institutional capacity building, public policies, support programmes, strengthened legal and institutional GI frameworks, efficient coordination and partnerships and demonstrative pilots in Africa, by 2023.<sup>22</sup>

Significantly, the AU–EU Continental Strategy identifies Ghana's *kente* as a GI or potential GI.<sup>23</sup> Though there have been attempts in Ghana to rely on Ghana's Copyright Act, 2005 (Act 690) (Copyright Act) to protect the IPR in *kente*, it has been universally agreed that, because of the unique nature of *kente* as a TCE, copyright does not, nor is it able to, comprehensively protect it.<sup>24</sup> One of the main features of IPRs is that more than one type of IPR protection could be vested in a single product.<sup>25</sup> The challenges confronting the copyright protection of *kente* indicate that it will be prudent to have additional protection to supplement and fill gaps created by the Copyright Act.

GIs have been popularly suggested as the best available legal means for protecting *kente* as a TCE. As a member of the World Trade Organization (WTO), Ghana enacted a GI legislation known as the Geographical Indications Act, 2003 (Act 659) (GIA) in accordance with the Trade-Related Aspects of

15 WIPO, 'Intellectual Property and Traditional Cultural Expressions/Folklore' (2005) Booklet No.1 WIPO Publication No. 913(E) (IP and TCE/Folklore) 5.

16 WIPO, 'Traditional Knowledge and Indigenous Peoples' (2010) WIPO Publication No. 1014E/R 40.

17 National Folklore Board (*folklore.gov*, 2019) <<https://folklore.gov.gh/>> accessed 29 July 2019.

18 Kwame Dadzie, 'National Folklore Board Launches 'Know Your Folklore' Campaign' (*Citi News Room*, 14 January 2019) <<https://citi.newsroom.com/2019/01/national-folklore-board-launches-know-your-folklore-campaign/>> accessed 29 July 2019.

19 Daniel Kenu, 'Vice-President cuts sod for Bonwire Kente Museum' (*graphic.com*, 15 October 2020) <<https://www.graphic.com.gh/news/gen>

<eral-news/ghana-news-vice-president-cuts-sod-for-bonwire-kente-museum.html>> accessed 9 November 2020.

20 *ibid.*

21 AU–EU Continental Strategy (n 4).

22 *ibid.*

23 *ibid.*, Annex 1.

24 WIPO, 'Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Fifth Session' (July 2003) WIPO/GRTKF/IC/5/3 (IGC Fifth Session) para 10.

25 UK Government, 'Intellectual Property and Your Work' (Gov.UK) <<https://www.gov.uk/intellectual-property-an-overview/protect-your-intellectual-property>> accessed 29 July 2019.

Intellectual Property Rights Agreement (TRIPS).<sup>26</sup> The GIA sets out the procedure for the registration of an indication as a Ghanaian GI and precludes unauthorized persons from its misuse. It provides that an application for the registration of a GI must be made at the Industrial Property Office of the Registrar-General's Department in Ghana.<sup>27</sup> Although the Act states that prior registration is not a requirement for a GI to be protected in Ghana, registration creates the *prima facie* presumption that the indication is protected under the GIA.<sup>28</sup> Thus, where any dispute concerning a GI arises, the registered GI provides documentary evidence about the quality or other characteristic of the good that links it to its place of origin. The GIA explicitly names *kente* as an eligible GI to be protected under the Act.<sup>29</sup> Nonetheless, 17 years later, there is little or no effort being made to implement the GIA to pursue a comprehensive IPR protection of Ghana's *kente*. This is evidenced from the authors' research conducted at the WIPO Law library in Geneva, as well as interactions with WIPO staff and officials at the Ghana Folklore Board. Research is required on the subject of the viability of using GIs to protect the IPR in *kente* for economic, social and cultural development. This article, therefore, seeks to study how *kente* could be registered as a GI to promote its economic importance and protect it from third-party misappropriation in light of the AU–EU Continental Strategy.

