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The Legal Framework for the Protection of Geographical Indications in Ethiopia: A Critical Review

Sileshi Bedasie Hirko*

Abstract

The legal protection of geographical indications (GIs) has become an important concern in both developed and developing countries. In Ethiopia, despite the existence of the need and enormous potential for the protection of GIs, the issue of GIs has not been given due attention. The legal protection of GIs in Ethiopia has not been expressly regulated by any specific legislation. It may arguably be protected under a collective trademark system. However, this system only operates for distinctive GIs. Consequently, most descriptive GIs are not embraced by the system unless the distinctiveness requirement is dispensed with for the registration of GIs as collective trademarks. Moreover, the existing system needs to be redefined in light of the notion of GIs under the TRIPs Agreement. It is therefore high time that an appropriate legal framework be designed to ensure the effective protection and enforcement of GIs in Ethiopia.

INTRODUCTION

General remarks

Legal protection of intellectual property rights (IPRs) in Ethiopia is a recent phenomenon. There has been little knowledge about the protection of IPRs in the country. Even those who produce intellectual property (IP) products and own the rights do not have a good understanding of the nature, use and protection of the accompanying rights. It is uncommon for the right holders to claim and enforce the protection of IPRs, despite extensive instances of infringement. Very recently, however, right holders have started to appreciate the protection of IPRs such as copyright and trademarks. In short, the development of an intellectual property system in Ethiopia is in

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its infancy, with an immature legal history. The only form of IPR that was accorded specific legal protection for more than half a century was copyright, the protection of which dates back to the enactment of the Civil Code in 1960. Trademarks were only protected under general unfair competition provisions under the same code, the Commercial Code of 1960 and the Penal Code of 1957. It was only in 2006 that a specific trademark law, with special legal effects on the basis of registration, came into existence. Currently, almost all forms of IPRs common in other jurisdictions are protected by specific laws in Ethiopia. However, the protection of geographical indications (GIs) is not yet regulated by any specific law. Despite the fact that three Ethiopian coffee varieties have been protected under trademark laws in several jurisdictions, there remains a vital question as to what system is indeed in place to ensure effective legal protection for GIs in the country.

Before exploring possible legal regimes, it is worth highlighting the major reasons that justify the need for legal regimes. This will serve as a framework for further analysis in this article of the relevant laws. Accordingly, the first section of this article gives an overview of the legal protection of GIs. In particular, it highlights the need for a legal framework for GI protection, from both national and international perspectives. More importantly, the article then elaborates on the possible legal frameworks available for GIs prior to the current trademark law. This is followed by an examination of the legal protection of GIs after the enactment of the trademark law, analysing whether or not the existing collective trademark system has the capacity to embrace the protection of GIs. An important prong of this analysis extends into the following section which scrutinizes the substantive legal requirement for protecting GIs under existing trademark law and rules of unfair competition. Based on the possible legal frameworks available for GIs, the article then sheds light on the enforcement of GIs in Ethiopia. The conclusion offers some recommendations towards designing a proper legal framework for the adequate and effective protection of GIs.

THE NEED FOR THE PROTECTION OF GIs IN ETHIOPIA

The protection of GIs has been an important issue in several jurisdictions, with growing international dimensions for various reasons. Its significance has become increasingly patent with manifold prospects both in developed and developing nations, particularly in the agro-food sector. As one of the least developed of sub-Saharan African countries, Ethiopia's economy is primarily based on agriculture. Besides, apart from domestic consumption, agricultural products constitute the largest portion of exports. Furthermore, the country has been actively participating in various bilateral and multilateral trade agreements. Currently, it is on the verge of acceding to the World Trade Organization (WTO) after many years of the accession process,[1] which

1 Ethiopia applied for accession to the WTO in 2003 and has since been in the process of accession, with observer status. See "Groups in the WTO", available at: <http://www.wto.

entails compliance with the obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).[2] The need for appropriate legal frameworks for the protection of GIs can therefore be viewed from both domestic and international perspectives. It is obvious that the existence of a legal framework would ensure the availability, acquisition, scope and enforcement of the proprietary rights pertaining to GIs. Hence, this article analyses the legislative frameworks for GIs in the light of these issues.

The need from a national perspective

There are several reasons that necessitate the existence of appropriate and effective legal frameworks for GIs in Ethiopia. Economic reasons are always at the forefront from a domestic perspective. As mentioned above, agriculture forms the backbone of the country's economy.[3] The country is richly endowed with immense biological diversity and unique terrain. As a result, most of the diverse agricultural products produced in the different parts of the country constitute important potential sources for GI products.[4] Among the major agricultural products produced for both domestic consumption and export are coffee, oil seeds, pulses, flowers and livestock.[5] Diverse coffee varieties of special flavours, grown in regions with unique terrain and excellent climatic conditions, account for more than 60 per cent of the country's export earnings. There is also a rapid growth of foreign and domestic investment in the production of commercial agricultural products in various sectors.

The economic benefit that would accrue to the country as a whole from the protection of GIs is therefore one of the compelling reasons that necessitate protection of those products. Effective protection of GIs requires the existence

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org/english/tratop_e/dda_e/negotiating_groups_e.pdf> (last accessed 25 June 2011) and "The WTO -accessions: Ethiopia", available at: <http://www.wto.org/english/thewto_e/acc_e/a1_ethiopia_e.htm> (last accessed 26 June 2011).

2 Annex 1C of the Marrakesh Agreement establishing the WTO, 1994.

3 According to the African Development Bank, agriculture in Ethiopia accounts for 45% of the country's GDP, with 80% and 75% of total employment and exports respectively. See *African Economic Outlook: Ethiopia* (2005, African Development Bank / Organization for Economic Co-operation and Development) at 227.

4 B Roussel and F Verdeaux "National patrimony and local communities in Ethiopia: Advantages and limitations of a system of geographical indications" (2007) 77/1 *The Journal of the International African Institute* 130 at 146.

