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# WALKING THE TRADITION- MODERNITY TIGHTROPE: GENDER CONTRADICTIONS IN TEXTILE PRODUCTION AND INTELLECTUAL PROPERTY LAW IN GHANA

BOATEMA BOATENG \*

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## INTRODUCTION

What is the relationship between gender, cultural production, and intellectual property (IP) law? What kinds of gendered subjects are brought into being by the different textile producing economies discussed in this article? How do these gendered subjects fare before the law and to what extent does gender determine their legal status? This article seeks to answer these questions by examining Ghana's use of IP law, which has protected national culture since the early 1970s. In particular, it looks at those issues in relation to the protection of the designs of adinkra and kente cloth.<sup>1</sup> This article argues that in the Ghanaian case the responses to the

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\* Assistant Professor of Communication, University of California, San Diego. I am grateful to the participants of the IP/Gender: The Unmapped Connections Conference, March 2006, for their comments on a related paper. I have tried to respond to some of those comments in this article. I am also grateful to Denise Ferreira da Silva for her comments on an earlier draft.

1. *See generally* G. F. Kojo Arthur & Robert Rowe, Akan Cultural Symbols Project, Akan Adinkra Cloth (Oct. 11, 2006), <http://www.marshall.edu/akanart/adinkracloth.html> [hereinafter Akan Adinkra Cloth] (noting that Adinkra represents a code infused with Akan knowledge, principles, history, religious beliefs, and perception of how society should be properly organized); G. F. Kojo Arthur & Robert Rowe, Akan Cultural Symbols Project, Akan Kente Cloths (Oct. 11, 2006), [http://www.marshall.edu/akanart/cloth\\_kente.html](http://www.marshall.edu/akanart/cloth_kente.html) [hereinafter Akan Kente Cloth] (defining kente as nwentoma (woven cloth) to differentiate the material from cloth manufactured in a factory (ntoma) and adinkra cloth stamped by the block-print technique (ntiamu ntoma)). These descriptions of "Akan" adinkra and kente are only intended to help familiarize the reader with the significance of the cloth; however, the

questions posed above contradict some of the ways in which the relationship between gender, cultural production, and IP law is often understood. The article draws upon interviews and life histories conducted in Ghana between 1999 and 2004.<sup>2</sup>

Kente is a form of strip-weaving in which designs are woven into the cloth in alternating blocks so that when the strips are sewn together to form a piece of cloth the overall effect is that of a checkerboard.<sup>3</sup> Adinkra features symbols stenciled onto a piece of cloth using a black dye prepared from tree bark.<sup>4</sup> Most adinkra symbols and kente designs are particularly valued for their specific meanings that reflect social beliefs or historical events.<sup>5</sup>

Adinkra and kente are produced by the Asante ethnic group, and both kinds of cloth are closely associated with Asante royalty.<sup>6</sup> Since the creation of the modern nation-state of Ghana in 1957, these textiles have been incorporated into the country's national culture, along with other elements from the several indigenous groups that make up the country.<sup>7</sup> The symbols of adinkra are widely reproduced in Ghana in non-textile media, such as masonry and jewelry. Adinkra and kente are also valued by members of the African diaspora, who claim them as part of their heritage.<sup>8</sup>

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focus here is on Asante cloth. It is noteworthy that the authors use the Asante words for cloth even though they designate it as Akan. While Asante is part of the larger Akan ethnic group, these textiles were introduced into Akan society by way of the Asante. Additionally, the Ewe ethnic group of south eastern Ghana also produces a kind of kente cloth that is distinguished mainly by its color scheme and use of representational motifs rather than the abstract designs of Asante kente. *See* DORAN ROSS, WRAPPED IN PRIDE: GHANAIAN KENTE AND AFRICAN-AMERICAN IDENTITY 19 (1998) (stating that "the strip-woven cloth called kente, (is) made by the Asante peoples of Ghana and the Ewe people of Ghana and Togo...").

2. I conducted interviews and life histories between 1999 and 2000 in a study on the copyright protection of folklore in Ghana and in a follow-up study in December 2004. Those interviewed in the earlier study included craftsmen and women producing adinkra and kente and other textiles, officials of the government departments administering intellectual property law, managerial personnel in the mechanized textile industry, and policy advisors on folklore and intellectual property. The second study included interviews with officials administering intellectual property law and activists in the music industry.

3. *See generally* Akan Kente Cloth, *supra* note 1.

4. *See generally* Akan Adinkra Cloth, *supra* note 1.

5. *See generally id.* (stating that the patterns reflect cultural transfusion or the borrowing of ideas from other societies).

6. *See* Republic of Ghana, Asante Kente, <http://www.ghana.gov.gh/visiting/culture/asantekente.php> (last visited Nov. 13, 2006) (pointing out that royalty were often the ones to wear the cloth). *See generally* IVOR WILKS, ASANTE IN THE NINETEENTH CENTURY: THE STRUCTURE AND EVOLUTION OF A POLITICAL ORDER (1975).

7. *See* Ghana.co.uk, History of Adinkra, <http://www.ghana.co.uk/history/fashion/adrinka.htm> (last visited Jan. 2, 2007) (elucidating the fact that the cloth "is also used to make clothing for such special occasions as festivals, churchgoing, weddings, naming ceremonies and initiation rites").