### 3. The AU–EU Continental Strategy and African GIs

The AU–EU Continental Strategy was developed by the AU's Department of Rural Economy and Agriculture in collaboration with the EU and other RECs and was adopted in October 2017 as a specific deliverable of the fifth AU–EU Summit in November 2017.<sup>30</sup> It is meant to contribute to the new African–European Alliance for sustainable investments and rural development.<sup>31</sup> The continental strategy also forms part of the AU's commitment to implement the United Nations 2030 Sustainable Development Agenda as well as the

2063 AU Agenda.<sup>32</sup> In order to facilitate the implementation of the AU–EU Continental Strategy, the Consultative Committee, which includes members from the AU, OAPI, ARIPO, European Commission and WIPO, sets up an action plan for 2020 on 29 March 2019 (the Action Plan).<sup>33</sup> The Action Plan established three initiatives for implementing the continental strategy. Specifically, Heading 4 of the Action Plan provides that the continental strategy will be promoted via cooperation on inclusive and sustainable value chains through development of an Africa GI Training Programme, an Africa GI web platform and support for concrete GI pilot projects.<sup>34</sup> Currently, an online Pan African GI Information Hub has been established to encourage GI training in Africa.<sup>35</sup> Additionally, in February 2020, an African GI web platform known as AFRIFI was also directed, co-funded and implemented by the EU and the European Union Intellectual Property Office (EUIPO), for an initial duration of 4 years.<sup>36</sup> The aim of this project was to 'create, protect, utilize, administer and enforce Intellectual Property Rights across Africa, in line with international and European best practices and in support of the African Continental Free Trade Area ("AfCFTA") and the African Union's Agenda 2063.<sup>37</sup> The AU–EU Continental Strategy provides specific guidelines and recommendations for implementing African GI projects such as *kente*. It specifically names the '*kente* cloth from Bonwire and Kpetoe' as a non-food product, which can be protected by GIs.<sup>38</sup> The next section considers the rationale for GI registration of *kente* by presenting the dangers confronting *kente* as well as the inadequacy of the Copyright Act 2003 in protecting the IPR in *kente*.

### 4. Elaborating the case: GI protection for Ghana's *kente*

GIs have the potential to be used to protect TCEs to ensure that the authentic producers and communities of the TCEs obtain higher economic gains for their products by helping to combat misappropriation and improving rural development of the communities. In

26 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (15 April 1994) 1869 UNTS 299.

27 Ghana's Geographical Indications Act 2003 (Act 659) (GIA), s 6.

28 *ibid*, s 2.

29 GIA (n 27), s 22.

30 AU–EU Continental Strategy (n 4).

31 African Union, 'Political Declaration of the 3rd African Union-European Union Agriculture Ministerial Conference, Rome (Italy)' (21 June 2019) (Political Declaration).

32 *ibid*.

33 European Commission, 'A Step Closer to the Establishment of African Geographical Indications' (*ec.europa.eu*, 3 April 2019) <[https://ec.europa.eu/info/news/step-closer-establishment-african-geographical-indications-2019-apr-03\\_en](https://ec.europa.eu/info/news/step-closer-establishment-african-geographical-indications-2019-apr-03_en)> accessed 13 October 2020.

34 Political Declaration (n 31), Annex to Declaration.

35 EUIPO, 'The Pan African Geographical Indications Information Hub' (*afri-gi.com*, 2020) <<https://africa-gi.com/en/pan-african-gi/learning>> accessed 13 October 2020.

36 AfrIFI, 'About AfrIFI' (*euiipoef.eu*, 2020) <<https://euiipoef.eu/en/afripi/about-afripi>> accessed 13 October 2020.

37 *ibid*.

38 AU–EU Continental Strategy (n 4), Annex 1.

effect, GI-type protection should impact positively on the economic growth of the countries in which these communities are located.<sup>39</sup> As a TCE, over the years *kente* has faced the threat of cultural and commercial misappropriation. To overcome same, registration as a Ghanaian GI is the next stage of IPR system protection and will be discussed in more detail in the ensuing paragraphs.

#### 4.1 Dangers confronting *kente*

The main danger affecting *kente* today is the economic misappropriation of the cloth by third parties. The widespread commercialization of Ghana's *kente* cloth to meet the demands of *kente* lovers all over the world has culminated in *kente*-type cloths and products being manufactured in other countries such as the PRC and being sold on international markets as authentic *kente*.<sup>40</sup> These imitation lower-quality cloths have been notoriously branded as being machine woven with cheap thread fibres instead of traditionally handwoven with silk and cotton. They do not possess the quality and sophistication of the authentic *kente* cloth produced by the Asante and Ewe communities.<sup>41</sup> The value placed on authentic *kente* is attributed to the quality texture of the cloth, as well its nature as a unifying national and cultural symbol for Ghanaians.<sup>42</sup> *Kente* is worn by Ghanaians on special occasions, such as weddings as depicted in Fig. 3(a) and (b).