5 See UNDP "African economic outlook: Ethiopia 2014" at 6, available at: <http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2014/PDF/CN_Long_EN/Ethiopie_EN.pdf> (last accessed 17 July 2014). Ethiopia is also one of the world's leading sesame producing countries. Sesame varieties mainly from Humera and Wollega were among the world's top commodities, with 250,000 metric tons being offered for the international market in 2010. Ethiopia is also the birthplace and Africa's leading producer and exporter of special varieties of Arabica coffee. See M Lightbourne "Organization and legal regimes governing seed markets and farmers' rights in Ethiopia" (2007) 51/2 *Journal of African Law* 285 at 293–97.

of a solid and relevant legal framework that is tailored to the country's economic needs. It is worth noting that the mere existence of a legal framework alone is not sufficient to guarantee the realization of economic benefit. Indeed, the economic value of GIs for export commodities depends on continued investment in the long-term development of the products' reputation. Despite the absence of an immediate economic benefit for export commodities, there is a much greater need to protect GIs for the domestic market.

The case of the three speciality coffee varieties,[6] registered in several countries including the USA, can be cited as a good example of export products that have already started to offer a relatively high premium following their protection. Similarly, the protection of GIs for other agricultural products, at least in domestic markets, will contribute much to the development of their reputation. Exporting the products will ultimately carry their reputation beyond the border, achieving a better price for them. From the consumers' perspective, the legal protection of GIs is useful in protecting consumers against deceptive practices. It will also reduce the search cost for consumers by identifying the geographical origin and attributes of the products.

Apart from economic reasons, the other reason that necessitates the legal protection of GIs in Ethiopia relates to the social benefits associated with protecting GIs. The protection of rural products through GIs creates job opportunities, and reduces unemployment and the subsequent migration to urban areas, both of which are acute problems in Ethiopia.[7] The role of GI protection in complementing the conservation of biodiversity and traditional knowledge can never be underestimated, despite the existence of separate legal regimes for both subject matters.

The need from an international perspective

Even though Ethiopia has been a party to the Convention Establishing the World Intellectual Property Organization (WIPO) of 1967 (as revised in 1979) since 1998, the country has not yet ratified most international conventions governing the protection of IPRs. Nevertheless, due to its growing economic interest in forging strong economic co-operation in the form of trade and investment with other nations, Ethiopia has been participating in bilateral and multilateral trade agreements. Obviously, most of the bilateral trade and investment agreements comprise some provisions pertaining to the protection of IPRs. These agreements impose an obligation on the country to respect its international commitment to ensure the implementation of,

6 The three speciality coffees are Harar, Yirgachaffe and Sidamo. See generally A Arslan and CP Reicher "The effects of the coffee trademarking and Starbucks publicity on export prices of Ethiopian coffee" (2010) 1606 *Kiel Working Papers* 1.

7 JO Odek "Intellectual property: Protection of geographical indications in Kenya and the TRIPS Agreement" (paper presented at World Intellectual Property Organization High Level Forum on IP Policy and Strategy, Tokyo, 2005) at 29.

inter alia, the IP-related provisions of the agreements. A typical example of these bilateral agreements is the Economic Partnership Agreement between the European Union (EU) and the Eastern and Southern African Countries, in which Ethiopia is also included as a party.[8] This agreement, under the section dealing with the protection of IPRs, specifically refers to the parties' mutual obligations to ensure the legal protection of GIs.[9] Even though such an agreement paves the way for Ethiopia to secure the protection of at least its specialty coffee varieties in the EU, it also carries with it the obligation for the country to extend the same protection to the GIs of the EU.[10]

More importantly, as noted above, Ethiopia has been planning to join the WTO and is on its way to conclude its accession process which started in 2003. Finalization of the accession process will oblige Ethiopia to reform its IP laws in light of the TRIPs Agreement. Thus, the need to adhere to its existing and prospective international commitments also necessitates the legal protection of GIs in Ethiopia. Moreover, the TRIPs Agreement requires the initial domestic protection of GIs in the country of origin to ensure their protection in other member states. The existence of an effective domestic legal framework for the protection of GIs lays a foundation for their international protection in the future.

PROTECTION OF GIs BEFORE THE ENACTMENT OF THE TRADEMARK LAW

As mentioned above, there is currently no special law regulating the protection of GIs as such in Ethiopia. Due to the proximity between the nature of trademarks and GIs, and the absence of a special law, practice suggests that both subject matters are usually protected under a similar system. Thus, a quest for the relevant legal regimes for GIs prior to the current trademark law inevitably requires a brief discussion of the legal history of trademark protection in Ethiopia.

Before the enactment of the current trademark law, in force since 2006, Ethiopia had no special legal regimes for the protection of trademarks. Indeed, the enactment of a special law for trademarks was envisaged a long time ago. This was generally stated in the Commercial Code. This code provides that the "rights of industrial property including trademark shall be regulated by special laws".[11] Unfortunately, the envisaged law did not come into existence for about 40 years. However, a few provisions of the Commercial Code, Civil Code and Penal Code provide civil and penal remedies for the

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8 See J Watson and J Streatfeild "The Starbucks / Ethiopian coffee saga: Geographical indications as a linchpin for development in developing countries" (2008) 3 *Policy Notes: Trade* 1 at 4.

9 Ibid.

10 This may entail the obligation to phase out the use of "champagne" for certain products in Ethiopia. See also Roussel and Verdeaux "National patrimony and local communities", above at note 4 at 146.

11 Commercial Code of 1960, art 148.

protection of trademarks on the basis of unfair competition.[12] In the absence of a separate legal framework for trademarks, trademark protection was largely based on the provisions of the Commercial and Civil Codes, while the provisions of the Penal Code were, if ever, rarely invoked. In addition, the Ministry of Commerce and Industry was mandated to maintain a register of trademarks merely for information purposes.[13] Despite some judicial practice, there was no statutory requirement for trademarks to be registered in order to be protected.[14] Nor was there any statutory definition of trademarks under the relevant laws. Therefore, trademark protection was based exclusively on the law of unfair competition under the Commercial Code, which provides substantially the same definition as in article 10 bis (2) and (3) of the Paris Convention for the Protection of Industrial Property (Paris Convention).[15] It must be noted that trademarks were not protected as a form of IP with exclusive rights in Ethiopia. Instead, they were protected as a business element against acts of unfair competition.[16]