8. *See, e.g.*, ALEXIS DE VEAUX, WARRIOR POET: A BIOGRAPHY OF AUDRE LORDE 158 (2004) (following a visit to Ghana in the 1970s, African-American poet and feminist Audre

Since the 1980s, adinkra and kente cloth have been widely imitated in textile form for both the local (Ghanaian) and diasporic markets, and it is this development that has made their legal protection a matter of concern.<sup>9</sup>

In 1973, Ghana passed the Textile Designs (Registration) Decree as part of the country's industrial property laws in response to lobbying efforts by the local textile industry. The Decree required registration of all textiles printed in the country.<sup>10</sup> In addition, individuals and companies were given the opportunity to register textile designs.<sup>11</sup> However, the Decree also contained a clause forbidding the registration of adinkra and kente designs.<sup>12</sup> In the 1990s and early 2000s, designs registered under the Decree often included close imitations of adinkra cloth.<sup>13</sup> Many of these were registered by women who then commissioned textiles with such designs from local factories.<sup>14</sup> This was made possible through a loophole in the Decree. As long as those registering designs included a clause saying that they did not claim ownership of the adinkra symbols used, they could register those designs. Through these arrangements women were, in effect, textile producers, while most adinkra and kente producers are male. The Textile Designs Decree was repealed and replaced by the Industrial Designs Act in 2003.<sup>15</sup> The Act defined industrial designs to include textiles but made no special provision to protect adinkra and kente.<sup>16</sup>

In 1985, Ghana broadened its use of IP law to protect local culture by including "folklore" in works protected under copyright law.<sup>17</sup> By doing so, the country followed the guidelines established by the World

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Lorde used adinkra symbols in the cover designs of some of her books).

9. See generally NAOMI CHAZAN ET AL., POLITICS AND SOCIETY IN CONTEMPORARY AFRICA 282-83 (2004); DORAN ROSS, WRAPPED IN PRIDE: GHANAIAAN KENTE AND AFRICAN-AMERICAN IDENTITY 194 (1998) (highlighting the concern expressed by some Ghanaians over the use of imitation kente by African-Americans).

10. See Textile Designs (Registration) Decree, 1973, N.R.C.D. 213 (Ghana).

11. See *id.*

12. See *id.* (excluding these designs left adinkra and kente susceptible to appropriation).

13. See Interview with Ghanaian woman trader, in Accra, Ghana (2000) (on file with author). In the interview the trader showed me an example of imitation adinkra cloth that she had commissioned from a local factory using a design that she had registered. *Id.* I also observed several other examples of imitation adinkra in the market where the trader operated. *Id.* The name of the producing factory is printed along the selvages of the cloth, clearly establishing the source of the cloth. *Id.* Because factories in Ghana may not print designs that have not been registered, and based upon my interview with the trader, above, my conclusion is that the designs of locally printed imitations that I observed in the markets must have been registered under the Textile Designs Decree. *Id.*

14. See Interview with officer, in Accra, Ghana (2004) (on file with author). An officer of the Registrar-General's Department, which administers industrial property law, reported that most individuals registering cloth designs were women. *Id.*

15. See Industrial Designs Act, 2003, Act 660 (Ghana).

16. See *id.*

17. See Copyright Law, 1985, P.N.D.C.L. 110 (Ghana).

Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in response to a growing movement by indigenous peoples and Third World nations seeking protection for their cultural production.<sup>18</sup> Under the 1985 law, folklore was defined very broadly to include elements of material culture including adinkra and kente designs.<sup>19</sup> The rights to these and other “national” folklore were vested in the Republic in trust for the people. While the language of the law makes the Republic the custodian and not the owner of folklore, the result, for most practical purposes, is State ownership of Ghanaian folklore.<sup>20</sup> Thus, while individuals could own textile designs under industrial property law, they could not as easily hold similar rights to folklore under copyright law. These ownership arrangements were retained with slight modifications when the copyright law was repealed and replaced with the Copyright Act of 2005 to bring it into compliance with the World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property (TRIPS).<sup>21</sup>

As a result of these developments, the two spheres of cultural production—namely adinkra and kente production and mass-produced cloth production—encountered Ghanaian IP law with consequences that challenge common conceptualizations of gender as it relates to cultural production and the law. While female cloth traders can claim ownership of textile designs as a formal legal right, male adinkra and kente producers cannot do the same unless they can prove that the designs in question are their own and not part of the larger “folkloric” pool.

The peculiar features of the Ghanaian case mean that, contrary to the trend in many instances of appropriation of indigenous cultural production, gendering sometimes occurs in ways that empower women rather than men. I argue in this piece that in order to account for this contradiction, it is necessary to look at gender in relation to cultural production and appropriation not only as a matter of sex-based social identity, but also of

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18. See U.N. Educ., Sci., & Cultural Org. and World Intell. Prop. Org. (UNESCO/WIPO), *Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*, ¶ 1-4, CPY.85/WS/30 (1985).

19. See Copyright Law, 1985, P.N.D.C.L. 110.

20. Copyright Act, 2005, Act 690 (Ghana) (in the 2005 Act “the rights of folklore are vested in the President on behalf of and in trust for the people of the Republic”). Those rights are administered by a State agency, the National Folklore Board.

