


Intellectual property rights as a tool for bridging gender gap: approaches and prospects under the African Union

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Abstract

- This article investigates the extent to which the current African Union's initiatives towards women's empowerment integrate intellectual property rights (IPRs) as a driver for bridging the gender gap. It is premised on the argument that the multiplier effect of IPRs manifests in a variety of achievable societal development objectives, including bridging the gender gap. Noticeably, the African Union (AU) seeks, among others, to facilitate women's socio-economic development through their involvement in the technological space and gender-enabling e-solutions. Intellectual property (IP) is one of the crucial drivers in socio-economic and technological development by granting exclusive rights to control various forms of its usage. Yet, IP is not immune from gender-based mischiefs, and hence its interdisciplinary functions are increasingly questioned and laid bare, necessitating rethought and repackaging.
- The chosen analytical orientation is a feminist one guided by the critical race IP theoretical construct. It is contended that the current AU interventions pertaining to women's empowerment are devoid of proper recognition and placement of IP, hence limiting its effectiveness in encouraging the participation and recognition of women in their creative endeavours.
- To address this shortcoming, a call is made for a review of all AU's legal instruments and programmes for women's empowerment to integrate IPR precepts, setting up IP support structures for women, and adopting a gender-conscious continental IPR agenda under the Agreement on African Continental Free Trade Area IPR Protocol and ongoing World Intellectual Property Organization initiatives by specifically integrating IPR principles in the ongoing plans for closing the gender gap.

1. Introduction

The extent to which law, let alone IP laws, serves as a tool for achieving social justice and equality for all has been a subject of considerable scholarly debates.¹ A drive to reformulate the current principles and structure of the IP policy and law to bridge the gender gap is steadily gaining momentum. The 2023 World Intellectual Property Day was aptly themed 'Women and Intellectual Property (IP): Accelerating Innovation and Creativity'² to

underscore the crucial role women play across the globe in shaping the world through their imagination, ingenuity and hard work. Such an inspirational theme is one of many IP-related initiatives for women's empowerment under the auspices of the World Intellectual Property Organization (WIPO).³ Inadvertently, the chosen theme coincided with the 20th anniversary of the African Charter on Human and Peoples Rights (ACHPR)'s Protocol on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted on 11 July 2003. Indubitably, women play a significant role in innovation and creativity in science, technology, arts, entertainment and commerce.⁴ Despite their contributions,

¹K Aoki, 'Distributive and Syncretic Motives in Intellectual Property Law (with special reference to Coercion, Agency, and Development)' (2007) 40 (3) UC Davis Law Review 717-801, https://lawreview.law.ucdavis.edu/sites/g/files/dgvnsk15026/files/media/documents/DavisVol40No3_Aoki.pdf, accessed 31 October 2024. R Stallman, 'Did You Say "Intellectual Property"? It's a Seductive Mirage', GNU OPERATING SYS.: PHIL. Available at <http://www.gnu.org/philosophy/not-ipr.html> (accessed 20 January 2024); B Boateng, 'That Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana' (2011). Available at <https://www.upress.umn.edu/book-division/books/the-copyright-thing-doesnt-work-here> (accessed 20 January 2024).

²WIPO, World IP Day 2023. Available at <https://www.wipo.int/ip-outreach/en/ipday/> (accessed 11 September 2024).

³Other WIPO initiatives include: WIPO Intellectual Property (IP) and Gender Action Plan The Role of IP in Support of Women and Girls of 2023. Available at <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-1-en-wipo-intellectual-property-ip-and-gender-action-plan-the-role-of-ip-in-support-of-women-and-girls.pdf> (accessed 5 September 2024), and other WIPO training and policy guides/initiatives on empowering women through the use of IP are available at <https://www.wipo.int/women-and-ip/en/> (accessed 11 September 2024).

⁴WIPO, 'The Global Gender Gap in Innovation and Creativity: An International Comparison of the Gender Gap in Global Patenting over Two Decades' (2023) Development

WIPO expresses concern that women in the IPR ecosystem often struggle to access knowledge, skills, IP-related resources and support⁵ and other socio-economic setbacks.⁶

Admittedly, the term 'gender gap' is broad, multifaceted and dynamic, and thus, its meaning tends to vary based on its contextual usage. Gender has been construed and interpreted as a 'floating signifier',⁷ lacking a fixed meaning or clear reference, with its interpretation shaped by various factors such as time, locality and cultural context. In the context of this article, the gender gap refers to the socio-economic disparity between women and men in terms of their levels of participation, access, ownership rights, remuneration or benefits resulting from creativity and innovation.⁸ IP, an area designed to promote creativity, is not free from criticism regarding its regulatory imbalances. For instance, it is criticised under the Critical Race IP theoretical construct for its perceived bias.⁹ Admittedly, the theoretical underpinnings of critical race IP do not specifically address gender. Yet, its underlying principle provides a useful benchmark in critically assessing the regulatory implications of IPRs in determining socio-economic entitlements and its consequent effect in bridging the gender gap.

Notably, African women face several inhibitive conditions and challenges in using the IPR system. Even though the IPR system is widely acknowledged as an important tool for fostering cultural and socio-economic empowerment,¹⁰ and in particular, women empowerment (as vindicated in several evidence-based case studies compiled by WIPO¹¹), there are still no concerted efforts and defined regulatory pathways under the AU aimed at locating its specific role in bridging the gender gap. Cognizant of the unique cultural and socio-economic intricacies in most parts of Africa regarding property rights,¹² education¹³ and domestic social orientation in which women are generally undermined or excluded, this article cautiously examines the AU's efforts to bridge the gender gap. It explores the IP-related shortcomings in

such interventions and argues for reorienting national IPR regulatory frameworks to explicitly integrate IPR provisions into the AU's existing women empowerment strategies.¹⁴

2. Contentious issues

As Africa celebrated the 20th anniversary of the Maputo Protocol in 2023, the continental initiatives deployed so far by the AU have not yielded the full extent of the projected outcomes for the improvement of women's lives. While some legal and regulatory progress has been made, there are still a lot of areas in the existing legal instruments that need further engagement and refinement. One of the aspects that requires closer examination is the apparent lack of connection between the AU's initiatives for bridging the gender gap and the role of IPRs. Admittedly, initiatives for bridging the gender gap are broad and multifaceted,¹⁵ inevitably attracting consideration of a wide range of variables, including proper placement of women in the creativity and innovation cycles as an agenda for women's empowerment. In such a context, consideration of IP as an instrument for bridging the gender gap is vindicated. Yet, the extent of its impact in the context of Africa could be regarded as contentious compared to the influence of IPRs in other production sectors.¹⁶

Consequent to the theme for the 2023 World IP Day, which focussed on the role of IPRs in empowering women, WIPO adopted a Gender Action Plan 2023 aimed at drawing a roadmap for repackaging substantive and procedural aspects of the existing IPR regime for supporting women's empowerment.¹⁷ Several studies reaffirm the role of IP in bridging the gender gap; hence, the various WIPO initiatives are relevant and pivotal in the context of contemporary global debates and initiatives on bridging gender-based disparities. While the implementation of the WIPO initiatives remains a discretionary matter of Member States, their contribution to articulating key issues for consideration offers a useful starting point for national implementation. However, determining specific IPR approaches for specific regions or countries remains a subject of discussion.