##### 4.1.1 Original Asante *kente* designed and worn for a traditional wedding ceremony

Examples of vendors of inauthentic *kente*-type products include Culture Royals and Pirongs Store, amongst others, whose *kente*-type products are offered for sale on Amazon.<sup>43</sup> The sale of these *kente* imitations has reduced the actual value and quality of the authentic Ghanaian *kente* textile.<sup>44</sup> These products are offered for sale more cheaply than the authentic *kente*, leading to lower economic returns for the local *kente* weavers. Ultimately, Ghana's GDP and trade exports are

adversely affected.<sup>45</sup> Gradually, *kente* is no longer being revered as the unifying symbol and embodiment of the history of the Ghanaian communities, but rather as a money-making venture. The loss of traditional and historical branding of the cloth in recent times has led to the acknowledgement of *kente* as a general type of African (Ankara) textile in lieu of the Ghanaian traditional textile cloth that it is.<sup>46</sup> Thus, the factors that make the *kente* unique that is, its correlation with the history and culture of Ghana's Asante and Ewe communities, are being eroded and its cultural heritage abused by third-party manufacturers.

The mass commercialization and quality deterioration of Ghanaian *kente* show the need for its protection and preservation from third-party cultural and commercial misappropriation. Protection of the cloth is also necessary to prevent *kente* imitations from flooding the market, thus improving on the trade of traditional textiles in Ghana. Increased textile trade will have a positive effect on Ghana's GDP and trade exports, particularly given the implementation of the AfCFTA.

#### 4.2 Why Ghana's copyright legislation is not enough to protect *kente*

Although in Ghana the IPRs in *kente* have been protected using copyright, GIs are being advocated by WIPO and other international and regional bodies as a more suitable and comprehensive form of protection for TCEs.<sup>47</sup> For an IPR system to be considered comprehensive, it must provide a complete 'defensive' and 'positive' protection to the creations.<sup>48</sup> Positive protection ensures that the creator has the right to profit from his creations.<sup>49</sup> Conversely, defensive protection refers to the ways of 'ensuring that third parties do not gain illegitimate or unfounded IP rights' in the TCEs. In Ghana, the Copyright Act used to protect the IPR in TCEs was fashioned according to the WIPO/UNESCO Model Provisions for the Protection of Folklore (Model Provisions).<sup>50</sup> It allows the author to control the use of his or her works by third parties, by protecting the

39 Cerkia Bramley, Estelle Bienabe and Johann Kirsten, 'The Economics of Geographical Indications: Towards a Conceptual Framework for Geographical Indication Research in Developing Countries' in WIPO (ed.), *The Economics of Intellectual Property. Suggestions for Further Research in Developing Countries and Countries with Economies in Transition* (WIPO, 2009), 109.

40 Nuruddeen M Abdallah, 'Inside Ghana's Collapsing Textile Industry' (*Daily Trust*, 20 June 2010) <<https://www.dailytrust.com.ng/inside-ghana-collapsing-textile-industry.html>> accessed 5 September 2019.

41 Safeguarding Ghana's Heritage (n 1) 12.

42 Bob Dennis Ahiagble, *The Pride of Ewe Kente* (Sub-Saharan Publishers 2004) 41.

43 Amazon, 'Kente' ([amazon.co.uk](https://www.amazon.co.uk)) <[https://www.amazon.co.uk/s?k=kente&ref=nb\\_sb\\_noss](https://www.amazon.co.uk/s?k=kente&ref=nb_sb_noss)> accessed 18 November 2020