21. See Agreement on Trade-Related Aspects of Intellectual Property art. 9(1), Apr. 15, 1994, 33 I.L.M. 81 [hereinafter TRIPS] (setting out transitional arrangements including time periods within which member states must apply the provisions of the Agreement). The general deadline was Jan. 1, 1995. *Id.* However, developing countries were granted an additional four years to apply the Agreement’s provisions. *Id.* Ghana undertook a comprehensive review of its laws in order to comply with these requirements. The process was completed with the passage of the revised Copyright Law in March 2005.

other factors such as class and the economic sphere.

#### THE POLITICAL, LEGAL, AND THEORETICAL CONTEXT

Over the past two decades, the cultural production of indigenous peoples and local communities has increasingly become the subject of IP law.<sup>22</sup> This has occurred as certain kinds of indigenous cultural production have been appropriated and used by groups and individuals often from outside the originating communities. While the original cultural products are generally perceived as part of the public domain and therefore treated as free for the taking, the products that result (such as pharmaceuticals) are often protected by IP law. A prominent case was the U.S. patent granted in 1992 to the W.R. Grace Company for an extract from the neem tree despite the fact that knowledge of the medicinal properties of the tree had been widespread in India for generations.<sup>23</sup> James Boyle expresses this point very vividly when he states:

Cultural forms, dances, patterns, traditional medical knowledge, genetic information from the plants of the rain forest, or from peasant-cultivated seed varieties, all flow out of the developing world unprotected by property rights. In return, the developed countries send their cultural forms—Mickey Mouse, the X-Men, Pearl Jam, Benetton, Marlboro, and Levis. The developed world also sends its wonderful medicines—Prozac and Tagamet—its computer programs—WordPerfect and Lotus 1-2-3—its novels and its industrial designs. Almost all of *these* things, of course, are well protected by intellectual property rights (emphasis in original).<sup>24</sup>

The result of this trend is that the law has different consequences for groups that vary not only in the nature of their cultural production, but also in their race, ethnicity, nationality, and class. It also affects groups and people within them differently on the basis of gender. A number of

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22. Indigenous peoples are groups of people who have endured settler colonialism, have resisted integration into the dominant culture, and are not organized into nation-states that represent their interests internationally. Some scholars, therefore, distinguish between them and local communities in Third World countries who are perceived to be more integrated into the global economy and who may not have experienced colonization at all or have gained independence, at least nominally. See, e.g., *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCE BOOK 10* (Thomas Greaves ed., 1994) (discussing the emergence of intellectual property rights in the context of indigenous societies).

23. See KEMBREW MCLEOD, *OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW* 177 (2001) (referring to a legal challenge filed by the Foundation for Economic Trends (FET) against the patent with the U.S. Patent and Trademark Office asserting that W.R. did not invent the neem tree extract).

24. JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 141-42 (1996); see also MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* 88-89 (2003) (describing other examples of indigenous and local cultural production becoming the basis of intellectual property claims); DARRELL ADDISON POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* 97 (1996).

responses have emerged as a result of this tendency. While some have called for a radical rethinking of IP law to accommodate forms of cultural production that lie outside its norms, others have sought to use the law to protect indigenous and local cultural production.<sup>25</sup> An example of the latter strategy is Ghana's protection of adinkra and kente designs and other "folklore" under IP law.

It can be argued that the Ghanaian response is less than ideal in using a legal framework that is at odds with the principles of subjectivity, creative work, and alienability underpinning much indigenous and local cultural production. For example, ideas of the creative subject in the communities where such production occurs often do not privilege the individual as IP law does. In many such communities, authorship and ownership are informed by principles of sharing and custodianship, which precludes exclusive individual ownership of cultural production.<sup>26</sup> The Ghanaian case is also problematic in reposing property rights to local cultural production in the State rather than in communities or jointly in both.

Despite the problems revealed by the Ghanaian case, the strategy of using mainstream IP law to protect indigenous local and cultural production is quite widespread. Furthermore, with the hegemony exercised by the WTO and the TRIPS Agreement over most national and international IP regulation since 1994, the framework of mainstream IP law has gained added importance as a site of struggle over the protection of such cultural production. Third World nations have insisted on attention to their priorities and concerns in international intellectual property regulation, and one outcome of this was the adoption of a Development Agenda by WIPO in 2004.<sup>27</sup> This struggle reflects many of the concerns raised by the Ghanaian case and seeks to challenge IP law's unequal consequences for the cultural production of different groups, nations, and world regions. The Ghanaian case, therefore, provides a useful basis for

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25. Compare POSEY & DUTFIELD, *supra* note 24, at 1 (highlighting the tension between intellectual property law and the principles of ownership and alienability that pertain in several indigenous societies), with Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa*, 48 AM. U. L. REV. 769, 773 (1999) (noting the push for effective legal protection of folklore to give traditional communities and national governments greater control over the use of folkloric works).

26. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1335 (2004) (asserting that "the increasingly binary rhetoric of 'intellectual property versus the public domain' deafens us to new claims by individuals who seek to restructure social and economic relations through property-like rights"); see also POSEY & DUTFIELD, *supra* note 24, at 60.