At the continental level, the AU, driven by its Constitutive Act,¹⁸ has adopted several initiatives aimed at bridging the gender gap through various programmes tailored to enhance women's empowerment. The legal instruments backing these AU's initiatives include the ACHPR of 1981,¹⁹ the Maputo Protocol of 2003,²⁰ and the Solemn Declaration on Gender Equality in Africa (SDGEA) of 2004.²¹ Moreover, the AU's Agenda 2063 contains several gender-related statements and initiatives as part of Africa's inclusive development.²² Furthermore, the adoption of the AU's Gender Policy in 2009 set out to address various forms of gender

Studies Series. Available at www.wipo.int/publications/en/details.jsp?id=4653 (accessed 24 July 2024). The report analyses women's participation in international patent applications between 1999 and 2020 and finds that women are involved in only 23% of all applications, representing 13% of all inventors listed.

⁵ibid., see also J Brant et al., 'Policy Approaches to Close the Intellectual Property Gender Gap – Practices to support Access to the Intellectual Property System for Female Innovators, Creators and Entrepreneurs' (2019). Available at https://www.wipo.int/export/sites/www/ip-development/en/agenda/docs/policy_approaches_close_the_ip_gender_gap.pdf (accessed 11 September 2024).

⁶C Beaudry et al., 'Factors That Affect Scientific Publication in Africa—A Gender Perspective' (2023) *Frontiers in Research Metrics and Analytics*. Available at <https://doi.org/10.3389/frma.2023.1040823> (accessed 11 September 2024).

⁷A Peter, 'Male/Female/Both/Neither: Gender as Floating Signifier' (1992) 14 *Literature of Medieval France Medieval Feminist Newsletter* 12–16.

⁸World Economic Forum, *Global Gender Gap Report 2023—Insight Report June 2023*, p 5. Available at <http://reports.weforum.org/global-gender-gap-report-2023> (accessed 2 January 2024).

⁹A Vats and DA Keller, 'Critical Race IP' (2018) 36 *Cardozo Arts & Entertainment Law Journal* 735. Available at https://scholarship.law.pitt.edu/fac_articles/512 (accessed 20 January 2024).

¹⁰SF Halabi, *Intellectual Property Rights and the New International Economic Order—Oligopoly, Regulation & Wealth Redistribution in the Global Knowledge Economy* (New York Cambridge University Press 2018); K Idris, *Intellectual Property Rights: A Power Tool for Economic Growth* (Geneva WIPO 2003) Publication No 888.

¹¹WIPO, *Closing the Gender Gap in IP: Women and the Sustainable Development Goals* (29 April 2024). Available at https://www.wipo.int/women-and-ip/en/news/2024/news_0002.html (accessed 27 May 2024).

¹²D Najjar, B Baruah and A El Garhi, 'Gender and Asset Ownership in the Old and New Lands of Egypt' (2020) 26 *Feminist Economics* 119–43.

¹³Education Sub-Saharan Africa (ESSA) 'The Gender Gap in Universities and Colleges in Sub-Saharan Africa' (2021). Available at <https://essa-africa.org/node/1421> (accessed 15 August 2023).

¹⁴R Dreyfuss and J Pila, 'Intellectual Property Rights Law: An Anatomical Overview' in R Dreyfuss and J Pila (eds) *The Oxford Handbook of Intellectual Property Rights Law* (Oxford Oxford University Press 2018) 3, 16.

¹⁵A Rudman, CN Musembi and TM Makunya, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A COMMENTARY* (Pretoria University Law Press 2023) 373, 385.

¹⁶Halabi (n 10).

¹⁷See WIPO (n 3).

¹⁸art 4(L) of the AU's Constitutive Act specifically provides that it 'shall function in accordance with the promotion of gender equality'.

¹⁹Available at <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed 11 September 2024).

²⁰Available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 12 September 2024).

²¹Available at <https://au.int/documents/20200708/solemn-declaration-gender-equality-africa> (accessed 14 September 2024). The Declaration contains six thematic areas of action: governance, peace and security, human rights, health, education and economic empowerment.

²²Available at <https://au.int/en/agenda2063/overview> (accessed 14 September 2024).

inequalities, such as unequal access to resources²³ that economically disadvantage women. Yet, none of the legal and policy instruments mentioned thus far have succinctly sought to integrate the use of the IPR system as a strategy for bridging the gender gap. Even the recently adopted Agreement on African Continental Free Trade Area (AfCFTA) of 2018, the AfCFTA Protocol on Women and Youth on Trade of 2023 peripherally mention IPR-related measures as one of the inputs in gender equality interventions without providing definite national implementation guidance.²⁴

Thus, the ongoing WIPO initiatives, such as the IP and Gender Action Plan of 2023,²⁵ which seeks to reformulate the current IP regulatory system by integrating gender perspectives, provide a valuable platform for the AU. These initiatives can help identify specific action points for using IPRs to bridge the gender gap and encourage a more pronounced inclusion of IPRs in its various women's empowerment initiatives. This article explores the following pertinent issues: (1) How can IP leverage the gender gap in the African context? (2) What opportunities for IP integration are available in the existing AU's legal instruments for bridging the gender gap? and (3) What IPR action points and approaches could help the AU bridge the gender gap?

This article locates its discourse in the context of the ongoing AU's initiatives. It addresses the subject from broad perspectives of selected subsets of IPR, namely patents, trade marks and copyright. It seeks to trigger informed dialogues and debates on the intersections of IPR and women empowerment while hoping that, in the future, it may attract specific research and analysis on the contribution of specific types of IPR in bridging the gender gap in Africa.

3. The intersection of IP and gender

Over the years, the relationship between IPRs and women's empowerment has been assessed through various analytical angles and diverse contexts. A key narrative that has emerged highlights the technological imbalance against women and the gender disparity in their participation within the IP ecosystem.²⁶ Furthermore, there is a growing discourse attempting to locate issues relating to the inherent discriminatory application of IP doctrines to gender and sexuality²⁷ and the feminist analysis of IP doctrines that appear gender-neutral on the surface.²⁸ Regardless of its orientational disposition, the current discourse offers useful insights into the subject under review, particularly in locating an appropriate model and strategies for integrating IPRs into the current AU's initiatives for women's empowerment. The intersection of IPR and women has attracted attention and debates in various contexts, as discussed below.

3.1. Women, IP and development

Recently, the role of women in achieving sustainable development goals has been extensively articulated in various contexts,²⁹

as well as the role of IP in steering human development.³⁰ Yet, the extent to which the global IPR system shapes the drive for bridging the gender gap is still not fully explored in the existing literature. Noticeably, the transformation of the IPR system propelled under the World Trade Organization (WTO)'s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)³¹ further institutionalised the doctrinal precepts of the IP system, which from its outset failed to consider the crucial role and space of women in the innovation ecosystem, particularly the inhibiting circumstances for their participation in scientific research.³² Unfortunately, the prevailing socio-economic structures in most societies tend to inadvertently limit women from effective participation in the knowledge creation and innovation process, adversely affecting their ownership share in the resulting IPRs.³³

In an attempt to grasp and appreciate the socio-economic factors affecting women's participation in development, a UN report highlights *how time and income poverty* doubly affect women based on their multiple domestic roles, which include childbearing and rearing.³⁴ Consequently, women's effective participation in the production and creative processes suffers. Hence, addressing these two pertinent issues—*time and income poverty*—is crucial in enhancing women's role in achieving global sustainable development goals, particularly in low-income countries.³⁵ The UN Report further highlights that the 25–34 years age range is the most productive phase of the human life cycle; however, it is during this stage women and their households face increased expenses and responsibilities associated with raising children, while at the same time grappling with time constraints since they also must engage in creative and paid work. Based on these inhibitive circumstances, the UN report calls for public action to support women during this critical stage of their lives through a combination of gender-responsive social protection and labour market interventions, as well as investments in time-saving public services (eg water, childcare, transportation) and basic infrastructure.³⁶ To illustrate, the UN Report notes that in poor countries, in 80 per cent of households, women and girls are responsible for collecting water, which is an arduous and time-consuming task. In Lesotho, for instance, the average time for a round trip to collect water takes an average of 39.5 minutes, while the average time for a roundup trip in the poorest countries is reported to be 45.5 minutes.³⁷ This average time, which could otherwise be devoted to education or creative activities, is a significant factor in Africa, where accessibility to water and other utilities, particularly in rural areas, remains an ongoing challenge. Arguably, these inbuilt societal conditions hamper women from

099013107142345483/SECBO504cf7b650208a5e08b784c0db6a4 (accessed 20 June 2024); DG Lorenza, 'The Role of Women's Participation in Development: Empirical Evidence from Indonesia' (2022) 6 *Journal of Economics Research and Social Sciences* 124–30.