44 Safeguarding Ghana's Heritage (n 1) 11.

45 Quartey (n 11) 139.

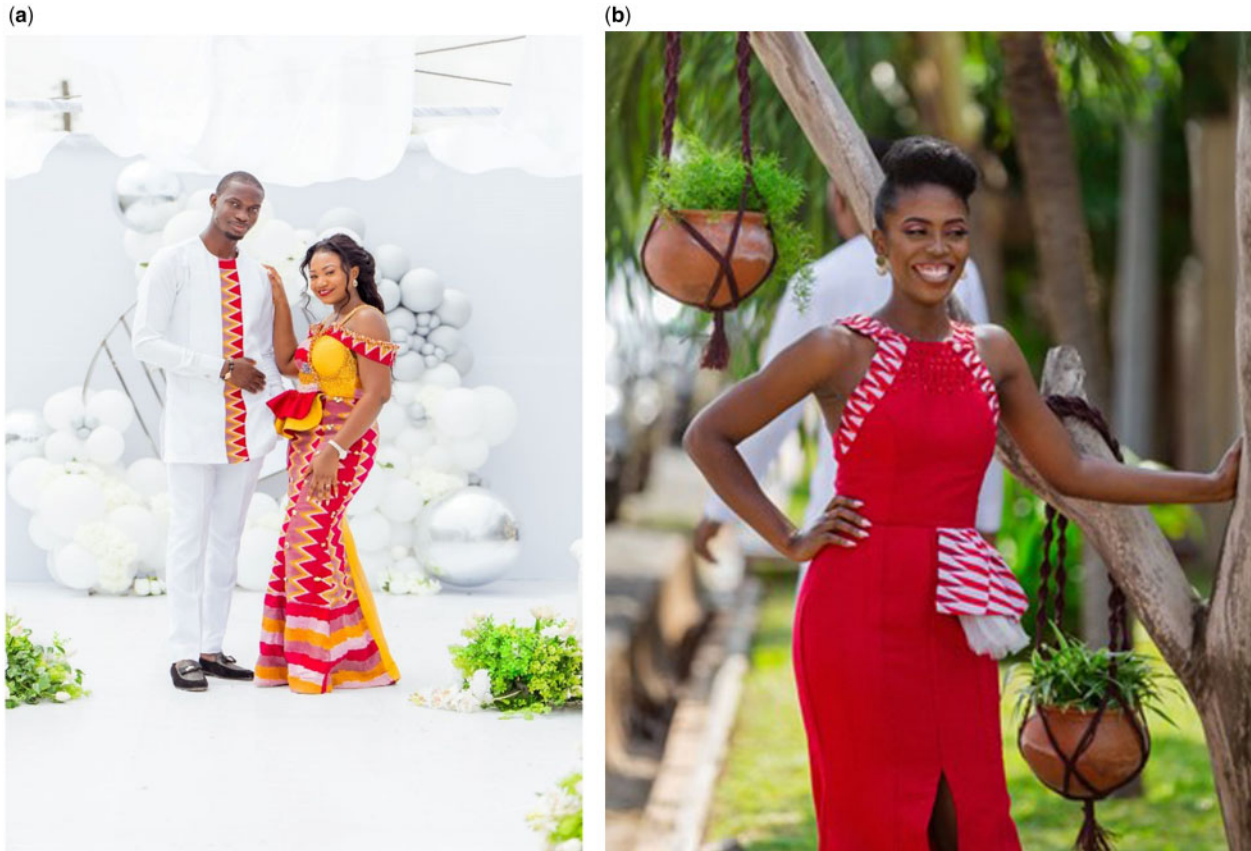
46 Doran H Ross, *Wrapped in Pride: Ghanaian Kente and African American Identity* (Fowler Museum of Cultural History 2001).

47 David Vivas-Eugui and Christoph Spennemann, 'The Treatment of Geographical Indications in Recent WTO Discussions and in Regional and Bilateral Agreements' in Meir Perez Pugatch (ed.), *The Intellectual Property Debate* (Edward Elgar Publishing, 2006), 7.

48 WIPO (n 16) 41.

49 *ibid.*

50 Kathleen Ludewig, 'The Nationalization and Commercialization of Ghanaian Folklore' (2009) 6 *Michigan Journal of Public Affairs* 1.



**Figure 3.** Original Asante *kente* designed and worn for a traditional wedding ceremony. (a) Credit: Kingkwekuananse photography. (b) Credit: Efuastanz designs and The Memory Lane Crew photography.

exact style of the creation from being copied.<sup>51</sup> Thus, copyright generally protects the expression of an idea and not the idea itself.<sup>52</sup> By not protecting the underlying idea of a work, copyright was considered an appropriate form of protection for *kente* and the other TCEs because it allowed for further creation of new and modern designs.<sup>53</sup>

Although the Copyright Act protects *kente* designs from being copied, which provides a positive protection to *kente*, there are still gaps in its protection. The Act has not prevented third parties from producing *kente* imitations for sale and as such does not offer a complete defensive IPR protection. In other words, the right allows specific authors to profit from their *kente*

designs, but the authors are not entirely protected from the expropriation of their works by third parties.