27. See Isabelle Scherer, *U.S. Vows to "Fight" the Push for WIPO Reform*, INTELL. PROP. WATCH, Nov. 4, 2004, available at <http://www.ip-watch.org/weblog/index.php?p=3&res=1280&print=1> (referring to the landmark decision of WIPO's 2004 General Assembly to adopt a Development Agenda and outlining the Development Agenda proposal).

examining some of the structural biases of IP law, the links between those biases in national and international contexts, and the ways in which different players negotiate them.

Formal Western law is the model for the legal systems of most countries, including Third World nation-states. In the case of the latter, this is due to histories of colonization that established British, French, or other Western European legal norms in many such nations. In relation to Africa, for example, “[t]he basis of the postcolonial state in Africa is the colonial state.”<sup>28</sup>

While there is considerable variation in such “Western” law, it is unified by the Enlightenment principles that inform it—for example, its conceptualization of the legal subject. In the Ghanaian case, the specific Western legal model is British law, which was first applied in the 1870s in the territory that eventually became Ghana.<sup>29</sup> Although this received law has been reformed gradually since 1957, when the country was created through independence from Britain, the forms and philosophical underpinnings have remained virtually intact. Ghana’s continued adherence to this broad legal framework is not merely evidence of neo-colonialism, but is also an important means by which the country signals its status as a modern nation-state in an international community where modernity (another Enlightenment legacy) is regarded as the norm to which all nations must aspire and the standard by which they are judged.<sup>30</sup>

Due to this history, the Ghanaian State is cast into the mold of modern political institutions along with the laws that comprise one of its key instruments of governance and sectors such as the national economy. As feminist scholars have long argued, modernity is gendered male through a combination of factors.<sup>31</sup> One such factor is the premium placed by its key philosophers on rationality and the view among some thinkers that women are irrational.<sup>32</sup> This is reinforced by earlier traditions of thought and

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28. NAOMI CHAZAN ET AL., *POLITICS AND SOCIETY IN CONTEMPORARY AFRICA* 40 (2004).

29. See Charlotte Kesson-Smith & Wisdom J. Tettey, *Citizenship, Customary Law and Gendered Jurisprudence: A Socio-Legal Perspective*, in *CRITICAL PERSPECTIVES ON POLITICS AND SOCIO-ECONOMIC DEVELOPMENT IN GHANA* 312 (Wisdom J. Tettey, Korbla P. Puplampu & Bruce J. Berman eds., 2003) (discussing the impact of British law on Ghana’s contemporary legal system and arguing that “the process of interpreting customary law and its attendant codification, during colonial rule, provided the foundations for the extensive marginalization and subordination of women in Ghana’s legal system”).

30. See *THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL* 7 (Lisa Lowe & David Lloyd eds., 1997) (becoming a modern nation entails massive conversion of the state’s cultural forms into conformity with post-World War II ideals of modernization).

31. See generally RITA FELSKI, *THE GENDER OF MODERNITY* 30 (1995) (focusing her analysis partly on text of male authors to highlight recurrent “representations of the gender of modernity”).

32. See *id.* at 46.

institutions (such as the Church) that assigned women an inferior status to men.<sup>33</sup>

The gendered nature of modernity and its institutions has consequences for encounters between the Ghanaian State and its institutions, on the one hand, and cultural production on the other. The gender of cloth production, both handmade and mass-produced, is thus not only a function of individual subjectivity, but also of the encounter between cloth producers, the State, and the sectors and institutions of the latter. Gender, therefore, translates into power and agency not only according to the relationship between women and men around cultural production but also according to the ways in which those producers are situated in relation to the State and its institutions, particularly the law and the economy.

Feminist analyses show that the law often operates as a space of patriarchal dominance and, in adopting the legal frameworks of modernity, Ghana has largely retained the biases of those frameworks.<sup>34</sup> Additional gender bias in Ghanaian law can be traced to colonial authorities who undermined the rights of women through their combined misinterpretation and dismissal of indigenous legal norms recognizing and protecting those rights.<sup>35</sup> As a result, the bias that feminist scholars identify in Western legal systems is not only reproduced, but also intensified in the Ghanaian case, especially in the area of family law.<sup>36</sup> With respect to IP law specifically, the acts of authorship and invention that such law typically protects have also been gendered male through most of their history.<sup>37</sup> Such norms of authorship combine with a long history of conceptualizing the legal subject as not only individual but also male to produce the gender biases inherent in mainstream IP law.

An additional kind of gender bias that becomes evident in the encounter between IP law and indigenous cultural production is in the legal status assigned to the latter. The status of such cultural production as

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33. See Genievieve Lloyd, *The Man of Reason*, in FEMINIST THEORY: A PHILOSOPHICAL ANTHOLOGY 179 (Ann E. Cudd & Robin O. Andreasen eds., 2005) (stating that the Church reasoned that men were created in God's image and women were created simply to be man's companion, thus making them inherently inferior).

34. See generally *id.* Kesson-Smith & Tettey, *supra* note 29, at 309-19 (arguing that during pre-colonization, Ghanaian women enjoyed more socio-economic and political rights that provided them with some autonomy compared to post-colonization, where legal biases against women reinforced their subordinate status, which British colonization created).