³⁰Halabi (n 10); Idris (n 10).

³¹S Barwa and SM Rai, 'Knowledge and/as Power: A Feminist Critique of Trade Related Intellectual Property Rights' (2003) 7 *Gender, Technology and Development* 91, 96. Available at <https://doi.org/10.1177/097185240300700105>.

³²C Beaudry and V Larivière, 'Which Gender Gap? Factors Affecting Researchers' Scientific Impact in Science and Medicine' (2016) 45 *Research Policy* 1790, 1804.

³³Barwa and Rai (n 31).

³⁴United Nations, *World Survey on the Role of Women in Development 2019: Why Addressing Women's Income and Time Poverty Matters for Sustainable Development* (2021). doi: <https://doi.org/10.18356/9789210049351>.

³⁵UN Women, *Progress on the Sustainable Development Goals: The gender snapshot 2023*, p 7. Available at <https://www.unwomen.org/en/digital-library/publications/2023/09/progress-on-the-sustainable-development-goals-the-gender-snapshot-2023> (accessed 5 July 2024).

³⁶ibid.

³⁷ibid 46.

²³African Union (AU) Gender Policy 2009, p 10.

²⁴art 3(e) of Agreement, and art 14 of AfCFTA Protocol on Women and Youth in Trade of 2023.

²⁵WIPO (2023) (n 4) p 4.

²⁶K Hagen, 'An Essay on Women and Intellectual Property Law: The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property' (1999) 15 *Santa Clara Computer and High Technology Law Journal* 139, 140.

²⁷M Sunder, 'Intellectual Property and Identity Politics: Playing with Fire' (2000) 4 *Journal Gender Race and Just* 69, 71.

²⁸S Wright, 'A Feminist Exploration of the Legal Protection of Art' (1994) 7 *Canadian Journal Women and Law* 61.

²⁹World Bank, *World Bank Gender Strategy 2024–2030: Accelerate Gender Equality for a Sustainable, Resilient, and Inclusive Future—Consultation Draft (English)* (Washington, DC World Bank Group 2024). Available at <http://documents.worldbank.org/curated/en/>

effectively participating in research, creativity, artistic works and business undertakings, all of which are crucial elements in the IPR ecosystem.³⁸

These conditions also hinder women's ability to absorb and apply innovations and technology-related solutions to improve their livelihoods. To illustrate, a recent study in Ethiopia found that farms managed by female-headed households had lower technological adoption rates than those led by men, partly due to differences in economic status, access to training and exposure to new opportunities.³⁹

Thus, these socio-economic realities confronting women in many contemporary African societies are useful in informing the discussion and consequently guiding a suitable model for the strategic integration of IP in the initiatives to bridge the gender gap under the aegis of the AU.

3.2. Technology gender biasness

Considering the possibility that technology may be inherently gender biased is arguably a thought-provoking notion. The term 'technological bias' against women has been part of the ongoing gendered narrative and concern, particularly in critical legal studies, where the role of law as a tool for social justice is continuously critiqued.⁴⁰ Technology gender biases are currently engaged with and assessed from various angles, including the regulatory and ownership complexities enmeshed in sophisticated Artificial Intelligence (AI) and blockchain technologies.⁴¹ Contentious issues have included institutionally inbuilt biases against women embedded in the development, application and distribution of benefits from technology, which disproportionately disadvantage women.⁴²

Such arguments, linked to contemporary technological trends and reasoning, raise several regulatory questions. For example: to what extent can IP regulation leverage a seemingly intractable technological gender bias? What lessons can AU draw from the contemporary and fast-changing global technological landscape in instituting its initiatives for bridging the gender gap? Addressing these questions through IPR policy and regulatory interventions could be instrumental in leveraging the gender gap for inclusive development in Africa.

3.3. The ineptness of the innovation and IP regulatory system

From a feminist theoretical approach, which argues that women's life conditions and experiences affect their perception of knowledge and power relations in society,⁴³ the IPR regulatory system has been challenged because it undermines women's effective participation and ability to benefit from various creative endeavours. This is due to the failure to fully acknowledge the nature and context of women's participation in the IPR ecosystem.⁴⁴ This

³⁸Beaudry et al (n 6).

³⁹GG Gebre, Y Amekawa and DB Rahut, 'Improved Maize Technology Adoption and its Intensity Among Male- and Female-Headed Households in Dawuro Zone, Southwestern Ethiopia' (2023) 27 *Gender, Technology and Development* 42–59, 47. doi: 10.1080/09718524.2022.2140382.

⁴⁰A Stewart, *Gender, Law and Social Justice: International Perspectives* (London Blackstone 2004).

⁴¹P Doneys et al, 'Gender, Technology and Development: Reflections on the Past, and Provocations for the Future' (2022) 26 *Gender, Technology and Development* 285, 289.

⁴²*ibid*.

⁴³JT Wood, 'Feminist Standpoint Theory' (2009) *Encyclopedia of Communication Theory* 397–99. Available at https://edge.sagepub.com/system/files/77593_2.2ref.pdf (accessed 9 August 2024).

represents an unfortunate regulatory outcome which contradicts the principles and values of IPR when viewed from the lens of human rights.⁴⁵ Thus, it is pertinent for IPR policies and statutes to be consciously tailored to recognise the specific contexts in which women (particularly in matrimonial settings) contribute to creative processes.

Some issues emerge at this point: should the application of the legal principle on women's contribution to the acquisition of matrimonial property be extended to IPRs owned by their husbands? If so, at what level and subject to which statutory qualifications? Given the socio-cultural settings in much of African society, where domestic responsibilities have inherently undermined women's participation in education and research, should the IP laws, in the spirit of inclusivity, provide for some special regulatory flexibilities to women regarding standards of compliance? These are some of the important questions to explore in order to leverage IP to bridge the gender gap effectively.

The discussion above highlights several regulatory issues that the current IP regulatory framework in Africa should consider in addressing the current gender disparity. In the patent system, for instance, studies have demonstrated that men are significantly more likely than their female counterparts to be the inventors of patented inventions, partly due to the gendered nature of the innovation systems and patent law itself.⁴⁶ Regarding disparity and the paradox surrounding gender and science-related studies, global trends indicate that men predominantly work in the fields of science, technology and mathematics.⁴⁷ Such a widespread imbalance affects the number of women engaged in scientific and engineering innovations; hence, the low number of patents resulting from women. Considering the significant role patents play in the global economy, the gender gap in science and technology deserves the utmost attention since it informs the future wealth trajectories and distribution. As the global sustainable development initiatives shift towards inclusive development, of which gender balance is integral, it is pertinent for regional bodies such as the AU to seriously reconsider integrating IPR in the ongoing women empowerment initiatives.