Furthermore, copyright generally offers exclusive rights to the creators of original works only.<sup>54</sup> Originality has been interpreted in common law countries to mean work that contains a minimal level of creativity, involves the author's effort, intellectual ability, skill and time and has not been copied from another person's work.<sup>55</sup> In civil law countries, it refers to work which contains the creator's personality.<sup>56</sup> It has been contended that TCEs, like *kente*, may not always be considered as original reproductions because they are traditional in nature and are handed down across generations.<sup>57</sup> Additionally, work will only qualify for copyright protection, where an individual creator or

51 WIPO, 'Intellectual Property and the Safeguarding of Traditional Cultures' (2012) WIPO Publication No. 1023E, (IP and Safeguarding) 22.

52 WIPO, 'WIPO Intellectual Property Handbook: Policy, Law and Use' (2004) WIPO Publication No. 489(E), 40.

53 *ibid.*, 24.

54 WIPO (n 51) 24; Ghana Copyright Act 2005 (Act 690) (Copyright Act) s 1(2).

55 *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, [2005] 1 WLR 3281.

56 WIPO (n 51) 24.

57 *ibid.* 27; *Bridgeman Art Library Ltd v Corel Corp.*, 36 F Supp 2d 191 (SDNY 1999).



the registration and protection of GIs in Ghana. The GIA lists *kente* as a non-food product or good which could potentially be afforded GI protection under the Act.<sup>70</sup> Nonetheless, the enactment of legislation identifying *kente* as a qualifying GI good is only the first step in successfully developing *kente* as a GI.<sup>71</sup> Further capacity building and steps need to be taken for successful implementation. Since there is currently no action plan in place in Ghana for the implementation of the GIA, this article provides recommendations as to the steps that could be taken by *kente* stakeholders such as the Ghana government and the Asante and Ewe communities to implement *kente* as a Ghanaian GI.

#### 4.5 The WTO, Article 24 TRIPS and unfair competition

The GIA offers the minimum level of protection as provided under the TRIPS Agreement to *kente*.<sup>72</sup> If registered as a GI, *kente* will only be protected from third-party misappropriation where such misappropriation would mislead the public as to the true geographical origin of the cloth or where the misappropriation will result in unfair competition.<sup>73</sup> Unfair competition has been defined under the Paris Convention for the Protection of Industrial Property<sup>74</sup> (Paris Convention) as ‘an act of competition contrary to honest practices in industrial or commercial matters’.<sup>75</sup> The WTO panel in the Australia-Tobacco Plain Packaging dispute stated that the definition of unfair competition under the Paris Convention incorporated into the TRIPS Agreement,<sup>76</sup> is broad enough to include ‘dishonest practices in industrial and commercial matters that relate to geographical indications’.<sup>77</sup> Such dishonest practices include acts which are likely to cause confusion with another product or service on the market as well as acts that create a false impression about a particular product which leads to the consumer acting on such false information to purchase the product.<sup>78</sup> It also includes acts which destroy the distinctive value and reputation associated with the product.<sup>79</sup>

70 GIA (n 27) s 22.

71 UNCTAD (n 9), 52.

72 GIA (n 27) s 1a; TRIPS Agreement (n 26) art 22(2).

73 TRIPS Agreement (n 26) art 22(2).

74 Paris Convention for the Protection of Industrial Property (adopted on 14 July 1967, entered into force on 26 April 1970) 828 UNTS 305 (Paris Convention).

75 ibi, art 10bis.

76 TRIPS Agreement (n 26) art 2 (1).

77 Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Reports of the Panels WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 816.

