

The Role of Intellectual Property Rights as a Development Tool for Women Entrepreneurs in  
Third World Countries: The Case of the Cosmetics Sector in Nigeria

Ofonmbuk Esther Ekong

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University of Ottawa

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## Abstract

How might ownership of intellectual property rights (IPRs) bring about sustainable socioeconomic development for women entrepreneurs in the emerging cosmetics sector of Nigeria? This research question is motivated by the observation that despite the very significant economic role women entrepreneurs in Third World countries play, their economic status remains low. This low status is a result of various factors including limited access to formal finance mechanisms, high cost of finance and other infrastructural deficiencies, as well as gender discrimination. Since the protection of intellectual property (IP) is claimed to be an effective strategy to sustain the growth and development of entrepreneurship, in this thesis I examine whether the IP regime engenders the development of women entrepreneurs in Third World countries. Using trademarks as an exemplar of IPRs and a case study of women entrepreneurs producing cosmetics in Nigeria, I carry out a nuanced analysis that questions assumptions about the role of the IP regime in the improvement of women's businesses in Third World countries. Through an intersectional lens, I explore whether and/or how to localize IP's impact in the context of complex global issues regarding IP protection. Deploying feminist methodology guided by theoretical frameworks of feminist theory and Third World Approaches to International Law (TWAAIL), this thesis draws attention to the politics of gender and racism in the IP system and how this is exacerbated for women entrepreneurs in Third World countries. The thesis while acknowledging the importance of IP protection, finds that the current IP regime does not accommodate the innovations of women entrepreneurs in Third World countries like Nigeria, that semi and informal IP appropriation like secrecy, are more utilized by women entrepreneurs, and that gender plays a significant role in their acquisition and exploitation of formal IPRs. The thesis concludes that the IP regime as currently framed plays no role in the development of women entrepreneurs in Third World countries, and recommends amongst others, that a gender based legislative impact assessment of IP laws be carried out in Nigeria to ensure gender transformative reforms, and that the content of IP education be revolutionized to reflect the realities of women entrepreneurship in Third World countries

Keywords: Intellectual Property Protection, Women Entrepreneurship, Women's Development, Third World Countries, Informal Economies, Intersectionality.

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## Dedication

To Yahweh, God Almighty.

To My Parents- Ekpenyong and Grace George Utuk,

May their souls rest in peace knowing that I am all they hoped I would be, and more.

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## List of Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
AfCFTA	African Continental Free Trade Area
ARIPO	African Regional Intellectual Property Organization
CAGR	Compound Annual Growth Rate
CAMA	Company and Allied Matters Act
CCPA	Combating Counterfeit Products Act
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CETA	Comprehensive Economic and Trade Agreement.
EE	Entrepreneurial Ecosystems or Entrepreneurship Ecosystems
EU	European Union (EU)
FDA	Federal Drug Agency
GATT	General Agreement on Tariffs and Trade
GEM	Global Entrepreneurship Monitor
GMP	Good Manufacturing Practice
GO	Geographical Indications
IAS	Igbo Apprenticeship System
IE	Informal Economy
ILO	International Labour Office
INTA	International Trademark Association
IPCOM	Industrial Property Commission Bill
IPLAN	Intellectual Property Law Association of Nigeria
IPR	Intellectual Property Rights
ISO	International Organization for Standardization

MSME	Micro, Small and Medium Enterprise
NAFDAC	National Agency for Food and Drug Administration and Control
NASS	Nigerian National Assembly.
NCC	Nigeria Copyright Commission
NDA	Nondisclosure Agreement
NGO	Non-Governmental Organization
NOTN	Nigerian Office for Trade Negotiation
OAPI	African Intellectual Property Organization
SAP	Structural Adjustment Program
SC	Supreme Court of Nigeria
SDGs	Sustainable Development Goals
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights 1994
TWAIL	Third World Approaches to International Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNEG	United Nations Evaluation Group
UNGPBHR	United Nations Guiding Principles on Business and Human Rights
UNWGNHR	United Nations Working Group on Business and Human Rights
VCRP	Voluntary Cosmetic Registration Program
WIPO	World Intellectual Property Organization
WNO	WIPO Nigeria Office
WTO	World Trade Organization
WTO	World Trade Organization (WTO)

## Chapter One: Goals and Objectives of Thesis

### 1.1 Introduction

Despite the very significant role women entrepreneurs in Third World countries play, their economic status remains low. This is as a result of various factors including limited access to formal finance mechanisms, high cost of finance, and other infrastructural deficiencies. Since the protection of intellectual property (IP) is claimed to be an effective strategy to sustain the growth and development of entrepreneurship, in this thesis I examine whether women entrepreneurs in Nigeria do enjoy or may enjoy economic benefits through the Nigerian IP system. I achieve this through a case study of women entrepreneurs producing cosmetics in Nigeria. I draw women entrepreneurs into ongoing global debates about the role of IP in Third World countries and propose reforms to the current IP system that can reduce the barriers faced by women entrepreneurs to create a more equal playing field.