3.4. Women and copyright

In contrast to patents, women's participation in copyright-related works offers varying outcomes based on the specific area of copyright and the role played in the entire copyright value chain, as shown in recent data from the film industry.⁴⁸ In certain areas of copyright, such as visual arts, performance, cultural education,

⁴⁴C Truluck, 'Women and IP: Inclusion of Women in South Africa's IP System' (2023) *Spoor and Fisher*. Available at <https://www.lexology.com/library/detail.aspx?g=66af6ae3-42b7-4158-a9cd-709cb826a705> (accessed 10 August 2024).

⁴⁵art 27 of the UN Universal Declaration of Human Rights provides both a right of every person to 'participate and enjoy' the arts and to share in scientific advancement and its benefits, and 'the right of the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

⁴⁶C Lai, 'The Role of Patents as a Gendered Chameleon' (2021) 30 *Social and Legal Studies* 203, 214. Available at <https://doi.org/10.1177/0964663920916237>; AI Kahler, 'Examining Exclusion in Woman-Inventor Patenting: Historical, Economic and Social Perspectives' (2011) 19 *American University Journal of Gender, Social Policy and the Law* 773.

⁴⁷G Stoet and DC Geary, 'The Gender-Equality Paradox in Science, Technology, Engineering, and Mathematics Education' (2018) 29 *Psychological Science* 581, 591. Available at <https://doi.org/10.1177/0956797617741719>; E Lechman and M Popowska, 'Enhancing Women's Engagement in Economic Activities through Information and Communication Technology Deployment: Evidence from Central–Eastern European Countries' (2020) 24 *Gender, Technology and Development* 314–40. Available at <https://doi.org/10.1080/09718524.2020.1824568>.

⁴⁸World Economic Forum, 'This is the State of Gender Parity in the Film Industry in 2024' (8 March 2024), Available at <https://www.weforum.org/agenda/2024/03/oscars-film-industry-gender-parity/> (accessed 10 August 2024).

fashion and designs, the numbers are high compared to software, video games and publishing, which continue to be dominated by men.⁴⁹ Yet, empirical research on copyright directly engaging with gender in Africa remains relatively minuscule. Seemingly, the socio-cultural and economic perception, such as the general view inclining towards objectification of women by the media,⁵⁰ may contribute to women's active participation in creative industries. Thus, consideration of the gender element in this research area of copyright is vital, particularly in the context of the ongoing initiatives under the AU.

A discourse on whether gender biases are embedded in copyright laws is relevant in informing the needed regulatory changes to enable women to optimally use copyright for economic and social gains.⁵¹ This argument bears relevance because copyright and the entertainment industry constitute one of the major production sectors in several African economies,⁵² yet women are generally underrepresented.⁵³ That said, a gradual surging number of women's participation in copyright-based industries can be attributed, in part, to the broad range of cultural works protected by copyright. Most of these works involve activities predominantly carried out by women at the domestic level, such as textile products, handicrafts, engravings, folk arts, dancing and singing.⁵⁴

Therefore, the discussion on the intersection of IPRs and gender reveals an urgent need to create a responsive and inclusive policy and regulatory approaches to IPR to bridge the gender gap. The ongoing initiatives under WIPO, which seek to reformulate the current IPR system for increased inclusion and participation of women in the IPR ecosystem, are commendable. However, the extent to which the WIPO initiatives may have a positive effect in Africa depends not only on how the IPR system is structured but also on the reorientation of the inbuilt socio-economic structures in most societies, which significantly affect women's participation in innovation and creative endeavours.

4. Assessment framework

This article's assessment model is qualitative. The analysis applies a feminist approach, informed and complemented by the theoretical underpinnings of critical race IP in examining the underlying regulatory intricacies of the IPR system and its instrumental role in bridging the gender gap. The critical race IP theory is relevant in this discourse, complementing a feminist approach based on its multifaceted conceptual setting and flexibility, which can inform and guide scholarly debates across other disciplines and perspectives.⁵⁵ Towards this end, the paper

examines the underlying exclusionary and inhibitive tendencies for women inherent in the IPR system stemming from its underlying precepts. It is a qualitative documentary assessment of the potential impact of IPR regulation and protection on women's empowerment initiatives.⁵⁶ It interrogates the extent to which various continental legal instruments, policies and programmes on women empowerment within the AU's intervention framework incorporate the virtues of IPR.

In this regard, the critical race IP and rights discourse provides a liberal and balanced framework for evaluating the impact of current socio-economic circumstances, the shortcomings of the AU's legal instruments on gender in relation to IP and the inequitable IP laws that hinder women's effective participation in various creative endeavours.⁵⁷ Moreover, the discussions are complemented by information drawn from various reports, interviews with selected women and the available guides for analysing gender participation in innovation.⁵⁸ These women, who are leaders in utilising IP to bolster their businesses, are key examples in the analysis.⁵⁹ In addition, the assessment draws on and is informed by various case studies of women in food making, agriculture, textiles and the creative industry, sourced from the WIPO database.⁶⁰

5. Role of IPRs in bridging the gender gap

The ubiquity of IPR makes it a cross-cutting subject with multifaceted uses capable of achieving various societal goals, including women's socio-economic empowerment. Generally, subject to some inbuilt theoretical constructs such as social justice and critical race theories, the IP system is designed to promote and protect creative works by granting statutory exclusive rights over such works for a limited period under relevant national laws. Such protection enables IPR proprietors to, inter alia, commercially exploit the protected work for economic and social gains. Based on its conceptual setting, women empowerment initiatives in Africa, particularly those centring on socio-economic empowerment, can use the protective benefits embedded in the IPR system. However, to produce positive outcomes, the AU's integration process of IPR into the women's empowerment agenda should be guided and informed by the socio-economic conditions facing women in various African regions, which may affect its applicability and adoption of the chosen approaches.⁶¹

Appreciating women's fundamental role in championing the use of IPR as part of inclusive development, WIPO has established several programmes and initiatives aimed at empowering women through the IPR system. While WIPO's initiatives are plausible, achieving positive outcomes requires moving from the 'one-size fits all' approach in conceptualising proposed regulatory interventions. Instead, the integration process should be adaptable,

⁴⁹Scotland, 'Gender Inequality in The Creative Arts' (2022) National Advisory Council on Women and Girls: Monthly Spotlight, UNESCO Institute for Statistics, 'Precarious Situation for Women Working in the Field of Culture' (2017). Available at [375706eng.pdf](https://unesco.org) (unesco.org). V Weinstein, 'A Woman's World: Gender Discrimination in the Entertainment Industry' (2019). Available at https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1250&context=honorscollege_theses (accessed 10 August 2024).

⁵⁰S Sen, 'Objectification and Exploitation of Girls and Women by the Mass Media and Social Media' (2019) *Right of Equality*. Available at <https://www.rightsofequality.com/objectification-and-exploitation-of-girls-and-women-by-the-mass-media-and-the-social-media/> (accessed 10 August 2024).

⁵¹A Bartow, 'Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 551, 564.

⁵²National Studies on Economic Contribution of Copyright are available at <https://www.wipo.int/copyright/en/performance/> (accessed 10 July 2024).

⁵³Y Moussa, 'Empowering African Women to Thrive in the Creative Industry' (2024). Available at <https://africanprimeinitiative.com/empowering-african-women-to-thrive-in-the-creative-industry/> (accessed 10 August 2024).

⁵⁴B Boatang, 'Walking the Tradition-Modernity Tightrope: Gender Contradictions in Textile Production and Intellectual Property Law in Ghana' (2007) 15 *American University Journal of Gender, Social Policy and the Law* 341.