Recently, WTO members have been engaged in debates and negotiations, pursuant to Article 24 of the TRIPS Agreement, to extend the higher level GI protection which exists for wines and spirits to other products, including handicrafts.<sup>80</sup> Here, a third party cannot use a GI without authorization, even though there is no consumer confusion as to the true origin of the good and will not lead to unfair competition.<sup>81</sup> To date, no agreement has been reached. It would be beneficial for the protection of Ghana’s *kente* and other international TCE textile products if the higher level of GI protection was extended to include handicrafts. However, until this is done the current level of GI protection should be adequate to protect *kente* from third-party misappropriation.

Registering *kente* as a new Ghanaian GI could play an important role in promoting the cultural awareness of the cloth as a uniquely Ghanaian textile. As noted in Section 2, *kente* has a market reputation as a quality woven textile cloth, for which consumers are willing to pay a premium price. Registration as a GI would also enable the original producer associations to prevent its unauthorized use by third parties.<sup>82</sup> The next section explains in more detail the unique nature of *kente* which, the authors argue, make it eligible for GI protection.

#### 5. A preliminary analysis of *kente*’s eligibility for GI protection

A good qualifies for GI protection where there is a definite link between the good and its place of origin. Such a link may be qualitative or reputational or may be natural or human characteristic factors present in the good’s place of origin.<sup>83</sup> A qualitative link is usually a measurable physical characteristic, which shows that the physical state of the good is attributable to certain unique features of its geographical origin. A reputational link, on the other hand, creates the sense that the relationship between the good and its geographical origin is built on the goodwill and consumer reputations associated with it.<sup>84</sup> Hitherto, GIs were mainly developed to protect agricultural products.<sup>85</sup> However,

78 European State Agency, ‘Intellectual Property Rights: Protection Against Unfair Competition’ (ESA, 22 November 2012) <[https://www.esa.int/About\\_Us/Law\\_at\\_ESA/Intellectual\\_Property\\_Rights/Protection\\_against\\_unfair\\_competition](https://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/Protection_against_unfair_competition)> accessed 3 September 2019.

79 ibid.

80 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization Text, Cases and Materials* (4th edn, CUP 2017) 1032; TRIPS Agreement (n 26) art 23.

81 TRIPS Agreement (n 26) art 23.

82 UNCTAD (n 9) 12.

83 Vivas-Eugui and Spennemann (n 47) 7.

84 ibid.

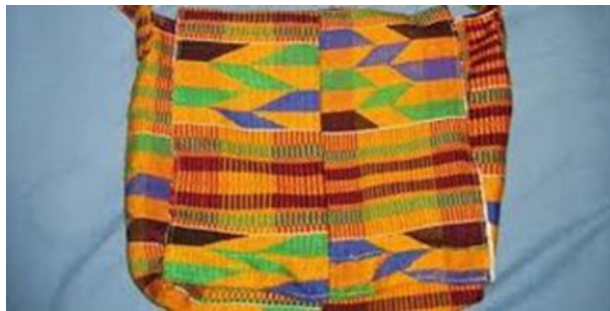
85 ibid 3.







**Figure 4.** A *Kente* weaver at Bonwire on the traditional wooden loom, Nsdua Kofi. Credit: Kraftsmen Media Co.



**Figure 5.** 'Oyokoman na gya da mu' means 'crisis in the Oyoko nation'. It symbolizes internal conflicts, the need for unity in diversity, and reconciliation.<sup>99</sup>

Research Centre for International Development controls the successful implementation of a project for the GI registration of *Degler Nour* dates, *Gabès* pomegranates and *Teboursouk* olive oil in the country. The Tunisian Ministry of Agriculture facilitated this by updating the regulations on quality labels relating to origin to back the GI certification scheme and obtaining international recognition of Tunisian GIs. In the same vein, it would be beneficial for the government of Ghana and other regional actors such as the AU, ARIPO, OAPI and the EU to be involved in the GI registration of *kente*. The main reasoning behind the advocacy of national and regional involvement is that GI registration is likely to be very costly and time-demanding.<sup>100</sup> The codification of the unique characteristics and designs of the *kente* in the different communities also requires some technical expertise which the individual *kente* communities may not be financially able to

provide. For instance, it may be quite difficult for the Asante and Ewe communities to individually identify and organize themselves into associations, producer groups or collective actions to submit applications for the protection of their *kente* designs under the GIA. However, the involvement of a national or regional body directing and overseeing such registrations may provide a push for these communities to submit the GI applications for the protection of their *kente* designs. At the national level, there could be a committee or board to co-ordinate with the *kente* producer groups for the registration of the *kente* GI. Recently, in Ghana, there have been demands to set up a National *Kente* Board to aid in the management and protection of the increasingly globally recognised *kente* cloth.<sup>101</sup> Once it is established, the new Board could also be used as a facilitator for the registration of the Asante *kente* GI. The assistance of the relevant state institutions and regional actors would facilitate the smooth registration and implementation of *kente* as a registered Ghanaian GI.

