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978-1-107-06552-9 - Diversity in Intellectual Property: Identities, Interests, and Intersections

Edited by Irene Calboli and Srividhya Ragavan

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## Diversity in Intellectual Property

This book aims to create an interface between intellectual property and diversity – including cultural, biological, religious, racial, and gender-based diversity. While acknowledging that the historical rationale for intellectual property protection is based on theories of utilitarian incentives and property rights, the authors of this volume assert that the current intellectual property framework is not incompatible with including diversity as part of its objectives. Through its various themes, this book delves into the debate of whether such inclusion can be made possible and how intellectual property norms could be effectively used to protect and promote diversity.

In this volume, leading scholars address ongoing regional, national, and international debates within the contexts of diversity, the existing legal framework, and the broader political and economic climate. The authors tackle such wide-ranging topics as the prohibition against trademarking slurs and concepts of intellectual property in ancient Indian texts.

Irene Calboli is a Professor of Law at Marquette University Law School and a Visiting Professor at the Faculty of Law of the National University of Singapore.

Srividhya Ragavan is a Professor of Law at the University of Oklahoma College of Law.

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# Diversity in Intellectual Property

*Identities, Interests, and Intersections*

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32 Avenue of the Americas, New York, NY 10013-2473, USA

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107065529](http://www.cambridge.org/9781107065529)

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First published 2015

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Diversity in intellectual property : identities, interests, and intersections /  
edited by Irene Calboli, Marquette University Law School and Faculty of Law,  
National University of Singapore; Srividhya Ragavan, University of Oklahoma  
College of Law.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-06552-9 (hardback)

1. Intellectual property. 2. Intellectual property (International law)

3. Culture and law. 4. Multiculturalism – Law and legislation.

I. Calboli, Irene. editor. II. Ragavan, Srividhya, editor.

K1401.D58 2015

346.04'8–dc23 2015003109

ISBN 978-1-107-06552-9 Hardback

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edited with E. Lee) and *The Law and Practice of Trademark Transactions* (2015, edited with J. de Werra).

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the economic contribution of women who are homemakers, introducing mandatory marriage registration, elevating freedom of speech by quashing the ban imposed on the screening of *The Da Vinci Code*, and determining the constitutionality of Section 3(d) of the Indian Patents Act in the now famed Novartis litigation. Justice Sridevan was named one of fifty “Most Influential People in the IP World” by *Managing IP* for two years in succession (2012–2013).

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## Foreword: Diversifying Intellectual Property

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Rosemary J. Coombe

Only two decades ago, it was common wisdom that the incorporation of “minimum standards” of intellectual property into international trade regimes would herald the extension of uniform, homogenous, one-size-fits-all legal protections around the world, to the advantage of the United States and those favoring certainty in commerce, and to the detriment of other countries, particularly those considered to be “less developed.” Lamenting this state of affairs was a widespread and predictable activity, particularly in the legal academy, where any suggestion of diversity in intellectual property would have been considered nostalgic, if not risible. The essays in *Diversity in Intellectual Property* indicate just how much has changed – in international and domestic law, in global and national politics, in transnational fields of advocacy, and in the legal academy itself – to make intellectual property law and scholarship the dynamic field of differences it has become.

Scholars of intellectual property diversity share affinities with a few anomalous ancestors. Early critics of copyright argued that this field of law needed to be considered a dimension of cultural policy, trademark scholars drew attention to the ways in which ostensibly commercial symbols shaped political speech, and historians of patents explored the particular social conditions under which allegedly general criteria for innovation were actually forged. Even economists historically acknowledged that countries at diverse stages of development needed to develop forms and degrees of intellectual property protection consonant with their distinctive industrial needs; intellectual property issues also historically intersected with issues of competition and the desirability of less concentration and greater choice in domestic markets. More belatedly, in the long-overlooked field of marks indicating conditions of production (collective and certification marks, denominations, appellations, and other forms now referred to as geographical indications), we now understand that even within Western intellectual property traditions, protections *against* alienation from collective traditions of practice were

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encompassed. The recognition of diversity within Western legal traditions should not be discounted.

Still, the range of normative contexts within which intellectual property is currently understood is unprecedented. Indeed, one could argue that the field is increasingly imbricated – politically, if not necessarily juridically – in nearly all fields of international human rights law and practice. Issues of substantive rather than merely formal equality have also slowly made their way into academic and political conversation. Intellectual property is now considered in relation to principles of environmental sustainability, access to knowledge and means to sustain health, the civil rights of minorities, the social rights of the disabled, recognition of indigenous peoples' cultural heritage, equality of opportunity for creator groups, security of subsistence livelihoods, food sovereignty, and the maintenance of biological diversity, to name but a few of the new global terrains of struggle in which it figures.