⁵⁵J Tehrani, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' (2012) *BYU Law Review* 1233; Vats and Keller (n 10).

⁵⁶KW Swanson, 'Intellectual Property and Gender: Reflections on Accomplishments and Methodology' (2015) 24 *American University Journal of Gender, Social Policy and the Law* 175-95.

⁵⁷WIPO 2023 (n 4).

⁵⁸WIPO, *Guidelines for Producing Gender Analysis from Innovation and IP data* (2022), Geneva, World Intellectual Property Organisation, Publication No. 1073E.

⁵⁹These interviews were held on 28 April 2023 during the celebration of IP Day in Tanzania, where 20 selected women who are champions of IP use were given awards by the Business Registration and Licensing Agency (BRELA), a national IP Office for Tanzania.

⁶⁰WIPO, *Women in Innovation and Entrepreneurship*. Available at <https://www.wipo.int/women-inventors/en/> (accessed 16 July 2024).

⁶¹M O'Sullivan, 'Gender and Property Rights in Sub-Saharan Africa: a Review of Constraints and Effective Interventions' (2017) World Bank Policy Research Working Paper (8250), Boatang (n 54).

considering the distinct social and cultural structures in various regions of Africa.

5.1. IP as a tool for women's economic empowerment

The substantive rights under the IP system include many statutory exclusive rights designed to preclude others from commercially dealing with the protected right or work by selling, stocking or exporting, importing and offering protected goods for sale. While the suitability of the existing IP architecture for women's empowerment is still debatable,⁶² various types of IPRs can have a positive empowering effect by assuring women proprietors of IP commercial control over products and services embedded with IP.⁶³ It follows that once a woman creates a work eligible for IP protection, the law would accord her requisite rights to control its production and marketing during the entire duration of the protection period. Thus, the holder may economically exploit the IPRs by licensing, assigning, franchising or entering into a joint venture with business partners for further commercial development. In that context, IPRs present a valuable platform for various business opportunities; hence, their proper integration into AU's agenda for gender may have far-reaching positive effects. Sadly, though, across the globe, the number of women using IP for economic empowerment is still relatively low, and this is also the case in Tanzania based on data collected in the interviews during World IP Day 2023, which consequently affects their ability to exploit the IP system for their socio-economic well-being optimally.⁶⁴

In contrast to the Maputo Protocol, which entitles women to acquire and own property, many traditional African communities do not consider women as 'breadwinners', thereby socially and culturally undermining their entitlement to property rights.⁶⁵ Thus, while the AU is keen on bridging the gender gap through various interventions, applying regulatory caution in integrating IP-related measures is crucial. Caution is necessary since insensitivity to potential social and cultural ramifications in some parts of Africa, whose cultural precepts exclude women from owning property, could prove to be counter-productive.⁶⁶ On the other hand, weighing these social and cultural ramifications could inform the selection of an ideal approach for IPR integration. Indeed, this observation reinforces the argument for the inclusion of IPR interventions in mainstream gender debates and initiatives to achieve inclusive and sustainable economic empowerment for women in Africa.

5.2. IP as a tool for women's social empowerment

Many legal principles governing the IPR system have abundant social ramifications. Whereas the concentration and focus of IPR have largely been confined to its contribution to trade and economic development, as advocated by WTO and WIPO, IPR can equally contribute to fostering social cohesion within society. With some discrepancies, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has attempted to advocate for fostering social and cultural aspects of IPR in its various legal instruments.⁶⁷ Relevant social aspects of the IP system

in the context of women's empowerment initiatives include personal recognition (moral rights under copyright) and reputational and attributional rights conferred upon the author or inventor.

Under copyright law, for instance, authors are granted moral and economic rights.⁶⁸ Moral rights are non-transferable personal rights held by authors and are designed to maintain the author's relationship to their work.⁶⁹ In such vein, copyright confers authors several non-economic rights, including: (1) being identified as the author of a work, otherwise known as the right of attribution; (2) objecting to any mutilation or derogatory treatment of a work or the right of integrity; and (3) not to be identified as the author of someone else's work—false attribution. Similarly, under patent law, there is a personality and attributional right requiring the mandatory naming of the inventor (natural person), who may not necessarily be the patent owner in the patent application and certificate.⁷⁰ This legal requirement helps maintain personal relationships, recognition and the identity of the person behind the invention.⁷¹ From a social standpoint, such public recognition and a mandatory requirement for attribution can be an invaluable asset. Thus, in addition to focussing on economic empowerment, initiatives to bridge the gender gap can also deploy IPR interventions to address the growing social disparity between men and women. Understandably, the concept of social empowerment is broad, and its definition varies depending on contextual factors and, in some cases, the philosophical orientation of writers. Generally, it encompasses many aspects aimed at inculcating a sense of autonomy and self-confidence, a feeling of having a role in influencing societal changes. Understood from this esoteric angle, women's social empowerment arguably engenders, inter alia, a sense of public recognition, identity and social belonging. Within such confinement, statutory recognition of women as inventors and authors under patents and copyright law constitutes an important social empowerment tool. It can instil personal confidence in women based on the public recognition of their role in innovation and creativity. Moreover, it can cultivate a sense of being appreciated as part of technological solutions and revolution with a positive impact on people's lives and a feeling of wielding power to object to any abuse and misuse of their work under moral rights.⁷² These and other ancillary social benefits enshrined in the IPR system can serve an important function in elevating women's social status; hence, they provide a useful base for bridging the gender gap.

Journal of Heritage Studies, doi: 10.1080/13527258.2023.2236590; UNESCO, *Whose Bright Idea is That?* (1999). Available at <https://unesdoc.unesco.org/ark:/48223/pf0000118090> (accessed 15 September 2024).

⁶⁸RR Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (California Stanford University Press 2010).

⁶⁹art 6bis of the *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, S Treaty Doc No 27, 99th Cong., 2d Sess 41 (1986) states: 'Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.'

⁷⁰E Ludwig, 'Naming Inventors on a Patent Application May Be More Important than You Think' (2022) IP Watchdog. Available at <https://ipwatchdog.com/2022/11/12/naming-inventors-on-a-patent-application-may-be-more-important-than-you-think/id=152903/> (accessed 16 September 2024).

⁷¹Kahler (n 46) 773.

⁷²CREATE, *Copyright and Gender: Evidencing the Connections* (2021). Available at <https://www.create.ac.uk/blog/2021/12/17/21-for-2021-copyright-gender-evidencing-the-connections/> (accessed 16 September 2024).

⁶²L Mtima, 'What's Mine is Mine but What's Yours is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age' (2012) 15 *SMU Science & Technology Law Review* 323.

⁶³TF Cotter, *Patent Wars: How Patents Impact Our Daily Lives* (New York Oxford University Press 2018) 51–54.

⁶⁴WIPO, 2023 (n 4); Interviews (n 59).

⁶⁵Najjar, Baruah and El Garhi (n 12).

⁶⁶UN Women, *An Overview of Arab States/North Africa*. Available at <https://www.unwomen.org/en/where-we-are/arab-states-north-africa> (accessed 10 June 2024).

⁶⁷C Bortolotto and B Ubertazzi, 'Intellectual Property as a Blind Spot in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage' (2023) *International*

6. AU's women empowerment initiatives

Policy and regulatory initiatives seeking to foster gender equality in Africa under the auspices of the AU are not a new phenomenon. Since its establishment, the AU has strived to bridge the seemingly insurmountable gender gap, as its various interventions and regulatory approaches attest. The AU's efforts on gender issues have included statutory statements and commitments reflected in various AU's legal and policy instruments, specialised gender programmes and a model policy framework adopted for promoting gender equality. As a testimony to the AU's commitment to leading the way on gender equality, its Constitutive Act specifically commits the organisation—as a continental umbrella institution—to ensure that all its operations and functions are guided and influenced by gender equality ideals.⁷³ Therefore, the AU has a solid foundation that requires all its future plans and strategies to be informed and inspired by gender equality-related considerations. A review of some of the AU's legal instruments and initiatives can help illuminate the efforts, gaps and opportunities for integrating IPR in existing and future initiatives and plans to bridge that gender gap in innovation and creativity.