35. See *id.* at 319-22 (highlighting case law pertaining to intestate succession, whereby post-colonial courts hesitated in applying customary law in favor of the widow).

36. See *id.* (discussing the misinterpretation and dismissal of indigenous norms during colonization and the resulting bias in Ghanaian family law).

37. See DEBORAH J. HALBERT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE: THE POLITICS OF EXPANDING OWNERSHIP RIGHTS 15-17 (1999) (revealing that intellectual property is considered private property and, furthermore, property and authorship historically have been considered masculine).

“traditional” renders it feminized in the encounter with a masculinized modernity, including IP law. Such feminization occurs regardless of the gender identity of cultural producers. It also occurs literally when the knowledge or culture concerned is produced by women. For some scholars, such as Vandana Shiva, the appropriation of indigenous culture often translates into the erosion of female knowledges by the patriarchal knowledge systems of modernity.<sup>38</sup>

A growing number of scholars have argued that gender analyses of the law cannot focus solely on patriarchal dominance of women as legal subjects.<sup>39</sup> Gender combines with race and class to produce different kinds of legal subjects and, while all women are affected by the patriarchal nature of the law, those effects vary depending on race and class. Arguing for attention to the intersection between race and class, Kimberle Crenshaw notes “any analysis that does not take intersectionality into account cannot address the particular manner in which Black women are subordinated.”<sup>40</sup>

This article extends this argument by suggesting that in addition to considering gender in combination with factors such as race and class, it is necessary to look at the ways in which gender intersects with different kinds of class privilege to understand the status of different subjects before the law. In Ghana, the retention of indigenous institutions of rule means that class advantages can stem from such institutions and from better known sources like education and wealth. For example, as will be seen in the following discussion, some Ghanaian market women derive a certain amount of class privilege from their wealth. The Ghanaian case also shows that depending on the factors that combine with gender to produce legal subjects, female or feminized cultural production may translate into empowerment rather than victimization.

In the rest of this article, I will describe the gendered nature of cloth production in Ghana at the level of producers. I will also examine the external factors that combine with gender to produce power and agency for different producers. Finally, I will discuss the contradictions that arise from the Ghanaian case and what they suggest for our understanding of the

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38. See, e.g., VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* 72-79 (1997) (explaining how indigenous culture is being subject to modern subordination by western corporations, which can be likened to the subordination that women face in the patriarchal knowledge systems).

39. See generally Deleso A. Washington, “*Every Shut Eye, Ain’t Sleep*”: *Exploring the Impact of Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women from a Critical Race Feminist Perspective*, 13 AM. U. J. GENDER SOC. POL’Y & L. 126 (2005) (arguing that for minority women, society ultimately confines them into separate classifications, for example, either discrimination based on race or gender, instead of considering both).

40. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

relationship between gender, cultural production, and the law. As the previous discussion suggests, I consider gender at the level of subjectivity and also in relation to social structures and institutions.

In this article, at the level of individual subjectivity, “gender” refers to the roles and identities that are assigned to members of a society on the basis of being biologically female or male. This definition acknowledges that feminist scholarship offers several more nuanced definitions including some that identify at least three genders and note the instability of gender identities.<sup>41</sup> In addition to using this simpler conceptualization of gender, I also use the paired terms “woman” and “female” interchangeably to refer to gender (and do the same with “man” and “male”) rather than using the first term in each pair to refer to gender and the second to designate sex.<sup>42</sup> Therefore, I refer to cultural production as being gendered female or male.

There are some cases where the male/female binary is blurred by overlapping or complementary roles in cloth production. However, instead of conceptualizing gender to account precisely for such grey areas, the approach taken here is to use the above definition, while pointing out those cases where it is undermined by the actual practices around cloth production. While I define gender in relation to biology, I also understand gender to be a political category; it matters primarily because it is a site at which power is exercised, resisted, negotiated. Therefore, the gender of cloth production is interesting because of the ways it translates into power for differently gendered subjects.

#### THE GENDER OF GHANAIAN CLOTH PRODUCTION

Many indigenous and local communities clearly define the gender of cultural production—women are responsible for certain kinds of production and men are responsible for others.<sup>43</sup> In some cases, production can shift back and forth between women and men in response to changing social and economic circumstances.<sup>44</sup> However, in the Ghanaian case, the gender of cloth production is quite stable since men almost exclusively produce kente and adinkra cloth. Taboos reinforce this male dominance by threatening women with barrenness if they practice these crafts. In spite of this, many

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41. See Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them To Be?*, in *FEMINIST THEORY: A PHILOSOPHICAL ANTHOLOGY* 154, 158-62 (Ann E. Cudd & Robin O. Andreasen eds., 2005) (maintaining that there are issues of gender beyond that of biological sex).

42. See *id.* at 158-59 (defining a simplistic approach to the concept of gender).

43. See, e.g., Elisha P. Renne, *Traditional Modernity and the Economics of Handwoven Cloth Production in Southwestern Nigeria*, 45, 4 *ECON. DEV. & CULTURAL CHANGE* 773, 775 (1997) (describing how in the Yoruba areas, excluding the Ekiti towns, weaving is viewed as a male’s job).