The important question to address therefore is whether or not the protection of GIs was also based on the same provisions of unfair competition that were applicable to the protection of trademarks. The quest for an answer to this question requires closer scrutiny of the Commercial Code. Before delving into an analytical discussion, it should be pointed out that the provisions under scrutiny do not mention the term "GIs" as such. The Commercial Code only contains a general provision defining unfair competition as "any act of competition contrary to honest commercial practice".[17] In particular, article 133(2)(a) stipulates that "any acts likely to mislead customers regarding the undertaking, products or commercial activities of a competitor" shall be deemed to be acts of unfair competition. It can be noted from the wording of the provisions that the deceptive acts pertaining to the commercial origin and characteristics of products are only an example of the broad spectrum of unfair competition as defined under article 133(1) of the code.[18] In other

12 Id, art 133; Civil Code of 1960, art 2057; and Penal Code of 1957, art 674.

13 See EF Goldberg "Protection of trademarks in Ethiopia" (1972) 8/1 *Journal of Ethiopian Law* 130 at 133.

14 Ibid.

15 Art 133(1) of the Commercial Code defines unfair competition as "any act of competition contrary to honest commercial practice". In particular, according to art 133(2)(a), "any acts likely to mislead customers regarding the undertaking, products or commercial activities of a competitor" shall be deemed to be acts of unfair competition.

16 Even though art 148(1) of the Commercial Code (which contemplates the enactment of special laws) merely indicates trademarks as industrial property, they are basically provided as a component of a business. Art 127 also lists trademarks as "elements" of a business, which itself would be deemed to be property in the code. It should however be noted that a "business" which consists of trademarks is deemed only to be ordinary incorporeal property by the code, not intellectual property which gives rise to exclusive rights.

17 Id, art 133(1).

18 An act that may constitute unfair competition is not limited to the instances under art

words, the acts of unfair competition indicated are not exhaustive. Hence, it is essential to analyse whether or not the legal protection of GIs fits into the notion of unfair competition under the Commercial Code.

To this end, the analysis of the protection of GIs within the ambit of unfair competition focuses on two important elements of article 133(2)(a) of the Commercial Code: the "misleading" element and the "products" from the phrase "any acts likely to mislead customers regarding … products … of a competitor". It may be argued that the misleading test could include, in the light of competitor products, any acts likely to mislead customers as to the geographical origin of the products. Customers may be misled not only as to the commercial source, quality and other characteristics of the products, but also as to their geographical source. A deceptive use of a product's GIs is an act contrary to honest commercial practice.[19] Thus, any false or deceptive use of GIs would fall within the ambit of acts prohibited by unfair competition law.

Furthermore, a similar assertion can be drawn from the relevant provision of the Penal Code. It is explicitly provided in the Penal Code that a false use of indications of origin amounts to criminal unfair competition.[20] The code prohibits any intentional deceptive act of infringement, imitation or passing off of another's mark, distinctive signs or declaration of origin on products or their packing.[21] The resulting civil action can be based on a tortious liability under the Civil Code.[22] In this regard, the protection of GIs may be considered to be primarily based on criminal unfair competition as opposed to protection under the Commercial and Civil Codes, for which the penal remedy in turn is based on the same provision of the Penal Code.

The legal regimes that existed generally to prevent unfair competition and were used to protect trademarks were, therefore, theoretically applicable for the protection of GIs in the form of collective trademarks, which were protected against acts of unfair competition without any registration.

PROTECTION OF GIs AFTER THE ENACTMENT OF THE TRADEMARK LAW

As elaborated above, the protection of trademarks and GIs was largely based on unfair competition as enshrined in the aforementioned codes.

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133(2). In other words, the definition of unfair competition is flexible enough to be adapted to changing commercial usage. See Goldberg "Protection of trademarks", above at note 13, footnote 22 at 134.

19 See art 10 bis (3) of the Penal Code which provides for the third instance of unfair competition. Clearly, this instance, though not mentioned under art 133(2) as such, is within the purview of acts contrary to honest commercial practice.

20 Penal Code, art 674.

21 Id, art 674(1)(a).

22 Civil Code, art 2035(1).

Legislation with specific legal provisions regarding the protection of trademarks only came into existence in 2006.[23] The Trademark Proclamation states explicitly in its preamble that its enactment is necessary to protect the reputation and goodwill of business persons by preventing confusion between similar goods and services.[24] The protection is equally designed to protect the interests of customers in the course of free trade.[25] In general, the protection of trademarks is believed to have a positive impact on national economic advancement, in particular the country's trade and industrial development.[26] It is with these basic objectives in view that a fully fledged trademark law was adopted on the basis of a registration system common in most jurisdictions.

It should be noted that the purpose of this section is simply to explore the possible legal regime(s) currently in force for the legal protection of GIs in Ethiopia. In doing so, it is first necessary to examine the relevant provisions of trademark law that may be appropriate for the protection of GIs. The article will also endeavour to point out any relevant provisions under unfair competition laws currently in force.

Protection of GIs under the existing trademark law

Current Ethiopian trademark law regulates both ordinary and collective trademarks. This article focuses on the protection of GIs as collective trademarks under the law. To begin with, a collective trademark is defined under the Trademark Proclamation as a "trademark distinguishing the goods or services of members of an association … from those of other undertakings".[27] It must be noted that the definition refers to a trademark which is owned by the association. This makes imperative the analysis of the definition of a trademark under the law. Accordingly, a "trademark" is defined as "any visible sign capable of distinguishing goods or services of one person from those of other persons".[28] It includes "words, designs, letters, numerals, colours or the shape of goods or their packaging or the combinations thereof".[29]

A closer look at the wording of the definition reveals that the essence of the definition lies in the distinctiveness of the sign. Moreover, it is apparent from the definition that "any visible sign", without being limited to the illustrative lists, can qualify as a trademark so long as it possesses the distinctive character for registration.[30]

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23 Trademark Registration and Protection Proclamation No 501/2006 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* (12th year, no 37, 2006) (Trademark Proclamation).

24 Id, preamble, para 1.

25 Id, para 2.

26 Id, para 3.

27 Id, art 2(1).

28 Id, art 2(12).

29 Ibid.

30 It must be borne in mind that the word "includes" in the definition indicates that the lists are not exhaustive.

Hence it is arguable that the definition of collective trademarks also encompasses GIs, despite the absence of a specific mention of the term in the definition. The definition may appear to include GIs partly because the definition under the TRIPs Agreement is not limited to geographical names.[31] It is possible that "indications" which conform to the definition of GIs under the TRIPs Agreement may be sufficiently distinctive to fall within the ambit of the definition in the Trademark Proclamation and thus qualify for protection as trademarks.