### 1.2 Mainstreaming Gender

Mainstreaming gender in development goals is a *sine qua non* of economic development. On the occasion of the eleventh World Trade Organization (WTO) Ministerial Conference, the Joint Declaration on Trade and Women's Economic Empowerment<sup>1</sup> acknowledged the importance of incorporating a gender perspective into the promotion of inclusive economic growth. It also acknowledged the key role that gender-responsive policies can play in achieving sustainable socioeconomic development, along with the need to develop evidence-based interventions to

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<sup>1</sup> WTO, "Buenos Aires Declaration on Women and Trade outlines actions to empower women", News item, (8 March 2021), online: *World Trade Organization* <[https://www.wto.org/english/news\\_e/news17\\_e/mc11\\_12dec17\\_e.htm](https://www.wto.org/english/news_e/news17_e/mc11_12dec17_e.htm)>.

address the range of barriers that limit opportunities for women in the economy. To achieve this, the members agreed to collaborate on several strategies to make trade and development policies more gender responsive.<sup>2</sup>

Women are critical to development and “the concern with gender relations in development has strengthened the affirmation that equality in the status of men and women is fundamental to every society.”<sup>3</sup> The United Nations Working Group on Business and Human Rights recognizes that

women and girls experience adverse impacts of business activities differently and often disproportionately. They also face additional barriers in seeking access to effective remedies. Moreover, because of intersecting and multiple forms of discrimination, different women and girls may be affected differently by business activities in view of their age, colour, caste, class, ethnicity, religion, language, literacy, access to economic resources, marital status, sexual orientation, gender identity, disability, residence in a rural location, and migration, indigenous or minority status.<sup>4</sup>

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<sup>2</sup> The Conference agreed to do this including by:

1. Sharing our respective experiences relating to policies and programs to encourage women’s participation in national and international economies through World Trade Organization (WTO) information exchanges, as appropriate, and voluntary reporting during the WTO trade policy review process.
2. Sharing best practices for conducting gender-based analysis of trade policies and for the monitoring of their effects.
3. Sharing methods and procedures for the collection of gender-disaggregated data, the use of indicators, monitoring and evaluation methodologies, and the analysis of gender-focused statistics related to trade.
4. Working together in the WTO to remove barriers for women’s economic empowerment and increase their participation in trade; and,
5. Ensuring that Aid for Trade supports tools and know-how for analyzing, designing and implementing more gender-responsive trade policies. See, *Joint Declaration on Trade and Women’s Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017* (WTO, 2017).

<sup>3</sup> Jane Parpart, Patricia Connelly, & Eudine Barriteau, “Theoretical Perspectives on Gender and Development”, (7 February 2021), online: *International Development Research Centre*, <<https://www.idrc.ca/en/book/theoretical-perspectives-gender-and-development>> at vi.

<sup>4</sup> United Nations, “*Gender Dimensions of the Guiding Principles on Business and Human Rights*”, Guidance Note, (22 November 2019), online: *United Nations Development Programme*, <<https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>> at 6.

To mitigate this, States are advised “to employ gender equality as a cross-cutting theme in drafting, revising and assessing all laws and regulations that have a bearing on promoting and ensuring business respect for human rights”<sup>5</sup> and States should consider “the gender impact of international agreements and policy frameworks adopted in all relevant areas, such as labor, trade, finance, investment, intellectual property, development, energy, environment, climate change, health, population, disarmament, peace and security.”<sup>6</sup>

More than the creation of opportunities for people to earn sustainable livelihoods, development requires the creation of a ‘conducive’ environment for women and men to seize those opportunities.<sup>7</sup> Such an environment requires legal policies that give women and men equal opportunities in entrepreneurial activities. To facilitate the flow of knowledge-rich goods and services across borders, the WTO incorporated IP into the trade regime through the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS).<sup>8</sup> Even though IP has always been an integral part of general economic, social, and cultural development worldwide,<sup>9</sup> the extent of protection and enforcement of IP rights varies widely around the world. This variation must be seen as parallel to the development concerns of each nation because as IP’s importance became elevated in trade, these differences became a source of tension in international economic relations. To address this tension, it is crucial to assess the role of IP in development from a nuanced perspective of the various players. I do so from the perspective of women entrepreneurs producing cosmetics in Nigeria, a Third World country.

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<sup>5</sup> *Ibid* at 12.

<sup>6</sup> *Ibid* at 19.