6.1. Context and thrust of the current initiatives

A preceding bird's-eye view of the AU's initiatives suggests that it primarily approaches and addresses gender equality issues from a human rights standpoint. Provisions on gender equality are evident in the ACHPR, which are further reinforced under the Maputo Protocol, the SDGEA, the AU Gender Policy of 2009, the AU Strategy on Gender Equality and Women's Empowerment [2018–2028], the AU Agenda 2063, the AfCFTA IPR Protocol of 2023, and AfCFTA Protocol on Women and Youth in Trade of 2023.

6.1.1. ACHPR

The ACHPR sets the benchmark by stating that the enjoyment of the rights and freedoms guaranteed under the Charter shall not be affected by one's gender or sex.⁷⁴ It sets a reassuring legal position that women are on equal footing with men in enjoying the human rights enshrined in the Charter, including the right to own property.⁷⁵ Also, the Charter categorically states the commitment of all AU's Member States to eliminating all forms of discrimination against women.⁷⁶ The AU's legal position on gender equality is pertinent in the discussion given the perceived inhibitive structural and operational setting of IPR on women.⁷⁷ In other words, based on its provisions, the ACHPR could create a strong base for developing and reinforcing the existing gender equality initiatives by incorporating IP-related provisions as part of the continental interventions for women's empowerment through the lens of human rights.

6.1.2. The Maputo Protocol

The Maputo Protocol builds on and is informed by Articles 2 and 18 of the ACHPR and other international legal instruments on women's rights. In the preamble, the Maputo Protocol cites the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the

Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child and other international and regional conventions and covenants relating to the women's rights as inalienable, interdependent and indivisible human rights. As part of the initiative for economic empowerment for women, the Maputo Protocol stipulates that women have the right to *access and control over productive resources* such as land and *guarantee their right to property*.⁷⁸ Arguably, the term 'productive resources' is broad and can encompass a wide range of subjects, including IPR resources. Thus, the Maputo Protocol offers a useful platform for building a case for integrating IPRs into gender equality initiatives.

6.1.3. SDGEA

This Declaration was adopted in 2004 to inter alia speed up the implementation of various AU commitments to achieve gender equality. The provisions in the Declaration are relevant to IPR, as they reaffirm the commitment to ensuring the active promotion and protection of all human rights for women and girls, including the right to development.⁷⁹ Development captures many aspects of human life, including social, economic and scientific development. IPRs play an important role in improving and expediting progress and enabling development sustainability in all these facets.⁸⁰ In addition, the Declaration seeks to promote speedy implementation of women's right to property and inheritance.⁸¹ Such a goal is vital because changing the African societal mindset regarding the right of women to own property can have a positive collateral effect on IPRs in the sense that IP is an intangible property that can be owned, transferred or bequeathed. As such, in tandem with the objectives of SDGEA, States Parties to the AU are obligated to provide legal frameworks to support equal treatment in the creation and protection process of IPRs. While this assertion may be viewed as far-fetched, it presents an important regulatory angle and entry point through which IPR issues may be integrated into mainstream gender equality initiatives.

6.1.4. AU's Gender Policy

The AU's Gender Policy constitutes one of the major instruments of the organization on gender-related initiatives as it sets the continent's priorities and strategic direction for women's empowerment. It is built on the various commitments and drives stated in various instruments, such as the ACHPR, the AU Agenda 2063 and SDGEA. In the context of IPRs, the AU Gender Policy, among other goals, aims to enhance women's access to and control over resources, knowledge, information, land, businesses and services such as education, training, healthcare, credit and legal rights.⁸² As such, it provides a crucial platform for incorporating IP as one of its key interventions. This Policy objective aligns with the principles of IPRs, which focus on protecting and commercialising knowledge and information. Thus, subject to the provision of other enabling national policies and frameworks, facilitating women's access to knowledge and information provides a solid foundation for their effective participation in the creative processes and, consequently, can empower them to protect such knowledge under the IP system for their sustainable economic and social empowerment.

⁷³art 4(L).

⁷⁴arts 2 and 19 of the Charter.

⁷⁵art 14 of the Charter.

⁷⁶arts 18(3) and 19 of the Charter.

⁷⁷DS Carvalho, L Bares and K Silva, 'The Gender Patenting Gap: A Study on the Ibero-American Countries' (2020) 5 *Journal of Data and Information Science* 116, 124. Available at <https://doi.org/10.2478/jdis-2020-0025>.

⁷⁸art 19(c).

⁷⁹para 6 of the Declaration.

⁸⁰SJ Mwakaje, 'Intellectual Property Rights in Tanzania: An Appraisal of the Law and Developmental Issues' (2022) 20 *Tanzania Journal of Development Studies* 111, 118. Available at <https://www.ajol.info/index.php/tjds/article/view/240610> (accessed 16 September 2024).

⁸¹para 7 of the Declaration.

⁸²Objective 6 of the Policy.

6.1.5. AU Agenda 2063

To devise a long-term strategic direction for Africa, in 2003, the Organization for African Union, the predecessor of the AU, formulated a forward-looking 50-year continental development agenda dubbed 'The Africa We Want', or simply Agenda 2063. As part of its inspiration, the Agenda envisages the African continent with equal universal participation, opportunity and access regardless of one's gender or other factors such as race, religion or creed. The Agenda defines key thematic areas, including aspirations to attain full gender equality in all spheres of life as part of the women's empowerment drive.⁸³ One of the targets under Aspiration 6 of the Agenda is to create equal economic rights for women, including the right to own and inherit property and value otherwise non-monetized care and domestic work. In addition, Agenda 2063 pushes for economic transformation in Africa by creating a resilient and diversified economy through, among other things, strengthening IP protection systems and regulation.⁸⁴

Therefore, acknowledging and supporting gender equality in all areas of life, along with highlighting IPR as a key factor in fostering economic empowerment under Agenda 2063, serves as a strong reference point and a promising foundation for developing effective strategies to integrate IPR as a tool for bridging the gender gap in Africa.

6.1.6. AU strategy for gender equality and women's empowerment

The AU Strategy on Gender Equality and Women's Empowerment (2018–2028) was launched in 2019 calculated to, among others, address fundamental institutional and cultural constraints on gender equality and women's empowerment in Africa.⁸⁵ It is built on various lessons learned from executing the AU Gender Policy of 2009 and several other instruments of the AU, such as the principles enshrined in Article 4(L) of the AU's Constitutive Act, which was later amplified under Aspiration 6 of AU's Agenda 2063. The Strategy sets four pillars for achieving the intended objectives: (1) maximizing (economic) outcomes, opportunities and tech E-Dividends; (2) engendering dignity, security and resilience; (3) formulating and enforcing effective laws, policies and institutions; and (4) guaranteeing leadership, voice and visibility.

