

Intellectual property and women's economic empowerment

What to know in the context of the African Continental Free Trade Area

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Key messages

State Parties to the AfCFTA are expected to formally adopt the Agreement's Intellectual Property Protocol in 2023. Traded goods and services can embody technologies and works protected under intellectual property regimes.

Women entrepreneurs and artisans' ability to exercise their rights to IP protection links back to women having the economic resources and legal capacity to have their artistic and scientific creativity protected. There exists a gender gap in IP: women are thought to be disproportionately underrepresented in IP filings in Africa.

The ramifications of the barriers and constraints to women fully reaping the benefits of IP protection for their trade touch issues related to gender norms as well as capacity-building issues, among others. Access to IP protection for women is currently constrained by a number of factors, including the characteristics of women-owned enterprises, systemic bottlenecks and problematic social norms.

Women's economic empowerment as an objective could be embedded in countries' national AfCFTA implementation strategies, which raises questions around capacity-building logics, gender budgeting and coordinated governance for IP rights.

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Acronyms

AfCFTA	African Continental Free Trade Area
ARIPO	African Regional Intellectual Property Organization
IP	intellectual property
IPR	intellectual property rights
MSMEs	micro, small and medium-sized enterprises
OAPI	Organisation africaine de la propriété intellectuelle
TRIPS	Trade-Related Aspects of Intellectual Property
UNESCO	United Nations Educational, Scientific and Cultural Organization

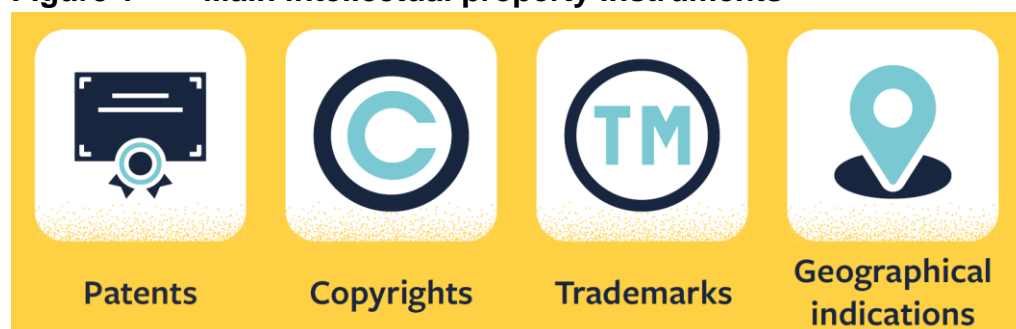
Intellectual property rights and the African Continental Free Trade Area

Traded goods and services can embody technologies and works protected under intellectual property (IP) regimes. The multilateral agreement on Trade-Related Aspects of Intellectual Property (TRIPS) of the World Trade Organization constitutes a legal basis for regulating the significant links between IP and trade.

Attention to African regional trade has gathered pace with the entry into force of the Agreement establishing the African Continental Free Trade Area (AfCFTA) and the start of trading on 1 January 2021. One of the AfCFTA protocols expected to be formally adopted in 2023 by State Parties to the Agreement is on intellectual property rights (IPR).

IP covers industrial property, which includes patents for inventions, industrial designs, trademarks and geographical indications, as well as copyrights to literary, artistic and scientific works (WIPO, 2020). IP laws are tools set up to reward creation and incentivise innovation. They also represent a trade tool to boost businesses. They encompass the following instruments (Figure 1):

Figure 1 Main intellectual property instruments



A patent covers invention as a product or process that offers a new way of doing something. It defines the inventor's right to ownership of the mental conception, without needing the invention to have been built (materially or digitally) or to work.

A copyright covers literary, artistic and scientific production. It defines the author's right to ownership of the intangible work, rather than its physical embodiment. As a result, the author's right to embodiment (e.g. reproduction) is reserved.

A trademark is a sign or a mark identifying the good or service as exclusive to a given enterprise.

A geographical indication is a sign used on a product that has a specific geographical origin. The qualities, characteristics or reputation of the product are essentially due to this place of origin.

Source: Burk (2006); WIPO (2020).

The adoption of the IP Protocol to the AfCFTA is still in the making but the Protocol is likely to include plant variety and genetic resources, marks, copyrights, patents, emerging technologies, and notably, geographical indications, traditional knowledge, and traditional cultural expressions and folklore. The Protocol will be guided by socioeconomic and technological development objectives which are likely to include digital trade, clean energy and medicine access. Cooperation, to ensure harmonisation at the continental level, will be key and a committee on IP rights as well as an AfCFTA IP office are likely to be established. Women may be mentioned in the Protocol's provisions alongside youth as a specific category under micro, small and medium-sized enterprises (MSMEs) that would need technical assistance but only for a specific manufacturing IP protection.