44. See *id.* at 789-90 (observing that not all gender-structured roles are inflexible).

state institutions override these taboos by teaching women how to practice these crafts; however, contradictorily, even here the taboos are sometimes invoked.<sup>45</sup> A Ghanaian woman who learned to weave kente at such an institution in the 1970s recounts the following exchange during her job interview:

So he (the director of the institution) asked me why there were so many professions here in Ghana, and I, a woman, wanted to weave cloth. And I said yes, here in Ghana no woman had ever woven cloth so... I wanted to weave cloth so that in future it would be a sign for Ghanaians and the Asante nation that a woman had woven cloth, and he said, "but if you weave you will not give birth," and I said, "oh, I have given birth once so even if I don't give birth again it doesn't matter."<sup>46</sup>

Outside such institutions, in the adinkra and kente producing communities, the taboos have been effective in reserving the production of these textiles for men. Women's participation is generally limited to auxiliary roles leading to a certain amount of interdependence between women and men. Women prepare the dye used for stenciling adinkra and in many cases they undertake the sale of the cloth that men produce.<sup>47</sup> Prior to the introduction of mass produced yarns into the kente-weaving economy, women were also responsible for spinning the cotton that men used for weaving.

This interdependence means that female labor enables male cloth production. However, the female labor is rendered invisible in the end products of adinkra and kente and men are generally perceived to be the producers of these textiles. In adinkra producing communities where women produce kuntunkuni, a type of dyed cloth, the gender hierarchy around cloth production becomes especially clear. Compared to adinkra, kuntunkuni is very tedious to make, and its production by women parallels the patterns in the division of labor in local households where women are assigned duties that involve far more drudgery than those assigned to men. One potentially subversive feature of kuntunkuni production is that it often serves as a means of recycling old adinkra cloth and thereby amounts to a kind of female erasure of male cultural production. However, the hierarchy is restored when, as is often the case, the dyed cloth is stenciled back into

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45. See College of Art at Kwame Nkrumah University, <http://www.knust.edu.gh/index.html> (last visited Jan. 2, 2007) (stating that such institutions established by the Government of Ghana train students in a range of skills, including textile production).

46. See Life history narration with Ghanaian woman, in Kumasi, Ghana (1999) (on file with the author).

47. See Glenn E. Lewis, *Adinkra, West Africa Traditional Handicrafts; Preservation and Artisan Design Enhancement*, at 8, available at <http://tm.uiah.fi/connecting/proceedings/Lewis.pdf> (last visited Jan. 2, 2007) (describing dye making as the most complicated aspect of the process).

adinkra.

Therefore, in the case of adinkra, men produce cloth that is relatively less labor intensive than what women produce. Further, the prestigious status of both adinkra and kente translates into social and economic advantages for men. The importance of adinkra and kente producing communities as tourist destinations is an additional source of status for the male producers of these textiles. In response to the question posed at the beginning of this article, the gendered subjects brought into being by the economy of adinkra and kente cloth production are both male and female. However, while there is some interdependence between the two, men are the privileged subjects, enjoying a considerable amount of prestige and power. Men's class advantages are derived from the association of their work with indigenous institutions of rule. Those institutions authenticate the status of adinkra and kente as "traditional." This traditional status, in turn, is a key element linking male cloth makers with the tourism sector of the national economy, which is an additional source of privilege.

In the sphere of mechanized cloth production the situation is quite different because it is bound up with the sale of mass-produced cloth and in Ghana such sale is undertaken predominantly by women. This leads to the popular perception of cloth production and sale as a female sphere. A number of economic, legal, and cultural factors combine to make this perception an accurate one. A major economic factor is women's success in creating a place for themselves in the commercial sector of the national economy. Within this sector, women control the supply of certain goods, such as fresh produce. They also control the supply of cloth, and some cloth traders operate at a scale where they do not only sell cloth but also commission it from local textile factories. Such commissioned cloth can include designs from a factory's inventory or cloth traders' own designs. Due to the Textile Designs Decree, women are the formal legal owners of designs that they register.<sup>48</sup>

Women's dominance over the control of the cloth trade is most significant in relation to a particular kind of mass-produced fabric that is used for "traditional" clothing. This is the kind of fabric that is widely regarded as "African" even though it originated with Dutch imitations of Indonesian batik that became popular in Africa during the first half of the 20th century.<sup>49</sup> The status of such fabrics as "traditional" incorporates them into the system of value within which adinkra and kente are used,

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48. See Textile Designs (Registration) Decree, 1973, N.R.C.D. 213 (Ghana).

49. See Matt Steinglass, *How a Dutch Company's Batik Textiles Became the Basis of "traditional" West African Culture*, METROPOLIS, available at [http://www.metropolis.com/html/content\\_1200/ent.htm](http://www.metropolis.com/html/content_1200/ent.htm) (last visited Jan. 2, 2007) (describing how, in 1846, the van Vlissingen family founded the Vlisco Corporation to manufacture designs based on what their son learned about the batik method while studying in Indonesia).

with African prints serving more mundane purposes and sometimes being substituted for the more expensive hand-made cloth.