### 6.1 Value creation at the producer level

The first level in the GI registration process, according to the AU–EU Continental Strategy, is the value creation of the product at the producer level.<sup>102</sup> One of the aims of registering *kente* as a GI is to foster trade development in Ghana's textile industry. As said, research reveals that consumers are willing to pay premium prices for GI-related products because of its correlation with quality.<sup>103</sup> For instance, in the EU, consumers are willing to pay between 5 and 10 per cent premium for non-agricultural products. Quality, therefore, lies at the

<sup>99</sup> *ibid.*

<sup>100</sup> UNCTAD (n 9) 54.

<sup>101</sup> Joy Online, 'Set Up a National Kente Board- Government Advised' ([myjoyonline.com](http://myjoyonline.com), 15 October 2020) <<https://www.myjoyonline.com/>

[news/set-up-a-national-kente-board-government-advised/](https://www.myjoyonline.com/news/set-up-a-national-kente-board-government-advised/)> accessed 16 October 2020.

<sup>102</sup> AU–EU Continental Strategy (n 4) 45

<sup>103</sup> Yogesh Pai and Tania Singla, 'Vanity GIs: India's Legislation on Geographical Indications and the Missing Regulatory Framework' in



**Figure 6.** Modern variations of the Asante *Kente*. Credit: Kraftsmen Media Co.

heart of the successful implementation of any GI. The successful achievement of a *kente* GI improving trade in Ghana is therefore highly dependent on consumers recognizing the value that the link between the product and the geographical region places on the product. Thus, consumers must understand that a GI in Asante or Ewe *kente* means that any product with that appellation or certification mark is a genuine product with specific qualities, which cannot be obtained in any other product. Consequently, there is the need to implement an effective quality control mechanism to monitor and ensure that the quality of *kente* as detailed in the GI application does not wane with time. The AU–EU Continental Strategy recommends that local producers draw up a Code of Practice (CoP) containing a marketing plan and other requirements for promoting the *kente* GI.<sup>104</sup> Also, the AU is being encouraged to focus on activities to disseminate information on the GIs and to train officials responsible for the GIs in the countries.

## 6.2 Active protection at the international level

Like all other traditional IP rights, GI protection is territorial.<sup>105</sup> Thus, a GI may be protected in one jurisdiction but not in the others. It is, therefore, expedient to not only protect a GI in the country of origin but also

internationally.<sup>106</sup> According to the AU–EU Continental Strategy, African countries are encouraged to provide international protection to their GIs.<sup>107</sup> International protection of a GI also contributes to the reduction of the risk of that indication becoming a generic term.<sup>108</sup> The TRIPS Agreement provides that a GI must be protected under national law before it can be protected internationally.<sup>109</sup> It, however, does not provide such an international system for GI protection and in the absence of this, there have been four proposed methods.

First, a GI can be protected internationally by obtaining corresponding GI protection directly in other countries. Such direct protection may be through any of the forms of protection of GIs available in that jurisdiction.<sup>110</sup> Secondly, two trading countries may agree to protect each other's GIs under a bilateral agreement. An example is the agreement between the European Union and other countries such as Albania, Australia and USA.<sup>111</sup> Thirdly, some multilateral agreements address the international protection of GIs.<sup>112</sup> This may be through the Lisbon Agreement, which provides a method of protecting appellations of origin in all the other member territories through an international registration system.<sup>113</sup> It may also be through the Madrid Agreement Concerning the International Registration

Irene Calboli and Ng-Loy Wee Loon (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific* (CUP 2017) 337.

104 AU–EU Continental Strategy (n 4).

105 WIPO (n 67) 35.

106 Ludwig Baumer, 'Protection of Geographical Indications under WIPO Treaties and Questions Concerning the Relationship Between those Treaties and the TRIPS Agreement' (1999) WIPO publication No 760(E).

