

ROUTLEDGE RESEARCH IN INTELLECTUAL PROPERTY

# Intellectual Property and Traditional Knowledge in the Global Economy

Translating Geographical Indications for  
Development

Teshager W. Dagne



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# Intellectual Property and Traditional Knowledge in the Global Economy

Arising from recent developments at the international level, many developing countries, indigenous peoples and local communities are considering using geographical indications to protect traditional knowledge and to promote trade and overall economic development. Despite the considerable enthusiasm over geographical indications in diverse quarters, there is an appreciable lack of research on how far and in what context they can be used as a protection model for traditional knowledge-based resources.

This book critically examines the potential uses of geographical indications as models for protecting traditional knowledge-based products and resources in national and international intellectual property legal frameworks. By analysing the reception towards geographical indications from developing countries and advocates of development in the various legal and non-legal regimes (including the World Trade Organization, the World Intellectual Property Organization, the Convention on Biological Diversity and the Food and Agriculture Organization), the book evaluates the development potential of geographical indications in relation to ensuing changes in international intellectual property law in accommodating traditional knowledge. Teshager W. Dagne argues for a degree of balance in the approach to the implementation of global intellectual property rights in a manner that gives developing countries an opportunity to protect traditional knowledge-based products.

The book will be of great interest and use to scholars and students of intellectual property law, public international law, traditional knowledge and global governance.

**Teshager W. Dagne** is Assistant Professor at Thompson Rivers University, Canada.

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'This carefully researched book is a rare attempt to examine the role geographical indications can play in protecting traditional knowledge. The analysis is timely, balanced and insightful, and it captures well the ongoing international debate. The book should be of interest to anybody who cares about intellectual property, international trade, agricultural production, food security or cultural preservation.'

*Peter K. Yu, Kern Family Chair in Intellectual Property Law, Drake University Law School, USA*

**In memory of my sister, Yamrote Worku Dagne**



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# Foreword

The intensification of intellectual property rights (IPR) protection since the late twentieth century has stoked resentments in developing countries for a number of reasons. One of the key reservations over strong IPR protection focuses on the role of IPR in the exploitation and marginalization of traditional knowledge and its custodians. As a consequence, the impact of IPR on the world's most vulnerable peoples and communities – the indigenous and local communities (ILCs) and, by extension, the relationship of IPR with development has become a touchstone for criticism and renewed pressure for recalibration of IPR law and policy at international and national levels.

There are, however, a few IPR regimes that directly and robustly engage the discourse on the potential or real role of IPR as an instrument for development than the concept of geographical indications (GIs). In this book, Tesh Dagne has boldly and critically weaved the disparate discourses on GIs into a comprehensive and compelling strand of analysis and makes the case for GIs as a *sui generis* intellectual property form on its own merit with great potential for sustainable environmental (biodiversity conservation) development, promotion of food security, agro-ecological diversity and overall economic empowerment of traditional agricultural practitioners involved in the production of traditional-knowledge-based agricultural products. Dagne's book has added depth and uncommon insight into perhaps one of the most misunderstood and underestimated regime of IPR. And the author did so perfectly mindful of the controversies, counterarguments and often conflicting treatment of GIs and cognate regimes in treaty texts and the overall jurisprudence of place or origin-based intellectual property law.

This book engages virtually all the contentious issues with GIs, with stout illustrations across jurisdictions, and provides elaborate context-specific analysis of the role of intellectual property in development. Without dispensing with the trade and commercial imperatives of IPR, the author demonstrates many oft-ignored values of IPR (especially its potential as a communal as opposed to conventional private rights regime) from a development perspective. In addition, Dagne successfully locates the debate on

GIs within the broader international trade diplomacy. He highlights the divergence of interests and the dynamics of their convergences on GIs in a shifting triangular relationship in regard to the European Union, the United States (including its allies) and the rest of the developing countries.

Not only has Dagne provided a significant piece of work that elaborates on GIs from a practical, authoritative and global outlook, his effort is also complemented by insights on several national experiences on the implementation of GIs. More strikingly, the book highlights the legal, policy and empirical challenges inherent in national implementation of GI regimes, as well as the pros and cons of GI initiatives in developing countries. It underlines the need for pragmatic and context-sensitive implementation strategies and argues that identified challenges may be exaggerated even as the potential benefits of GIs would seem to outweigh putative or genuine obstacles or costs of their implementation.

This book is an important contribution that brilliantly maps out the complex intersections of IPR and development within the site of one of the most underdeveloped and underestimated regimes of IPR. Many stakeholders interested in the role of intellectual property in development, including ILCs, lawyers, researchers, students and policy makers at global and national levels have compelling evidence to seriously consider GIs in particular and origin-based IPRs in general from refreshing and empirical perspectives. We all owe a deserved debt of gratitude to Dr Tesh Dagne for this important contribution.

Chidi Oguamanam  
Professor, Faculty of Law, University of Ottawa  
May 2014

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# 1 General introduction

## 1.1 Introduction

The legal regimes that govern the relationship between intellectual property, traditional knowledge and biodiversity remain sources of significant tension in international intellectual property law making. A number of difficulties arise in efforts to reconcile legal and policy norms at the intersection of the three regimes. Such difficulties generally stem from perceived shortcomings of the globally recognized forms of intellectual property rights to accommodate epistemological underpinnings of traditional knowledge and biodiversity in providing sufficient protection.<sup>1</sup>

In the spectrum of international regimes for intellectual property, traditional knowledge and biodiversity, this book focuses on the possibility of using geographical indications (GIs) as forms of intellectual property protection by which biodiversity-rich communities may control their traditional knowledge-based agricultural products (TKBAPs) in the commercial world.<sup>2</sup> Proposals for the use of GIs as tools for protecting TKBAPs have appeared in many forums for international law making in recent times. These proposals coincide with a shift in outlook on the role of intellectual property in which many advocated reorienting its focus from serving the conventional purpose of providing individuals with economic incentives to 'spur innovation' to broader objectives of serving 'societal interests and development-related concerns'.<sup>3</sup> If the current 'globalization of [intellectual property] is going to have legitimacy', it is held, 'issues of recognition and redistribution, development and sustainability... must be emphasized'.<sup>4</sup> The book addresses the question of whether GIs can, as forms of intellectual property, be used to recognize a category of traditional knowledge and related biodiversity in the form of TKBAPs.