In addition to dominating the “African” print cloth trade, women further put their stamp on it by giving names to different cloth designs, including designs that they do not formally own. This practice is widespread among women traders in West Africa and serves both as a marketing strategy and as a means of symbolic expression.<sup>50</sup> During the study on which this article is based, a number of women were observed purchasing cloth from a trader. Several asked for the names of cloth before deciding which ones to buy.<sup>51</sup> Through this practice of naming, individual women traders “re-produce” cloth as a specific kind of cultural artifact that is distinct from other kinds of mass-produced fabric. In the process, they also mark it as part of a female sphere of cultural production.

However, it is important to avoid romanticizing the power of women traders and to note that the majority operate at very marginal levels. Most are dependent on the minority of women who possess sufficient capital to operate at wholesale level and commission cloth from factories. Thus, while the majority of traders are women, it is not the numbers alone that make cloth production and sale “female.” It is also the activities of the relatively small group of women who control the supply of cloth that make this a female sphere.

In the 1990s, close imitations of adinkra began to gain popularity among Ghanaians and to appear in cloth commissioned by women traders from local factories. Through this process of appropriation, a sphere of cultural production that was gendered male faced competition from one that was female. Some adinkra cloth producers interviewed in 1999 complained that demand for their cloth had diminished since the emergence of mass-produced imitations. For these producers, women were perceived as a major cause of this decline. Such female appropriation of male cultural production inverts the common scenario of male appropriation of female cultural production.

The gender of the different players alone cannot explain this inversion because patriarchal norms significantly constrain the place of women in much of Ghanaian society despite a number of indigenous norms and practices that give women a degree of autonomy and agency. For example, women in ethnic groups that practice matrilineal inheritance have access to property through their maternal kin, granting them a certain degree of

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50. See Susan Domowitz, *Wearing Proverbs: Anyi Names for Printed Factory Cloth*, *AFRICAN ARTS*, July 1992, at 82; see also KWESI YANKAH, *SPEAKING FOR THE CHIEF: OKYEAME AND THE POLITICS OF AKAN ROYALTY ORATORY* 81-83 (Charles S. Bird et al. eds., 1995) (repeating ways in which women are empowering themselves in the cloth trade).

51. See Interview with Ghanaian woman, *supra* note 13.

autonomy in marriage; however, women's share of such property tends to be smaller than that of men.<sup>52</sup>

The "modern" aspect of the cloth that women produce is also not enough to explain their ability to appropriate male cultural production. As noted above, even though such cloth is manufactured through the industrial processes of modernization, its social value stems from its status as traditional. Hence, it exists on a continuum with the traditional adinkra and kente that men make. From this perspective, women's cloth is lower in the hierarchy of cloth than adinkra and kente. Rather than explaining their power to appropriate male cultural production, women's effective use of industrial cloth production processes undermines the tradition/modernity dichotomy.

Women do not feminize the industrial processes of modern cloth production, rather they successfully harness it to their sphere of the economy. That sphere is regarded as belonging outside the sector of "modern" commerce and is often designated as part of the "informal" economy, and this is an additional factor reinforcing women's status as traditional. However, women shrink the distance between tradition and modernity by operating skillfully within modern sectors such as mechanized cloth production in ways that empower rather than victimize them. This is somewhat similar to male adinkra and kente producers who encounter and effectively navigate a major sector of the modern economy—tourism—as purveyors of tradition.

The main factor enabling women's appropriation of male cultural production is the legal status of their cultural production. In the Textile Designs Registration Decree and the Industrial Designs Act, the key feature determining the legal ownership of textile designs is the fact that they are industrial therefore, modern products.<sup>53</sup> This trumps any cultural significance that they may have.<sup>54</sup> While the old Textile Designs Decree attempted to accommodate cultural significance by excluding adinkra and kente cloth from registration, the ineffectiveness of the law meant that, for a time, women could claim legal ownership of textile designs that imitated hand-stenciled adinkra cloth enough to compete with the latter.<sup>55</sup>

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52. See Kesson-Smith & Tettey, *supra* note 29, at 309-410 (noting that after an Akan woman marries, she still remains a member of her matrilineal family and, additionally, she is able to hold property independent of her husband since no community of property exists).

53. See Textile Designs (Registration) Decree, 1973, N.R.C.D. 213 (Ghana); *see also* Industrial Designs Act, 2003, Act 660 (Ghana).

54. See Industrial Designs Act, 2003, Act 660 (Ghana) (stating that an industrial design is a material that gives a "special appearance to a product of industry").

55. See Textile Designs (Registration) Decree, 1973, N.R.C.D. 213 (defining "textile design" as "any pattern or ornamental feature applied to a textile article by printing weaving or other similar process").

In contrast to women's ability to claim legal ownership of textile designs, the legal protection of adinkra and kente designs has not translated into any formal rights or privileges for the male producers of these textiles. The Textile Designs Decree and the 1985 and 2005 copyright laws have all sought to protect adinkra and kente designs from appropriation.<sup>56</sup> However, these laws have granted minimal legal status to producers of adinkra and kente or other Ghanaian folklore as authors or owners of their designs.<sup>57</sup> Technically, it is possible for such cultural producers to claim individual authorship and ownership of those designs, but the onus is on them to prove that those designs are indeed theirs and not part of the larger pool of designs, tunes, proverbs, or other folklore.<sup>58</sup>

The likelihood of adinkra and kente craftsmen pursuing such ownership claims is minimal, not only because of the conceptualization of folklore as national rather than ethnic or communal property, but also because, for the most part, craftsmen do not conceive copyright law as a space within which they can pursue formal rights over their cultural production. Indeed, when asked about copyright law, several craftsmen associated it with musicians, who have been very active and vocal in pursuing their authorship and ownership rights as cultural producers.