Nevertheless, as noted from the definition, collective trademarks under the Trademark Proclamation cannot appropriately encompass most GIs for two major reasons. First, the definition of a collective trademark is essentially limited to that of ordinary trademarks under the law, which is not primarily designed to designate the geographical origin of products. The only difference from ordinary trademarks is the fact that a collective trademark is owned by an association and collectively used by the members. Thus, unless the definition itself is revisited in order to encompass most GIs, the collective marks under the law only serve the function of ordinary trademarks in a collective manner. Secondly, as the requirement for distinctiveness provided for ordinary trademarks is similarly required for collective trademarks,[32] most GIs are in effect excluded as they primarily designate geographical origin. The requirement excludes most geographical names, which are descriptive despite their capability to serve as GIs in the context of the definition under the TRIPs Agreement. This is against the interests of most producers as they cannot get legal protection for descriptive GIs for their products for want of distinctiveness.

This is the fundamental drawback of the existing collective trademark system to acquire protection for GIs.[33] Most of the potential GIs available for agricultural products are merely descriptive geographical names that cannot qualify for registration. As a result, the existing collective trademark system excludes protection of GIs designed to indicate the geographical origin of the products in Ethiopia, due to lack of distinctiveness.

Nonetheless, the system could be adapted to encompass most GIs for most products in Ethiopia. This could only be possible if dispensation were provided by law for descriptive geographical names to be registered as collective trademarks. Moreover, the definition of collective trademarks in trademark law needs to be revisited in light of the notion of GIs. This would ultimately ensure the protection of GIs as collective trademarks for most agricultural products in Ethiopia. The protection would in turn offer most producers an additional premium for their products, in addition to a myriad of factors such as

31 K Das "Protection of geographical indications: An overview of select issues with particular reference to India" (Centre for Trade and Development working paper 8, 2007) at 5.

32 See Trademark Proclamation, art 18(3).

33 See also Das "Protection of geographical indications", above at note 31 at 114.

demand in the market, quality of the products and the reputation of the GIs among consumers.[34]

There remains another important provision worth considering in respect of trademarks admissible for registration under the Trademark Proclamation. The proclamation explicitly states that a trademark may not be admissible for registration where it consists exclusively of signs or indications which designate the geographical origin of goods.[35] In light of this provision, GIs consisting exclusively of signs or indications designating the geographical origin of goods may not qualify for registration to be protected as collective trademarks. They would be rejected ex-officio by the Ethiopian Intellectual Property Office on examination or, if registered in error, the office would subsequently invalidate the registration.[36] It must be noted that GIs are indications which identify the geographical origin of goods to which a given quality, reputation or other characteristic is essentially attributable.[37]

Thus, it may appear that this provision does not exclude the protection of GIs as collective trademarks, since GIs in principle are not mere indications of geographical origin without the attributes that link the products to the geographical area. Nevertheless, this notion of GIs is not what is contemplated by the law. The notion of GIs under the TRIPs Agreement is not adopted under the Trademark Proclamation. In other words, the nexus between the attributes of a product and its geographical area is irrelevant under the current law for GI protection in the context of collective trademarks. Rather, it can be noted from the law that such collective trademarks are eligible for protection only when they acquire secondary meaning in Ethiopia on the date of application for registration.[38] The existence of a distinctive character has an overriding significance for the legal protection of an indication. Therefore, this provision also underlies the preclusion of GIs as collective trademarks indicating the geographical origin of goods without distinctiveness at the time of registration.[39]

Even if registration of a GI as a collective trademark depends on the existence of distinctiveness, GIs which are unregistered (but widely used) may be protected against misappropriation by others. In view of the purpose of GIs to counter deceptive practices against the public, article 6(1)(h) of the

34 See L Schuessler "Protecting 'single-origin coffee' within the global coffee market: The role of geographical indications and trademarks" (2009) 10/1 *The Estey Centre Journal of International Law and Trade Policy* 149 at 169–70.

35 Trademark Proclamation, art 6(1)(e).

36 See id, arts 11 and 36(1).

37 See the TRIPs Agreement, art 2(1).

38 It is stipulated under art 6(2) of the Trademark Proclamation that the inadmissibility under art 6(1)(e) of the proclamation does not apply if it is certified on the date of the application for registration that the trademark has, through use, become well known in Ethiopia.

39 This provision is almost a verbatim copy of art 7(1)(c) of EC Regulation 40/94 on the community trademark.

Trademark Proclamation is of a paramount importance for the legal protection of GIs. Closer scrutiny of this provision elucidates that any trademark is inadmissible for registration if it is likely to mislead the public, in particular as regards the geographical origin of the goods. It is apparent from the wording of the provision that protection of GIs as collective trademarks is not guaranteed. The proclamation only prohibits the protection of collective trademarks which are of such a nature to deceive the public as regards the geographical origin of the goods. The ground of the prohibition is obviously the existence of the likelihood of deception. The "misleading test" as embodied under the proclamation is almost the same as the language of article 10 bis (3) of the Paris Convention which defines an act of unfair competition.[40]

In this regard, this provision of the proclamation also protects prior collective trademarks, which may, due to their nature, serve the purpose of GIs in indicating the geographical origin of goods. In so doing, the prohibition against the protection of trademarks likely to mislead the public reinforces the protection of existing collective trademarks with a similar scope to the protection of GIs as indicated under article 22(2)(a) of the TRIPs Agreement. Of course, the scope of protection under the TRIPs Agreement is not limited to a prohibition against registering deceptive trademarks. Instead, it extends to prevention of the use of any means in the designation of goods in a manner which misleads the public as to the geographical origin of the goods. Hence, such a limited scope of the protection under the trademark law against public deception greatly reveals the non-conformity of the Ethiopian law with article 23 of the TRIPs Agreement. In providing for "absolute" protection of wines and spirits, the agreement prevents the use of GIs despite the absence of deception.[41] There exists no such heightened level of protection in Ethiopia for wines and spirits. All products are indiscriminately subject to the same requirements and level of protection. Consequently, the current level of protection under Ethiopian trademark law falls short of the level of protection required by the TRIPs Agreement for GIs. Though the agreement as a whole is not currently binding on Ethiopia for any nonconformity, Ethiopia's

40 The misleading test in the proclamation can be drawn from the phrase "likely to mislead the public or the business community".