Despite notable progress in adopting legal instruments and norm-setting in Africa on gender equality, the Strategy recognises that the situation and reality on the ground remain far from ideal. Thus, the Strategy is built on the principles of maximizing results, leveraging opportunities, promoting and protecting women's rights, strengthening institutional capabilities, enhancing accountability and giving women and girls an influential voice in all spheres of life.⁸⁶ The envisaged outcome is predicated on effective laws, policies and institutions. As such, the Strategy presents a promising dimension for integrating all laws, including IPR laws, in the AU initiatives and adopting them as a mechanism for fostering women's empowerment. Thus, addressing the socio-economic challenges facing most African societies is key to creating a supportive environment for a smooth integration of IPR into the ongoing gender equality programmes in Africa.

6.1.7. AfCFTA Agreement and the Protocol on IPR

One of the objectives of the AfCFTA is to promote and attain sustainable and inclusive socio-economic development, gender

equality and structural transformation of the State Parties.⁸⁷ Consequently, in February 2023, the AU adopted the AfCFTA IPR Protocol to achieve the objectives of AfCFTA.⁸⁸ The Protocol acknowledges the need for an inclusive growth and sustainable development-oriented approach that centres on African interests and prioritises African-driven innovation and creativity.⁸⁹ The term 'inclusive development' encompasses, among others, measures aimed at promoting gender equality. Yet, in the substantive texts of the Protocol, except for a section on the utility model,⁹⁰ there are no provisions specifically tailored to empower and support women to make full and effective use of the IP system for their socio-economic emancipation. This is the case despite the fact that Article 14 of the AfCFTA Protocol on Women and Youth in Trade of 2023 specifically calls for establishing a mechanism to assist women in the registration and use of intellectual property rights, capacity building, and access to IPR resources. Hence, based on the various statements and commitments enshrined in other AU's legal and policy instruments on women empowerment, the AfCFTA Protocol on IPR should have provided a more elaborate framework for supporting women in using the IP system for their socio-economic empowerment. This may include introducing preferential official fees for women entrepreneurs and setting up a technical support system for women in national IP Offices, particularly in patent filings.

6.2. IP gaps in AU initiatives

The discussion above reveals that even though most of the legal instruments and initiatives on gender equality within the framework of AU contain statements supporting women's social and economic empowerment, they lack clear-cut strategies on how IP can be integrated to leverage the gender gap in Africa. As a starting point, including express reference to IPR as one of the drivers for women's empowerment in Africa would open up an important angle for policy and legislative dialogue on reorienting the current IP system to support various AU initiatives for women. Noticeably, the focus of the AfCFTA Protocol on IPR is largely on cross-border trade-related issues. However, it fails to capture other pertinent perspectives and operational angles of the IPR system for women's empowerment. Still, it would have been plausible for the AfCFTA IPR Protocol to succinctly and distinctly address gender equality issues within its operative provisions for a holistic approach to integrating IP within the existing women empowerment initiatives in Africa as required by Article 14 of the AfCFTA Protocol on Women and Youth in Trade. To this end, specific dialogues and consultation platforms are essential in identifying and establishing pertinent IPR and gender issues that should be addressed at the continental level.

6.3. Opportunities for inclusion of IP in gender programmes

Despite the lack of integration of IPRs within the mainstream gender equality initiatives under the AU, there are some positive and promising signs for the AU to build upon in developing an appropriate approach to using IP as a tool for bridging the gender gap in Africa. Some of the initiatives that the AU can build on include:

- (1) the Constitutive Statute, which specifically commits all activities and plans of the AU to be informed and aligned to

⁸⁷ art 3(e).

⁸⁸ Assembly/AU/Dec.856(XXXVI).

⁸⁹ See paras 1 and 4 of the Preamble to the Protocol.

⁹⁰ art 13 (3) urges State Parties to provide technical assistance to micro, small and medium enterprises or individual entrepreneurs, with special consideration to women and the youth.

⁸³ para 3(2)(6) of the Agenda.

⁸⁴ Agenda 2063, p 143.

⁸⁵ AU Gender Strategy is available at <https://au.int/en/articles/au-strategy-gender-equality-and-womens-empowerment> (accessed 16 June 2024).

⁸⁶ See p 12 of the Strategy.

of information and AI, blockchain technologies and other modern technologies. Inadvertently, the IP regulatory regime has had an exclusionary effect on certain types of knowledge given its underlying qualifying process, particularly patent law, which has clearly demarcated the type of technical knowledge qualifying as an invention based on patentability criteria.¹⁰³ As a result, a huge amount of useful knowledge has been excluded from patent protection due to its inability to meet the prescribed statutory criteria. Given gendered unequal engagement in higher levels of education and research, particularly in Africa, women are more prone to be affected by the stringent patent protection criteria than their male counterparts, hence affecting their effective use of the IP system.¹⁰⁴

Under the AU, it is advisable to review the current IP system with a view to adopting a suitable and responsive model for Africa¹⁰⁵ by reflecting the context of women's innovation in Africa. This development should occur within the precincts of the doctrine of the IPR territoriality, which allows Member States, subject to abide by the minimum standards enshrined in various international IP legal instruments, to structure their national laws, taking into account the obtaining local conditions.¹⁰⁶ It is now time for the AU to engage in critical and constructive dialogues on what constitutes a suitable model for fostering IP protection, which can take on board the interrelationship between IPRs, development and gender. Also, it is pertinent to consider regulatory approaches for limiting the inadvertent tendency of the substantive provisions of IP to perpetuate power hierarchies based on gender and heteronormativity in ways that may be opaque to the legal fraternity.¹⁰⁷

8.2. Setting up support structures for women

Even though the initiatives for reviewing the fundamentals of the IP system are ongoing, the AU should consider devising a specific continental strategy that would impose the obligation on state parties to set up IP support structures for women engaged in creative industries. About two-thirds of women interviewed during the World IP Day of 2023 celebrations in Tanzania consistently complained of their inability to protect their innovation based on the complexities of the patent law and processes.¹⁰⁸ Thus, putting in place institutional support structures as required under Article 14 of the AfCFTA Protocol on Women and Youth is appropriate and feasible in view of the ongoing and future negotiations on substantive IPR issues to be included in the Annexes to the AfCFTA IPR Protocol. These negotiations present an opportunity to introduce specific IP-related measures aimed at empowering women in Africa to trade, compete and benefit from the continental market under the AfCFTA framework. Failure to create IP support structures and capacity-building for women will continue to limit their effective use of IPRs to attain business competitiveness under AfCFTA. Consequently, it can also inhibit their general socio-economic progression envisaged under the AU's other gender equality legal instruments and programmes.

The support structures may entail establishing permanent women IP help desks in national IP Offices, developing tailor-made IP awareness programmes for women at various levels, from elementary to higher education, and supporting women

entrepreneurs with IP tools. In addition, a dedicated fund could be established to support women in covering costs for patent or utility model drafting and guidance for filing other types of IP at the national or regional IP offices.¹⁰⁹ This support can reinvigorate women's IP appetite and thus increase the number of IP assets developed and owned by women in Africa.

8.3. Co-ownership: appreciating the contribution of women

The legal position in determining the contribution of married women to acquiring matrimonial property and equal sharing or ownership interest of such properties has been a subject of contentious legal battles in the courts of law in many jurisdictions.¹¹⁰ In many African countries, the laws recognize the right of women to matrimonial property based on their contribution through domestic work. This legal position is based on the judicial assumption that domestic work by women benefits the men/husbands, as it gives them more time and, in some cases, tranquillity to focus on other creative works and income-generating endeavours. Thus, a woman should be entitled to a share of her partner's earnings within the marriage. The courts of law have frequently and widely used this legal conception in relation to the distribution of matrimonial real estate or physical property and other types of financial assets.¹¹¹ The intriguing legal dilemma is whether the same legal principle can be applied to intangible assets like IPRs. An audacious regulatory attempt should be made towards extending this legal principle to IP-related assets when filing applications and transactions by recognizing women as co-IP applicants/owners. Once the AU advocates this legal principle and imposes it as a commitment for Member States, it may significantly reform the IP landscape and contribute to strengthening women's empowerment initiatives in Africa.