If this larger context has diversified our approaches to intellectual property, it has also diversified the agents involved in fields of policy making, as the essays in this volume clearly attest. If the World Intellectual Property Organization has reached out to “new beneficiaries,” both individual and collective, to ensure the field's continuing legitimacy, a range of new nongovernmental and civil society organizations have become more vocal and influential in voicing hopes for and concerns about intellectual property in ever widening policy arenas. If intellectual property has become more diverse as a field of policy and politics, it has also become more divergent and potentially discordant.

The scholars in this volume push further still, discovering room for differential maneuver in all aspects of intellectual property governance, whether they are directly considering issues of morality, exploring the scope for flexibilities in interpretation of global agreements, bravely addressing distributional concerns and differentials of access to intellectual property protected goods or the room created by elasticities of enforcement and the potential for differentiations in assessing liability. None of the authors are naively optimistic, but neither are they routinely pessimistic; indeed, a hopeful pragmatism is one of the volume's more salutary characteristics.

If intellectual property as an arena of scholarly inquiry has become a wider and more richly politicized field in the last two decades, so too has it become more interdisciplinary in its field of reference and its methods. As the works featured here illustrate, it is no longer unusual for legal scholars of intellectual property to do ethnographic fieldwork, engage in fact-finding missions, interview interested parties, empirically explore the workings of markets, evaluate art forms, analyze economic data, explore

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Foreword: Diversifying Intellectual Property

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technological innovations, or engage in hermeneutic inquiry. There is perhaps no other field of legal scholarship in which such a differentiated range of scholarly effort can be found, making the work of intellectual property a source of diversification on yet another significant front. The editors are to be congratulated for their work in fostering and showcasing such a diversity of scholarship.

ROSEMARY J. COOMBE

*July 2014*

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## Acknowledgments

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We would like to start this book with a series of acknowledgments to those who made it possible with their academic expertise and in many other ways.

At the outset, we would like to thank the contributors, our colleagues who generously accepted our invitation to be part of this volume despite many other commitments. Our conception has become a reality thanks to their contributions. These distinguished scholars not only made our work as editors academically interesting and enriching; they also taught us life lessons in professionalism, friendship, and kindness as part of the journey of creating this book. We are honored by their excellent contributions, from which we have gained endless insights on many different important issues. We would like to especially thank Rosemary J. Coombe for writing the Foreword and encouraging us to pursue the idea of a volume on diversity-related issues in intellectual property law. We are also honored that Retired Justice Prabha Sridevan contributed to the volume by sharing her knowledge and experience. We hope that this book will make our contributors as proud as we are to have had the privilege of coordinating this project with them.

We additionally extend a warm thank you to our publisher, Cambridge University Press, which supported this project from the beginning. In particular, John Berger, David Jou, Stephen Acerra, and the editorial team of Cambridge University Press assisted us with unquestionable dedication throughout the different stages of production of this book. It is thanks to our contributors and our editing team that this volume is a reality today. Additional thanks are due to Elizabeth Kendall, Andrew Minten, and Jamie Yu, who provided excellent assistance during the editing process of the manuscript before the submission of the final draft to the publisher. We also thank Kelly Cook, Michael McTee, and Casey Whetten for their assistance with the project, and the University of Oklahoma College of Law for covering the costs associated with the index. Our families, as always, were there for us. We thank them for their

Cambridge University Press

978-1-107-06552-9 - Diversity in Intellectual Property: Identities, Interests, and Intersections

Edited by Irene Calboli and Srividhya Ragavan

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support and patience during the many hours that we spent away from them while completing this book.

We would like to dedicate this volume to our contributors, and to all academics who believe that diversity – in its many aspects – deserves scholarly attention as part of the intellectual property debate. Regardless of the unavoidable differences in opinions, all of these scholars are open-minded toward diversity and agree that diversity should be weighted as a relevant component of an inclusive legal process, despite the difficulties and the controversies, which this invariably entails. With their contributions, these scholars have raised the awareness of diversity not only within academic circles but also beyond these circles, reaching policy makers and civil society. “*Vasudeva Kudumbagam*,” says the Gita – meaning that the world is a large family in itself. To us, the scholars to whom this book is dedicated are like members of a large family. We hope that this family will continue to grow, and in turn more scholars will continue to foster awareness of “the different” with their scholarship in years to come.

Last, but not least, we are grateful for having had the opportunity to collaborate and create this volume together. We began this project as academic friends and we conclude it as friends who are academics. To us, this book is a testament to the possibility of academic cooperation between scholars from different backgrounds and different parts of the world, and of the ability to bring creativity and diversity together in the pursuit of important projects, such as the one that we hope this book represents.

IRENE CALBOLI AND SRIVIDHYA RAGAVAN

*July 2014*