41 The legal protection for wines and spirits under the TRIPs Agreement is considered absolute in the sense that the highest level of protection is provided for these products compared to the level of protection for ordinary products. In this regard, the level of protection guaranteed under the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration has only been maintained under the TRIPs Agreement for wines and spirits. See NS Gopalakrishnan "Exploring the relationship between geographical indications and traditional knowledge: An analysis of the legal tools for the protection of geographical indications in Asia" (Intellectual Property Rights and Sustainable Development: UNCTAD/ICTSD Program on IPRs and Sustainable Development working paper, August 2007) at 13 and 16, available at: <http://www.iprsonline.org/ictsd/docs/Gopaletal%20-%20GIs&TK.pdf> (last accessed 29 June 2014).

forthcoming accession to the WTO will consequently require Ethiopia to reform its relevant laws to ensure consistency with the provisions of the agreement.[42]

It follows from this analysis that the aforementioned provision of current trademark law does not positively authorize the protection of GIs as collective trademarks. It only protects GIs indirectly once they are protected as collective trademarks by prohibiting the registration of other trademarks which are likely to mislead the public or the business community as to the true geographical origin of the goods under the protected collective trademarks.

In sum, the protection of GIs is not expressly regulated under the Trademark Proclamation. Despite the current general understanding as to the approach in Ethiopia for GI protection, it is not clear from the provisions of the Trademark Proclamation. Nonetheless, a closer analysis of a few of the relevant provisions of the law as discussed above reveals the existence of very narrow scope for the protection of GIs as collective trademarks under the proclamation. Even if a trademark system has been used by the Ethiopian government for coffee varieties in several countries,[43] the existing collective trademarks cannot guarantee adequate protection of geographical GIs for most agricultural products in Ethiopia. Thus, it must be emphasized that the existing level of protection for GIs under current trademark law does not conform to the required minimum level of protection under the TRIPs Agreement. Needless to say, the law also does not provide for any provision indicative of the additional level of protection under the agreement for the protection of wines and spirits. This would necessarily require appropriate legislative reforms in the law or the adoption of a new mode of protection to ensure conformity with the provisions of the TRIPs Agreement. Nevertheless, the need for compliance with international obligations depends on the realization of Ethiopia's accession to the WTO.

Protection of GIs under unfair competition law

The other relevant legal regime in force for the protection of GIs in Ethiopia is the law of unfair competition. As elucidated above, Ethiopia's unfair competition law used to consist of a few provisions scattered between different codes. It was only recently that a relatively consolidated statement of unfair competition law came into force with the enactment of the Trade Practice and Consumers' Protection Proclamation (Trade Practice Proclamation) in 2003.

42 The TRIPs Agreement provides for sets of minimum standards to be applied by all members of the WTO. Once Ethiopia accedes to the WTO, the country will be obliged to comply with the provisions of the TRIPS Agreement through legislative measures, among others. Of course, the country will be free to adopt whatever method it deems fit to comply with the required level of protection for GIs under the TRIPs Agreement. See CM Correa *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2000, Zed Books Third World Network) at 8. See also TRIPS Agreement, art 1.

43 Arslan and Reicher "The effects of the coffee trademarking", above at note 6 at 2–8.

This proclamation (as amended in 2010)[44] primarily deals with anti-competitive practices, abuse of dominance and other miscellaneous conduct as unfair trade practices. Nonetheless, the provisions devoted to unfair practices do complement commercial unfair competition under the Commercial Code. Yet, the relevant provisions that constitute a corpus of unfair competition law in Ethiopia exist under the Civil Code, the Commercial Code, the Criminal Code, and the Trade Practice and Trademark Proclamations. Needless to say, this article only discusses the pertinent provisions for the issue at hand.[45] In other words, the following discussion does not purport to be a detailed account of issues of unfair competition law as embodied in these codes and legislation.

To begin with the relevant provisions under the Commercial Code, it has been indicated above that the definition of acts of unfair competition under the code[46] is almost the same as that in article 10 bis of the Paris Convention. The only apparent difference between the two is the omission of the third line of article 10 bis (2) of the Paris Convention from article 133 (2) of the code. However, the provision in the code of particular instances of "acts contrary to honest commercial practice" is not restrictive. Thus, a false use of indications of geographical origin of the goods falls within the ambit of the general definition of acts of unfair competition.[47] This is due the fact that a false use of the indications is very likely to mislead the public as to the true geographical origin of the goods in the strict sense of GIs or as to the commercial origin of the goods.

Likewise, in dealing with an aspect of unfair competition, the Trade Practice Proclamation provides pertinent provisions that may appropriately apply to the protection of GIs. There are enumerative lists of prohibited acts of unfair competition enshrined in the Trade Practice Proclamation.[48] Unlike the definition and limited list of particular acts of unfair competition under the Commercial Code, the proclamation offers a much more elaborate and longer list of forbidden acts of unfair competition. In so doing, it also explicitly stipulates the protection of consumers' rights against those acts.[49] This additional

44 See Trade Practice and Consumers' Protection Proclamation No 685/2010 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 16th Year, No 49, 2010*. The Trade Practice Proclamation No 329/2003, which was in force prior to the promulgation of the current proclamation, has been repealed.

45 In order to avoid redundancy, this article does not discuss further the legal provisions which have already been discussed as regimes applicable for the protection of GIs prior to the Trademark Proclamation and which are still in force.

46 Commercial Code, art 133(1).

47 So long as the false use of the indications is likely to mislead the public as to the origin of the goods, the provisions of the Commercial Code can be invoked for protection despite the absence of an explicit mention of geographical indications or equivalent terms.

48 Trade Practice Proclamation, art 21(2).

49 For instance, art 22(1) of the proclamation provides for consumers to have the right to receive sufficient and accurate information about goods. This right obviously correlates to the corresponding duty of other business persons not to commit acts that are likely to

limb of protection introduced by the proclamation was not embraced by existing codes. The codes provide protection against acts of unfair competition only from the perspective of producers and competitors.