Box 1 Concepts in this note

Gender is a performative social construct that mediates identities and social interactions. This means it is an iterative enactment of behaviours and language that functions as an action (i.e. performativity is what sustains gender identity, see Butler, 1990). Note that this brief uses the term 'gender' to cover only cisgender identities, meaning persons whose gender identity corresponds to their sex assigned at birth.

Gender equality is a state in which gender does not affect access to rights and opportunities. Discriminatory social and gender norms, including those related to masculinity, violence against women and girls, and social exclusion, all undermine gender equality.

Technology relates to soft or hard technology embodied in goods or services.

Women's economic empowerment is one aspect of gender equality that is shaped by gender-based violence and social norms.

Women's underrepresentation in protected intellectual property

Like any system, the IP system is not gender-neutral. Indeed, economies and societies are not gender-neutral but rather reflections at any given time of power imbalances. As such, a system can benefit different groups of women in a differentiated way based on their socioeconomic status, the sectors in which they work, their assets, ethnicity, age, bodily ability, etc. Hence, depending on the sector in which they trade, their socioeconomic status, etc., women in Africa will experience barriers to IP in a differentiated way.

For example, the concept of IP shapes and influences the development and design of creation and the idea of who is a creator and innovator. The IP system implicitly defines which individuals will

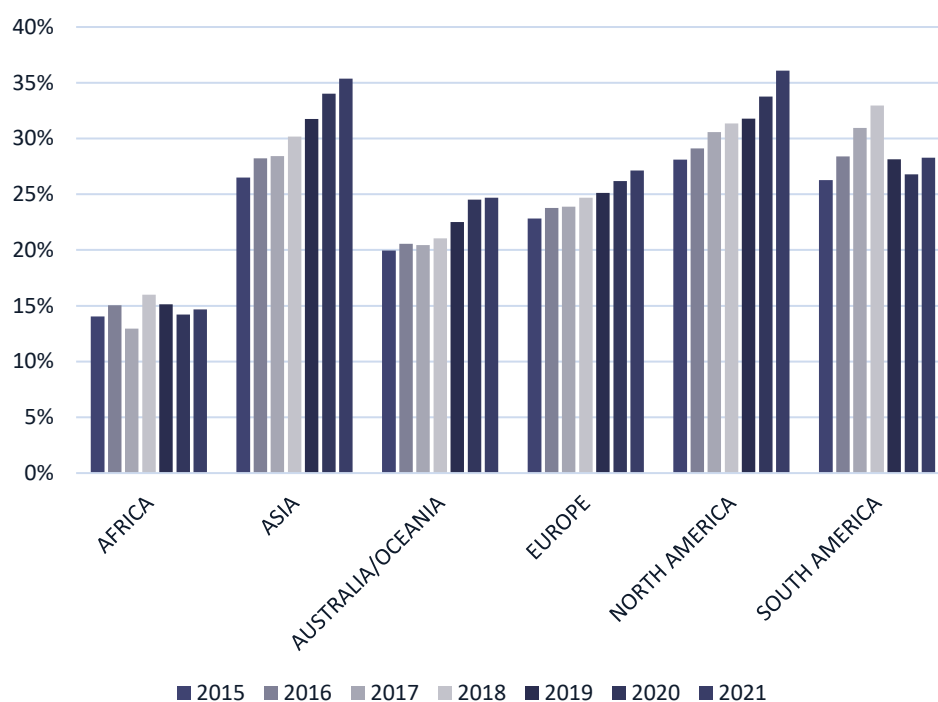
benefit from its incentives. For copyrights, such individuals are original authors whose work is not derived from somewhere else. Such a definition leaves limited room for collaborative or derivative work. Meanwhile, the definition of who can be granted a patent (i.e. the inventor) covers the one who conceives of an idea in final form but with no requirement for it to be executed in practice. Put differently, what counts towards the act of invention is its mental conception rather than its actual building (Burk, 2006). This has implications for women trading in traditional knowledge. Filings by women would be more significant if traditional knowledge had IP protection. Many women are custodians of traditional and indigenous knowledge that is essential for food security and healthcare. However, this knowledge is rarely patented or protected by IPR: being known in a community through generations, it often does not qualify as 'new' or 'original' or as being in a material form, disqualifying women from obtaining patents and copyrights – nor is it developed for commercial purposes or export by the women who hold the knowledge (Williams, 2003).

As critical feminist theory points out, these definitions on what counts as creation and creator also matter in that they emphasise conceptual work over material production, implicitly not valuing and making invisible the material execution of the creative process.¹ The contribution of individuals or collectives to the material creation is not recognised. Creative contribution in the current system excludes particular classes of contributors: those who participate in the building and making – physical or digital – of the works. In many cases, it is these contributors who are in positions of lower status, such as certain lower-income women groups (Burk, 2006; Boateng, 2011). Such a setup explains in part why, globally, women are thought to be disproportionately underrepresented in intellectual property filings.

Figure 2 shows that the situation is similar across continents globally: fewer women than men apply for patents. In Africa, the gender gap is even more marked than on other continents: women file about 15% of patent applications.² This gap speaks to an untapped potential with regard to women's socioeconomic wellbeing (Osei-Tutu, 2017).