As far as their cultural production goes, the law is a sphere that is foreign to craftsmen, and where they assert their ownership rights over designs, they do so within the space of indigenous institutions and authorship practices. Therefore, while male cultural production may lead to advantages for men over women in cloth producing communities, this does not translate into formal legal power for men. The gender advantages that these craftsmen have in the production of cloth have little impact on their status as legal subjects. Before the law, it is women cloth producers rather than men who benefit because of their success in a sphere of cultural production over which the law grants them formal rights as owners of cloth designs.

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56. Textile Designs (Registration) Decree, 1973, N.R.C.D. 213; Copyright Law, 1985, P.N.D.C.L. 110 (Ghana) (conferring explicit protection over works of Ghanaian folklore); Copyright Act, 2005, Act 690 (Ghana) (providing protection for expressions of Ghanaian folklore by prohibiting its reproduction, adaptation and translation).

57. *See* Copyright Law, 1985, P.N.D.C.L. 110.

58. *See* Copyright Law, 1985, P.N.D.C.L. 110 (elaborating that an author must prove that the original work is the product of independent efforts and not one belonging to the cultural heritage of Ghana); *See* Copyright Act, 2005, Act 690 (defining folklore as "including kente and adinkra designs, where the author of the designs are unknown"). This means that it is technically possible to know the author of such a design, although such known authorship implicitly removes the work in question from the category of folklore. In addition to this, the law bases its presumption of ownership on the appearance of the name of the author on a work. Since this is contrary to the authorship practices of adinkra, kente and other folklore producers, the task of proving authorship over their work is made even more onerous.

## GENDER CONTRADICTIONS

It is now clear that the gendering of cultural production in relation to textiles is contradictory in the Ghanaian case for a number of reasons. First, although adinkra and kente cloth production is gendered male, the production of locally manufactured appropriations of adinkra is gendered female because of women's dominance of the cloth trade and their role in mechanized cloth production. Contrary to the usual case of feminized indigenous production being appropriated through its incorporation into the processes of modern industry and aesthetic production, male indigenous cultural production is appropriated through its incorporation into a sphere of industrialized cultural production that is linked to an important female economic and cultural sphere. Second, contrary to the usual privileged position of the male legal subject, being a male cultural producer does not guarantee superior access to the space of the law; rather, it is the type of cultural production in which one engages. The Textile Designs Decree created a legal space in which the privileged individual subjects were mostly women because of the latter's role in the sphere of mechanized textile production.<sup>59</sup> On the other hand, the copyright law provides little room for individual legal subjects in the area of indigenous and local cultural production. In effect, by making the State the formal owner of folklore, the law diminishes authors' rights while emphasizing owners' rights.<sup>60</sup> It thus operates in a way that is typical of copyright law, especially in cases where such law fails to recognize the principle of authors' moral rights. This is ironic because Ghana's copyright law in fact recognizes moral rights in the case of cultural production other than folklore.<sup>61</sup> Another irony arises from the fact that Ghana's protection of folklore was intended to combat the injustices arising from the unregulated appropriation of indigenous cultural production. While that cultural production may now be regulated under the law, it is in ways that do little to promote the interests of folklore producers.

Clearly the contradictions in the Ghanaian case show that subjectivity alone is insufficient as a basis for understanding the ways in which cultural production and appropriation are gendered, and the ways in which female and male cultural producers fare before the law. In addition to the gender of individual cultural producers, one must also take into account the kind of cultural production that they undertake and the status of that production before the State and the law. While women produce cloth that is traditional in its use, the manufacture of that cloth under the conditions of modern

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59. See Textile Designs (Registration) Decree, 1973, N.R.C.D. 213.

60. See Copyright Act, 2005, Act 690.

61. See Copyright Act, 2005, Act 690 (conferring moral rights to authors of any work).

industrialization gains women access to the modern space of IP law. As a result, female cloth producers who may be marginalized in the wider society enjoy superior legal status to male cloth producers as the subjects of IP law.

The combination of the status of adinkra and kente production as traditional, the fact that there are few avenues or incentives for craftsmen to modify this status, and the treatment of adinkra and kente as *national* rather than individual or communal culture ensures that craftsmen have little standing before the law as cultural producers. This is despite the privileged position that men have in general and as cloth producers in their communities. The result is that such male cultural production is feminized, not through the actions of women cloth traders, but through the State's paternalism in its legal treatment of folklore—a treatment that effectively subordinates the tradition of folklore to the modernity of law. This kind of treatment effectively subordinates the tradition of folklore to the modernity of the law. Ultimately, it is not only gendered subjectivity that determines the status of individual cultural producers before the law, that status also depends on such producers' ability to navigate the spaces between tradition and modernity.