It is also evident from the enumerative lists in article 30 of the Trade Practice Proclamation in general and its sub-article 1(11) and (15) in particular that the provisions essentially involve misleading or false acts concerning the source or country of origin of the goods or deceptive acts in transacting goods. Thus, the misleading acts or false description concerning the source or origin of the goods may be construed to include both the commercial and geographical origin of the goods so far as there is no indication to suggest a restrictive construction of the provisions. Moreover, performing any cheating or confusing act in any transaction of goods as provided under article 30(11) of the Trade Practice Proclamation is much broader than the other instances, in order to embrace cases of GIs. It encompasses the deceptive or false use of GIs in a manner that misleads the public as to the true source or geographical origin of the goods.

In addition to these legal regimes, unfair competition under the Civil Code as a particular type of extra-contractual liability[50] can still be invoked to protect GIs. As stated earlier, article 2057 of the Civil Code, defining civil unfair competition, requires the infringer's act to be contrary to "good faith". This still traces itself back to article 132 of the Commercial Code, which indicates the fact that unfair competition is a type of liability based on fault.[51] Hence, the deceptive use of GIs in a manner contrary to good faith can be a ground for a person claiming to be the user of GIs to indicate the true geographical origin of the goods. Apart from the legal regimes under civil law, there remain pertinent provisions under article 719 of the Criminal Code defining criminal unfair competition. Furthermore, article 720 of the Criminal Code can also be the relevant legal regime for intentional acts of infringement, imitation or passing off committed in such a manner to deceive the public as to the declaration of origin on any produce or goods or their packaging, whether industrial or agricultural. It is notable that the Criminal Code explicitly refers to a "declaration of origin of goods" and the common law tort of passing off, neither of which is mentioned under the Civil and Commercial Codes.

It follows that there are relevant legal provisions under unfair competition law for the protection of GIs in Ethiopia. However, it must be noted that protection under unfair competition law is not based on any property right. Unlike protection under trademark law, protection under unfair competition law does not grant any legal property right over the GIs. Principally, the legal

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mislead or confuse consumers as to the nature, quality or origin of the goods, as provided in particular under art 21(2)(a) of the proclamation.

50 A Fentaw "Ethiopian unfair competition law" (The University of Oxford Centre for Competition Law and Policy working paper CCLP(L) 21, 2008) at 4.

51 Goldberg "Protection of trademarks in Ethiopia", above at note 13 at 139.

regime protects the integrity of trade and consumers' expectations about the geographical origin of products.[52] Hence, the protection under unfair competition, other than serving as a supplement to other regimes, does not fit into the notion of GIs under the TRIPs Agreement. The incompatibility is inherent in the nature of the legal regime, for it is essentially devoid of property rights contemplated by the required protection under the agreement. Nonetheless, the protection under the unfair competition legal regime can supplement the protection under other legal regimes that primarily engender property rights. This is implicit in the existing Trademark Proclamation as protection on the basis of unfair competition under the law is not pre-empted.[53] This can be inferred from the wording of article 6(1)(h) of the Trademark Proclamation which prohibits registration of a trademark that is likely to mislead the public or business community, in particular as to the geographical origin of goods. Such an instance is a typical feature of unfair competition.

In a nut-shell, the protection of GIs in Ethiopia is theoretically based on both trademark and unfair competition law. The gaps in the trademark laws may be partly filled by protection under unfair competition law even if the latter does not grant any property right. Moreover, there may be dual protection under both corpuses of laws in the absence of any specific prohibition.

THE LEGAL REQUIREMENTS FOR THE PROTECTION OF GIs IN ETHIOPIA

The substantive legal requirements for the protection of GIs in Ethiopia vary depending on the legal basis and mode of protection. As indicated above, the protection of GIs as IPRs under trademark law obviously depends on the legal requirements applicable for the protection of trademarks, while a different set of legal requirements applies for protection on the basis of unfair competition law against acts of unfair competition. Hence, an attempt is made to shed light on the substantive requirements for the protection of GIs on the basis of the underlying legal regimes enunciated above.

The legal requirements under trademark law

The legal protection of trademarks in Ethiopia is based on registration. Like other countries using registration-based systems, distinctiveness of the marks is the most fundamental substantive legal requirement for registration. Apart from embodying distinctiveness as the very essence of the definition of a collective trademark, the "distinctiveness" requirement for a trademark enshrined in article 5(1) of the Trademark Proclamation is similarly applicable for the registration of collective trademarks within the meaning of article

52 See B O'Connor *The Law of Geographical Indications* (2007, Cameron May Publishing) at 69.

53 The relevant provisions of unfair competition law under the Commercial Code may still be applicable so long as they do not contradict the provisions of trademark law. The same holds true for other relevant provisions under other laws.

18(3) of the proclamation. Moreover, the proclamation provides for other grounds that render a collective trademark inadmissible for registration, such as functionality, generality, public order or morality, etc. Thus, it is repeatedly emphasized in the law that a sign that is devoid of distinctiveness cannot qualify for registration.

It should be noted that the legal protection of GIs as collective trademarks depends on the distinctive character of the signs. Under the Trademark Proclamation, neither generic nor merely descriptive terms can qualify for registration without proof of acquired distinctiveness through use on the date of receipt of an application for registration.[54] This means that the primary function of the collective trademarks is meant to identify the commercial origin of the goods. The law does not provide for any differential treatment for collective trademarks to serve as GIs in the context of indicating geographical origin. There is no dispensation regarding distinctiveness permitting descriptive geographical names to be registered as collective trademarks. This is a basic pitfall in the existing collective trademark system in Ethiopia. Ultimately, this prevents most producers of agricultural products from benefiting from the protection of GIs as collective trademarks for their products.

It may be argued that distinctiveness may not necessarily be an issue for the foreign protection of geographical names for products originating in Ethiopia. No foreign consumers may be misled or confused when the descriptive geographical names are not known as such to the consumers and are rather regarded as fanciful or arbitrary terms for trademark protection. However, this is often not the case regarding the domestic protection of those names in Ethiopia. Moreover, foreign protection for geographical names without domestic protection may be expensive or simply of no economic value for most products.