Focusing on the responsiveness of GIs to the needs and desires of indigenous peoples and local communities (ILCs) – whom the international community considers custodians of biodiversity<sup>5</sup> – this book examines the relationship between GIs and TKBAPs in developing countries. Despite the considerable enthusiasm in recent times over the role of GIs in serving the needs and expectations of ILCs, and traditional agricultural producers (TAPs)

there is appreciable dearth of research on how far and in what context GIs can be used as a protection model for TKBAPs. Indeed, not only is the concept of GIs itself widely misunderstood. As well, analyses as to their applicability for protecting TKBAPs in developing countries often reflect underlying cultural differences in the nature, scope and jurisprudence of GIs protection across jurisdictions. This book explores the conceptual, legal and analytical bounds of GIs and examines the question of how GIs could address some of the concerns in the exploitation of traditional knowledge and its underlying agrobiodiversity in the global economy.<sup>6</sup>

The book identifies and discusses themes concerning the design of an effective and collectively beneficial GIs regime to protect TKBAPs in a development-oriented intellectual property system in developing countries. It offers perspectives on how legislation, policy and initiatives for the protection of TKBAPs at the international and national levels could be shaped under the framework of GIs law. At the international level, the book proposes for stronger protection of GIs through the integration of the negotiations and discussion over GIs and with that for traditional knowledge. At the national level, the case is made for the determination of immediate challenges and long-term opportunities in choosing a legal means for protecting GIs in developing countries. In this connection, it is suggested that the potential of GIs to meet national and local imperatives of protecting TKBAPs be assessed, *inter alia*, based on their potential to achieve identifiable economic, biodiversity, cultural and food security objectives.

### **1.2 The role of intellectual property in the protection of traditional knowledge**

From the perspective of developing countries, the instrumentality of GIs as a means for protecting TKBAPs should be viewed in the broader context of the role that intellectual property rights (IPR) could play in protecting traditional knowledge. The relationship between IPRs and traditional knowledge has become an issue in international intellectual property law with the realization of the significant contribution of traditional knowledge to the utilization of biological resources in technological advances.<sup>7</sup> Traditional knowledge usually provides the lead for the exploitation of genetic resources in biotechnology applications.<sup>8</sup> IPRs are often used to secure the 'functional utility of genetic resources' derived from traditional knowledge.<sup>9</sup> IPR is 'one, or even the principal' way through which the potential value of genetic resources is captured.<sup>10</sup> The linkage of intellectual property rules with international trade under the ambit of the World Trade Organization (WTO) shaped the evolution of international regimes that govern biological resources and their underlying traditional knowledge.<sup>11</sup> In this respect, traditional knowledge has brought to the intellectual property system questions such as:



Has the intellectual property system been used to misappropriate traditional knowledge, failing to protect the interests of indigenous and local communities? What forms of respect and recognition of traditional knowledge would deal with concerns about traditional knowledge and give communities the tools they need to safeguard their interests? Is the intellectual property system compatible with the values and interests of traditional communities – or does it privilege individual rights over the collective interests of the community? Can intellectual property bolster the cultural identity of indigenous and local communities, and give them greater say in the management and use of their traditional knowledge? What can be done – legally, practically – to ensure that the intellectual property system functions better to serve the interests of traditional communities?<sup>12</sup>

The major challenges to efforts to extend legal protection to traditional knowledge arise from difficulty of categorizing it in a proper protective legal regime. The appropriation of traditional knowledge through IPR systems usually takes the form of an establishment of rights by non-indigenous interests, the physical element of a biological resource usually forming the basis for 'invention'. A biological resource within which traditional knowledge is embedded is sometimes understood in its material sense.<sup>13</sup> Biological resources are considered objects of tangible property protection under a traditional property rights regime and, thus, inappropriate subject matter for IPRs protection.

The material legally categorized as a 'biological resource' and, thus, an object of the traditional property regime is, however, at once, 'multifaceted and polyvalent', as it is perceived and valued by its holders – ILCs – according to an altogether different value system.<sup>14</sup> In the worldview of many ILCs, the physical material is valued for its immediate attributes (such as a seed that serves as food to satisfy hunger or a leaf that delivers compositions to provide medicinal effects). More importantly, ILCs value the resource 'for its intangible information content (the seed's capacity to pass on the information necessary to grow a crop, or the plant's coding for a therapeutic protein)'.<sup>15</sup> Beyond its information content, the physical material of the biological resource usually has cultural and aesthetic (and spiritual) value to most ILCs. In this context, the resource is technically known as 'biodiversity'.<sup>16</sup> Biodiversity embodies 'valuable information' and cultural values and, thus, ILCs perceive it as a form of intangible asset.

As an intangible asset, the protection of intellectual property should ideally avail biodiversity and the traditional knowledge integrated with it. IPRs protect intangible subject matter and, being intangible, biodiversity and its underlying knowledge systems may ordinarily be considered matters for intellectual property protection. However, it is difficult to envisage intellectual property protection for traditional knowledge and biodiversity under existing IPR regimes because the criteria of protection