107 AU–EU Continental Strategy (n 4) 43.

108 WIPO (n 67) 24.

109 TRIPS Agreement (n 26) art 22(2).

110 WIPO (n 52) 129.

111 European Commission, 'Geographical-Indications' (*Europa.eu*, 14 February 2019) <<https://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/>> accessed 20 July 2019.

112 WIPO (n 52) 125.

113 *ibid* 127.

of Marks<sup>114</sup> and the Protocol Relating to the Madrid Agreement<sup>115</sup> (the ‘Madrid System’). Here, a GI that has been protected as a collective or certification mark in the country of origin will be protected through the international system for trade marks by filing an international application with the International Bureau in Geneva.<sup>116</sup> All OAPI member states, who have registered their GIs on the national level, are automatically registered at the international level through the Madrid System.

Ghana is not a member of the Lisbon Agreement and is not an OAPI member state but is a member of the Madrid System.<sup>117</sup> Thus, *kente* as a GI can be registered internationally through the Madrid System where it is first registered on the national level as a certification or collection mark. Furthermore, *kente* can still be registered as a GI abroad through direct protection in the country in which the GI protection is sought or through bilateral agreements with other countries.

## 7. Conclusions and recommendations

In this article, we have illustrated how the commercial diversification of Ghana’s traditional and unique *kente* cloth has resulted in its economic misappropriation whereby lower quality *kente* textiles are being marketed and sold by people in countries other than Ghana as authentic *kente*. In particular, we asserted that *kente* cloth risks being viewed as a general African fabric, rather than revered as the embodiment of the history of the Ashanti and Ewe communities of Ghana. Further, reduced income for the local *kente* weaving industry negatively affects Ghana’s overall revenue from its local textile industry. Such threats to the *kente* textile have

resulted in the urgent need for the defensive protection of the *kente* to be intensified. In WIPO, the IGC has been spearheading discussions since 2001 to provide a *sui generis* system for the protection of TCEs such as *kente* because of their unique nature. Its main aim is to provide a system to complement the current traditional IP system and make it more suitable to protect such TCEs.<sup>118</sup> Nonetheless, after 18 years, it is still unknown whether and when a new *sui generis* system of TCE protection will become law.<sup>119</sup> In the absence of a new *sui-generis* system, this article recommends that the best system currently available to holistically protect *kente* is to implement the GIA, pursuant to the guidelines stated under the AU–EU Continental Strategy, in addition to the protection afforded by Ghana’s Copyright Act. While Ghana’s Copyright Act provides legal protection for certain original aspects of *kente* designs by protecting the underlying concept of *kente*, when combined with GI protection, a stronger degree of protection will better protect *kente* from all forms of third-party misappropriation. In addition, protecting *kente* as a GI will likely enhance *kente*’s goodwill in trade in Africa and beyond, preserving its reputation for quality textile and further support the local *kente* textile industry. Despite the major financial and institutional challenges involved and hurdles to overcome, registering *kente* as a GI presents several developmental advantages for the communities and Ghana as a whole. Finally, as a key step in the process to facilitate the effective registration of *kente* as a GI, the authors support the establishment of the National *Kente* Board to lead the collective action by the *kente* producing communities.<sup>120</sup> The Board could spearhead the registration of *kente* as a Ghanaian GI as well as coordinate consultation with regional and international actors, such as the AU, EU and WIPO.

114 Madrid Agreement Concerning the International Registration of Marks (adopted on 14 April 1981, revised on 28 September 1970) 828 UNTS 389 (Madrid Agreement).

115 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (adopted on 27 June 1989) WIPO Doc MM/DC/27 Rev. (Madrid Protocol).

116 Madrid Agreement (n 113) art 1(2).

117 WIPO, ‘WIPO-Administered Treaties: Notifications-Ghana’ (WIPO) <[https://www.wipo.int/treaties/en/ShowResults.jsp?search\\_what=N&country\\_id=65C](https://www.wipo.int/treaties/en/ShowResults.jsp?search_what=N&country_id=65C)> accessed 20 September 2019.

118 WIPO, ‘Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Thirty-Ninth Session’ (March 2019) WIPO/GRTKF/IC/39.

119 WIPO, ‘Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Fortieth Session’ (June 2019) WIPO/GRTKF/IC/40.

120 Kenu (n 19).