The foreign protection of the GIs as collective trademarks without domestic protection can also be refused by member states under article 24.9 of the TRIPs Agreement. Furthermore, as discussed above, a trademark consisting exclusively of indications that designate the geographical origin of goods is inadmissible for registration under the Trademark Proclamation for the same reason.[55] This underlines the fact that the domestic protection of GIs as collective trademarks is essential for their protection in other jurisdictions.

This is therefore one of the basic obstacles in existing trademark law against the protection of GIs as collective trademarks, even if the indications serve the purpose of GIs within the meaning of article 22(1) of the TRIPs Agreement. It is rather fallacious to conclude that indications or signs of the geographical origin of goods which do not qualify for protection as collective trademarks are categorically incapable of serving their purpose as GIs. In most cases, the

54 See Trademark Proclamation, arts 6(1)(e) and(f) and 6(2). It is also important to keep in mind that the proclamation allows for registration of generic terms so long as they become well known as a result of their use in Ethiopia up to the date of the application for registration.

55 Trademark Proclamation, art 6(1)(e).

descriptive geographical names which do not perform a trademark function indicating a single producer or commercial origin[56] can however serve the function of GIs to indicate the geographical origin of the products.

Besides, there is no requirement for a link between the products and the geographical area with those characteristics, which are essentially attributable to the area for the protection of collective trademarks under trademark law. Nonetheless, once the GIs are registered as collective trademarks, they are protected against the registration of a trademark that is likely to mislead the public or the business community, in particular as regards the geographical origin of the goods concerned, or their nature or characteristics.[57] To sum up, in light of the problems associated with the requirement, the protection of GIs under the Trademark Proclamation falls short of the minimum standard of protection guaranteed under the TRIPs Agreement. This is so since the stringent distinctiveness requirement designed for ordinary trademarks eventually limits the possible protection of most descriptive geographical names as GIs for most agricultural products. Unless appropriate legislative reform is introduced following the country's adoption of the TRIPs Agreement, the continued application of the current distinctiveness requirement for GIs will be inconsistent with the required level of protection under that agreement.

The legal requirement(s) under unfair competition law

As elaborated above, protection under unfair competition law either supplements the protection under the trademark law or, in the absence of such protection, fills the gap and primarily ensures the protection of unregistered GIs against acts of unfair competition. It is obvious that the protection under unfair competition law does not grant any legal property right over the GIs. Contrary to trademark law or similar systems which grant exclusive IPRs with proactive and remedial protection, protection under unfair competition law primarily depends on the remedial function of the law. To this effect, the application of the relevant law becomes operative when the commission of acts of unfair competition is proved by the owner of the GI.

The underlying requirement and the elements to be proved vary slightly based on the legal basis for the cause of action. In other words, despite the existence of the same conceptual notion of unfair competition, whether under commercial, civil or criminal law, proof of bad faith is required, for instance under the Civil and Criminal Codes to establish the infringement of GIs used as collective trademarks on the basis of unfair competition.[58] The proof of this mental element is a daunting task, in particular in an

56 D Gangjee "Protecting geographical indications as collective trademarks: The prospects and pitfalls" (2006) 14 *IIP Bulletin* 112 at 114.

57 Trademark Proclamation, art 6(1)(h).

58 See Civil Code, art 2057. In cases of infringement of registered GIs, the issue of bad faith may not be challenging as such, since the registration itself, which serves as a notice to third parties including the infringer, defeats the defence of good faith by the infringer.

infringement suit of unregistered GIs, which are only protected under unfair competition law. However, the common and overriding condition to be proved is the existence of the likelihood or actual deception or confusion caused to the public or consumers by the false or deceptive acts of the infringer. This has been repeatedly affirmed by decisions of the Federal Supreme Court of Ethiopia in cases involving trademarks for actions based on unfair competition.[59]

The Trade Practice Proclamation provides for the establishment of the commission of any act or practice in the course of trade which is dishonest, misleading or deceptive and harms or is likely to harm the business interest of the competitor.[60] Thus, the overarching legal requirement is the proof of a "misleading or deceptive act" of the infringer which gives rise to a presumption of unfair competition. The misleading test can be satisfied where a deceptive use of GIs indicates or suggests that the goods in question originate in a geographical area other than the true place of origin, in a manner which misleads the public as to the geographical origin of the goods.[61] It is worth mentioning that the occurrence of actual harm to the business interests of the owner of the GIs is not required. Rather it is sufficient to show the likelihood of the occurrence of harm to the economic interest of the owner of the GIs. Hence, the satisfaction of legal requirements under unfair competition law for the protection of GIs is based on an in-depth factual consideration.

THE ENFORCEMENT OF GIs IN ETHIOPIA

The essence of adequate and effective legal protection of IPRs in general and GIs in particular lies in the enforcement of the rights guaranteed by substantive laws. This article has attempted to enunciate the legal protection guaranteed by the substantive legal regimes. This section will analyse the legal regime governing the enforcement of GIs in the context of collective trademarks, in light of the civil, criminal and administrative remedies available under Ethiopian laws.

Civil enforcement

The civil enforcement of the protection of GIs as collective trademarks can primarily be vindicated on the bases of trademark law, unfair competition law or both. The principal aspect of civil enforcement is based on the infringement of GIs under the relevant provisions of trademark law. In this regard, the various acts constituting the infringement of ordinary trademarks are equally applicable for the infringement of GIs, which are essentially protected as collective trademarks. Thus, a civil suit can be brought before the federal court

59 See Z Fassil *Institutional Capacity to Administer and Enforce IP Rights in Ethiopia: Prospects and Challenges* (2013, Lambert Academic Publishing GmbH KG) at 37.

60 Trade Practice Proclamation, art 21(1).

61 See TRIPs Agreement, art 22(2)(a).

for both injunctive relief and damages.[62] The amount of compensation to be awarded to the holder of the rights may be determined on the basis of the infringer's profit or an estimated royalty rate. From both possible options, the mode of assessment with a higher award is applied.[63] The plaintiff is also entitled to claim an amount to cover the expenses he incurs in connection with the suit.[64] For unregistered GIs, which cannot be enforced under trademark law, reliance can be put on the relevant provisions of unfair competition law in the Commercial and the Civil Codes, in addition to the Trade Practice Proclamation, for similar remedies.[65] Also worth mentioning is the fact that the remedies on the basis of unfair competition law can be opted for as well, even in cases involving the infringement of GIs protected as registered trademarks.