¹ In much the same way, recognition of what constitutes labour has been circumscribed to the public sphere, to the exclusion of domestic, private labour.

² Note that data are difficult to obtain because, first, gender-disaggregated data are not a standard requirement for application and filing at regional IP offices, and, second, only patents are held in a centralised registry; copyrights and trademarks are not, making it more difficult to obtain a complete picture.

Figure 2 Proportion of patent applications filed by at least one woman, by continent, 2015–2022 (%)

Source: Calculations based on www.wipo.int/ipstats/en/.

The gender gap in patent applications can also be explained by the underrepresentation of women in science, technology engineering and mathematics fields, which may yield higher patent filings. However, it is important not to underestimate the impact of the system setup, as explained above, on women's underrepresentation (Burk, 2018).

Economic structures are not gender-neutral; as such, the IP Protocol to the AfCFTA will contribute to shaping intra-African trade and economic development opportunities for women. Women entrepreneurs and artisans need to be able to exercise their rights to IP protection, which means having the economic resources and legal capacity to have their artistic, entrepreneurial and scientific creativity protected. The Protocol and its implementation both present opportunities to further women's economic empowerment.

Navigating constraints and enablers for women traders

The ramifications of the barriers and constraints to women fully reaping the benefits of IP protection for their trade touch issues related to gender norms as well as capacity-building, among others. Access to IP protection for women is currently constrained by a number of factors, which explain the gender IP gap, including the following:



The economic characteristics of women-owned businesses: micro, small, online and informal enterprises may have difficulties bearing the costs of IP registration. In particular, the often-informal nature of women-owned businesses can bar them from IP filing.

In the context of intra-African trade, the issue of registration costs and informality is compounded, with entrepreneurs needing to register in cross-border jurisdictions. IP regulation is national; while some efforts have been made to harmonise or reach minimum standards, regulations and enforcement still vary greatly between AfCFTA State Parties.³



Systemic constraints: Many women-led MSMEs in Africa have limited understanding of the advantages of IP protection, in particular related to agro-food processing and geographical indications (UNESCO and Africa Women's Forum, 2021).

Furthermore, weak enforcement may disincentivise entrepreneurs from paying to protect their work nationally and across borders. Such disincentives can be particularly acute for women traders who often trade informally or lead micro and small enterprises with limited resources to pay for registration costs.

Geography may also play a role, as women entrepreneurs in rural areas and smaller urban centres can face long journeys to access national IP offices.



Norms: IP regimes globally emphasise the role of the creator(s) of the idea, to the detriment of those executing, building, crafting and processing the creation – who often are women (e.g. in the artisan, textile, agriculture and informal medicine sectors).

Norms relating to girls and women's education play into the gender gap in IP: the registration system is complex and a certain education level is required to be able to apply IP protection to a trade.

³ Currently, two regional organisations – the African Regional Intellectual Property Organization (ARIPO) and the Organisation africaine de la propriété intellectuelle (OAPI) – manage the different forms of IP for their member states on the continent.

The gender gap in IP and its impact on trade implies reduced economic activity and, relatedly, lower socioeconomic outcomes for women on the African continent. It also limits the effectiveness of the AfCFTA as a whole and of the IP Protocol specifically. The IP Protocol may be gender-blind but its implementation could recognise the specificities of women's participation in IP-related trade (Ncube, 2022). The Women and Youth in Trade Protocol currently being negotiated could also represent an opportunity to improve the gender-responsiveness of the IP Protocol.

In conclusion, processes of empowerment call for complex, multi-layered solutions. Women's economic empowerment as an objective could be mainstreamed in countries' national AfCFTA implementation strategies, including in the actions they plan to take to implement their obligations under the IP Protocol. This raises questions regarding:

- a gender-sensitive policy vehicle for the implementation of the IP Protocol and links to other AfCFTA protocols
- capacity-building on women's economic empowerment mainstreaming for agencies coordinating the Protocol's implementation, and practical solutions such as information points and capacity-building targeted at women in trade on their IPR
- making finance (national budget; bilateral and multilateral aid) available over time to implement a gender-sensitive policy vehicle and its related capacity-building, including gender-disaggregated data collection for reporting and evaluation over time
- geographical indications and their potential for traditional knowledge and cultural expression, a sector in which women are predominant
- addressing the systemic barriers women entrepreneurs face in accessing their rights to IP protection, including reflecting on potential provisions for the AfCFTA Women and Youth in Trade Protocol regarding IP, such as a cultural exception creating fee waivers for women-owned businesses or MSMEs, simplifying their access to IP protection
- improved IP governance: building on and improving coordination and cooperation between existing regional IP regimes (including ARIPO and OAPI) to streamline IP policies; exchange information; and coordinate mechanisms of capacity-building, technical support and enforcement from continent-wide institutions to trade border posts.

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