8.4. Creating requisite policy space

It is evident that social and systemic structures are among the factors that influence women's participation in innovation and creative endeavours.¹¹² Also, as already noted, several AU initiatives on women's empowerment contain provisions supporting women's participation in science and innovation and other creative endeavours. Yet, there is no reference to IP as a pertinent input and distinct policy agenda for gender equality. To support socio-economic development, the AU could revisit and revise its legal instruments, programmes and policies on gender equality to seamlessly integrate the use of the IPR system and encourage women's participation in innovation as one of the continental interventions as already briefly hinted under article 14 of the AfCFTA Protocol on Women and Youth in Trade of 2023. The inclusion of IPR within the mainstream gender initiatives at continental and national levels could give requisite impetus and a new

¹⁰³art 27(1) of the WTO TRIPS Agreement sets three requirements, namely, (1) the invention must be new, (2) involve an inventive step and (3) it must be of industrial use.

¹⁰⁴Education Sub-Sharan Africa (ESSA) (n 13).

¹⁰⁵CB Ncube, 'Decolonising Intellectual Property Law in Pursuit of Africa's Development' (2016) 8 *WIPO Journal* 34, 37.

¹⁰⁶arts 7 and 8 of the WTO TRIPS Agreement.

¹⁰⁷Swanson (n 56).

¹⁰⁸See Gebre, Amekawa and Rahut (n 39).

¹⁰⁹K Kusakabe, P Doney and JS Chatterjee, 'Looking Forward, Looking Back: Gender, Technology and Development in a Changing World' (2017) 21 *Gender, Technology and Development* 1, 3. Available at <https://doi.org/10.1080/09718524.2017.1407069>.

¹¹⁰RS Meinzen-Dick et al, 'Gender and Property Rights: Overview' (1997) 25 *World Development* 1299. doi: [https://doi.org/10.1016/S0305-750X\(97\)00029-6](https://doi.org/10.1016/S0305-750X(97)00029-6); Z Khan, 'Married Women's Property Laws and Female Commercial Activity: Evidence from US Patent Records' (1996) 56 *Journal of Economic History* 1798.

¹¹¹South Africa: *Sithole and Another v Sithole and Another* [2021] ZACC 7 (South Africa Constitutional Court), Kenya: *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto*, Supreme Court of Kenya, Petition No 11 of 2020 (Ruling on 27 January 2023 acknowledging the entitlement of women to matrimonial property, yet clarifying that 50-50 distribution is not automatic, other circumstance of fairness should be considered).

¹¹²Beaudry et al (n 6).

progressive dimension to women's empowerment programmes in Africa.¹¹³

8.5. Adopting an African IP agenda

IPR merits special attention in Africa because of its critical role in various development programmes, including gender-related ones. The IP field correlates with almost all development-related programmes and initiatives, whether it is trade,¹¹⁴ health,¹¹⁵ agriculture,¹¹⁶ education,¹¹⁷ arts and culture¹¹⁸ and science and technology.¹¹⁹ Even though IP's ubiquitous nature can be advantageous, it can also be a setback, particularly when the initiatives for its strategic use and application are fragmented. If the protection models offered do not align with the unique circumstances of women in creative fields, the potential positive impact on reducing the gender gap is diminished.¹²⁰ Thus, despite the existing regulatory disparities across the continent, the AU should consider embarking on a holistic continental needs assessment study. This would serve as a foundation for developing an African IP agenda, which could become a key reference in shaping the continent's IP landscape.¹²¹ Once a shared continental IP vision and agenda are in place, it could facilitate the determination of how IP can be sustainably integrated into the existing gender equality initiatives.

9. Conclusion and recommendations

The ongoing initiatives on gender equality in Africa under the auspices of the AU offer much-needed optimism for women's empowerment. Even though the existing AU initiatives are implemented with a measure of success, this article argues that including and integrating IPR perspectives in legal instruments and programmes for women's empowerment could result in additional and sus-

tainable success in bridging the gender gap. Towards this end, it is pertinent that IP policies and laws should be reoriented to appreciate and take on board feminist considerations.

Since all of the AU's legal instruments and policies strive to promote gender equality and support women's socio-economic development, incorporating IPR considerations and principles into such initiatives could present an added stimulus by expanding avenues for women's empowerment. Admittedly, the socio-economic structures in most African countries inadvertently limit women's access to education and consequently affect their participation in research and creative endeavours. In turn, limited participation in innovation affects their robust engagement in using IP for their sustainable development.

Furthermore, the underlying legal principles governing IPRs have somewhat negatively affected the frequency and levels of women's use of the IP system. These systemic and regulatory predicaments could be addressed through various approaches and mechanisms, including the AU undertaking a detailed assessment of African IP needs and areas of common interests. The establishment of continental needs, priorities and IP consensus should be followed by locating specific approaches to integrating IPR to support and strengthen the ongoing women's empowerment initiatives. The AU should undertake a holistic review of its various legal instruments and programmes on gender equality and the ongoing WIPO initiatives on IP and gender with a view to integrating IP as a central focus in its agenda. In the long run, the jurisprudential development, norm change and the integration of IP in bridging the gender gap in AU's initiatives should be done progressively, taking into account the challenges posed by socio-economic factors, systemic issues and the underlying fundamental principles of the IPR system.

¹¹³OECD, *Entrepreneurship Policies Through a Gender Lens* (2021). Available at www.oecd-ilibrary.org/industry-and-services/entrepreneurship-policies-through-the-gender-lens_71c8f9c9-en (accessed 16 June 2024).

¹¹⁴J. Babyar, 'Trade, Intellectual Property, and the Public Health Bearing' (2023) 12 *Health Systems* 123–32, doi: 10.1080/20476965.2022.2062460.

¹¹⁵*ibid.*

¹¹⁶M. Campi and A. Nuvolari, 'Intellectual Property Rights and Agricultural Development: Evidence from a Worldwide Index of IPRs in Agriculture (1961–2018)' (2021) 57 *The Journal of Development Studies* 650–68, doi: 10.1080/00220388.2020.1817395; L.R. Helfer, 'Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments' (2004) *Food and Agriculture Organization (FAO)*, available at <https://www.fao.org/3/y5714e/y5714e.pdf> (accessed 10 September 2024).

¹¹⁷J. Willinsky, 'Intellectual Property and Education' (2017) *Oxford Research Encyclopedia of Education*, available at <https://doi.org/10.1093/acrefore/9780190264093.013.230> (accessed 18 May 2024).

¹¹⁸Bortolotto and Ubertazzi (n 67).

¹¹⁹Y. Luo, L. Xu and C. Wu, 'Internet Development and Regional Innovation Efficiency: The Moderating Effect of Intellectual Property Protection' (2023) *Technology Analysis and Strategic Management*, doi: 10.1080/09537325.2023.2196350; Commonwealth Secretariat, 'The Role of National Intellectual Property Laws in Promoting Innovation, Scientific and Technological Development' (2017) 43 *Commonwealth Law Bulletin* 471, 479, doi: 10.1080/03050718.2017.1470798.

¹²⁰M. Sunder, *From Goods to A Good Life: Intellectual Property and Global Justice* (Connecticut Yale University Press 2012) 124, 133.

¹²¹T. Kongolo, 'The African Intellectual Property Organizations – The Necessity of Adopting One Uniform System for Africa' (2005) 3 *Journal of World Intellectual Property* 265–88.