Prior to a civil suit for damages and injunctive relief, an application for a preliminary injunction in the form of provisional measures can also be filed before the federal courts or the delegated equivalent regional courts. The competent court will have the power to adopt provisional measures to hear the other side where it deems it appropriate. In particular, provisional measures shall be adopted where any delay is likely to entail irreparable harm or the destruction of evidence to the prejudice of the applicant.[66] The provisional measures so adopted are subject to review on request by the defendant, having received a due notice after the execution of the measures.[67] In this regard, it is important to mention that article 39 of the Trademark Proclamation is essentially a verbatim copy of article 50 of the TRIPs Agreement in providing for provisional measures.

Criminal enforcement

The protection of GIs under trademark law or unfair competition law can be enforced under Ethiopian criminal law. For GIs protected as collective trademarks under the Trademark Proclamation, the infringement of GIs entails a special criminal liability, in addition to the ordinary criminal responsibility under the Criminal Code. To this end, article 41 of the proclamation stipulates a specific penalty unless a heavier penalty is prescribed by the Criminal Code depending on the mental element (*mens rea*) of the infringer. The

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62 See Trademark Proclamation, art 40.

63 Id, art 40(2).

64 Ibid.

65 For a civil action to be based on general commercial unfair competition, art 132 of the Commercial Code cross-refers to art 2057 of the Civil Code. This provision of the Civil Code alone can also be a legal basis for damages, while art 2121 can be invoked for injunctive relief. Art 2035 of the Civil Code may also be relevant as a legal basis for civil liability arising from the violation of explicit provisions of any law. This is however too general to be relied on where a specific provision is available for the purpose of claiming damages.

66 See Trademark Proclamation, art 39.

67 Id, art 39(6).

proclamation prescribes a penalty of imprisonment ranging between five and ten years for intentional infringement, while gross negligence entails a penalty of one to five years imprisonment. Where appropriate, the penalty may include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements used in the commission of the offence.[68] This prong of the penal remedy is essentially similar to the remedies prescribed by articles 46 and 61 of the TRIPs Agreement.

On the other hand, the Criminal Code, which specifically refers to the declaration of origin, also prescribes criminal liability irrespective of whether the protection of the GIs is based on the trademark law or rules of unfair competition. Article 720 of the code provides for a penal remedy against the infringement of marks or declarations of origin on goods or their packaging. Unlike any other relevant laws, the Criminal Code makes specific mention of the term "declaration of origin", which is much more akin to GIs than ordinary trademarks.

Administrative / border measures

The Trademark Proclamation also provides measures at customs port and stations. The Ethiopian Customs Authority may seize and detain alleged infringing goods upon a written application by the holder of the rights. Article 42 of the proclamation stipulates that the seizure and detention of the goods are made only when a sufficient guarantee is furnished and the application is accompanied by a certificate of trademark registration in addition to other evidence. The measures taken by the Customs Authority must be communicated forthwith to both parties.[69] The Customs Authority must release the seized and detained goods unless the applicant brings a court injunction within ten working days. The provision on border measures largely conforms to the border measures under the TRIPs Agreement. However, the requirement for a collective trademark registration certificate to substantiate the application consequently renders the measures inapplicable for the enforcement of unregistered GIs protected under unfair competition law. This falls short of the protection guaranteed on the basis of unfair competition by the Paris Convention. The upcoming accession of Ethiopia to the WTO will require its compliance with the required protection under the Paris Convention as enshrined in the TRIPs Agreement, which reinforces the protection of GIs under national rules of unfair competition.

In conclusion, this section has indicated that there exist lacunae in the protection and enforcement of GIs in Ethiopia. The non-existence of explicit and adequate substantive laws, apart from the trademark law and rules of unfair competition, is the most fundamental issue that requires the adoption of appropriate legislative measures. As shown, there are enormous issues worth addressing with regard to both reforming the existing substantive

68 Id, art 41(2).

69 See Trademark Proclamation, art 42(3).

legal regimes and ensuring effective enforcement. These legislative reforms are necessitated by both economic reasons and the need to comply with the inevitable level of protection of GIs which the TRIPs Agreement will require to be adopted by the country following its accession to the WTO.

CONCLUSION

Concluding remarks

The legal protection of GIs in Ethiopia has both socio-economic and policy implications. In view of the economic benefits, the adequate and effective legal protection of GIs does not offer fewer benefits than those derived from other IPRs in Ethiopia. Nevertheless, despite the existence of potential benefits from GIs for various agricultural products, the legal protection of GIs has been given no significant attention. There is no specific legislation devoted to the protection of GIs. Moreover, there is an inadequate level of protection under existing trademark law, which is primarily designed for ordinary trademarks. The current trademark system based on the registration of distinctive signs cannot embrace most GIs as they predominantly comprise descriptive geographical names. The only option available for the legal protection of unregistered GIs is the unfair competition law which does not grant any property rights. This inadequacy has therefore undoubtedly denied the country the benefits that accrue from the adequate protection of GIs for most agricultural products. The existence of an adequate and effective system of protection for GIs will boost the economic returns deriving from those products, both in domestic and foreign markets. Despite the absence of an empirical study about their economic value, GIs are beneficial to producers and consumers since they share similar economic rationales with trademarks.

In addition to the socio-economic benefits associated with the legal protection of GIs, the adequate protection of GIs has policy implications for the country with regard to its accession to the WTO. In consequence of its accession, the country will assume the duty to comply with the level of protection required by the TRIPs Agreement. In other words, the country bears a duty to make a policy decision to undertake legislative reforms for the adequate protection of GIs.

Recommendations

On the basis of the problems indicated in this article, the following recommendations may be worthy of consideration. First, it is important to adapt the existing collective trademark system to accommodate the protection of GIs as collective marks, as adapting the existing system would be less costly. Secondly, legislative reforms should be carefully introduced to redesign the system to ensure the effective and adequate protection of GIs with a view to incentivizing the producers / farmers. Once an effective and operational system has been designed, it will also be important to raise awareness among potential users about the benefits of the system. This would play a pivotal role as most people in Ethiopia do not have adequate awareness about the economic importance of most IPRs.