<sup>7</sup> Jane Parpart, Connelly, & Eudine Barriteau, *supra* note 3.

<sup>8</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, WTO, (27 January 2017, amended from Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994). .

<sup>9</sup> WIPO, “WIPO Intellectual Property Handbook” (2004), online: World Intellectual Property Organization, <<https://www.wipo.int/publications/en/details.jsp?id=275&plang=EN>>.

### 1.3 Intellectual Property and Development

To accept the necessity for development, one must first accept one's relative inferiority and inadequacy and the need to evolve and advance towards something else.<sup>10</sup>

The relative inferiority of half of the world and the “white savorism”<sup>11</sup> of the other half (led by the United States chariots) became enshrined in development initiatives when former US president, Harry Truman, declared in his inaugural speech: “we must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.”<sup>12</sup> Development narratives of Third World nations have been shaped by a skewed representation of their development needs ever since.

This narrative has been osmotically transferred to the IP regime. The globalization of IP, like the globalization of human rights “fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world.”<sup>13</sup> Indeed the relentless campaign to universalize IP,

present[s] a historical continuum in an unbroken chain of Western conceptual and cultural dominance over the past several centuries. At the heart of this continuum is a seemingly incurable virus: the impulse to universalize Eurocentric norms and values by repudiating, demonizing, and ‘othering’ of that which is different and non-European.<sup>14</sup>

I therefore follow a process of decolonizing development. Reluctant to continue a derogative narrative, perpetuating the historical binaries of civilized / uncivilized, developed / undeveloped,

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<sup>10</sup> Jon Sylvester & Ruth Gordon, “Deconstructing Development” (2004) 22:1 Wis Int'l L J, online: <<https://digitalcommons.law.ggu.edu/pubs/191>>.at 2, citing Gustavo Esteva, Development, in *The Development Dictionary: A Guide to Knowledge as Power* 6 (Wolfgang Sachs ed., 1992)

<sup>11</sup> Shaz Elahee, “Decolonising Development Narratives” (26 July 2021), online: Medium <<https://medium.com/@shazelahee/decolonising-development-narratives-6483d384769>>.

<sup>12</sup> “Inaugural Addresses of the Presidents of the United States: From George Washington 1789 to George Bush 1989”, online: Yale Law School, The Avalon Project <[https://avalon.law.yale.edu/20th\\_century/truman.asp](https://avalon.law.yale.edu/20th_century/truman.asp)>.

<sup>13</sup> Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42:1 Harv Intl LJ 201.

<sup>14</sup> *Ibid.*

I approach development as a process of expanding the real freedoms that women entrepreneurs in a Third World country like Nigeria enjoy.<sup>15</sup> According to Sen,

viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that, inter alia, play a prominent part in the process. Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.<sup>16</sup>

I therefore frame IP and development from the perspective of critically examining the IP regime as a system of power that potentially inhibits the freedom of the Third World to develop. In this thesis I adopt the phrase “Third World” over “developing countries” to move away from the perceived relative inferiority, inadequacy, or the implied need to evolve that the word “developing” connotes. I question assumptions about the role of the IP regime in the improvement of women’s businesses in Third World countries and explore whether and / or how to localize its impact in the context of complex global issues regarding IP protection.

I frame the “Third World” as a group of countries—diverse but with a shared history of Western dominance—joining to resist the universalization of Eurocentric norms and values. A group made up of different, sometimes discordant, but distinctive voices that produce one “rhyme”: a “fundamental rethinking of international relations.”<sup>17</sup> Like a symphony, tucked in the cacophony of Third World voices is a rhyme that rejects the old narratives of international law and draws its perfection as it deconstructs old paradigms and replaces them with the lived realities of the Third World. In this framing of the Third World, the existence of differences

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<sup>15</sup> Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) at 3.

<sup>16</sup> *Ibid.*

<sup>17</sup> Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16:2 *Wis Envtl LJ* 353at 360.

between and within Third World countries is celebrated and “the relative disadvantage experienced by Third World countries is seen not only in descriptive but in normative terms, as an intolerable situation that demands a response.”<sup>18</sup>

When development in the Third World is framed thus, development concerns can be driven by innovation and the need to create an environment for development that is inclusive, sustainable, and equitable.<sup>19</sup> Like ‘groping for stones to cross the river,’<sup>20</sup> development involves constant experimentation with policies that may or may not work. Within this framing, the Third World is emboldened to continue groping as they critically analyse and assess policies that are germane to their development needs and reject those that are not. Consequently, the last decade has witnessed sporadic arguments about the actual role of IP in development. On one side, proponents of IP argue that IP is “a key factor promoting economic development.”<sup>21</sup><sup>22</sup> Conversely, IP opponents, view IP as a form of “economic imperialism” used by the First World countries.<sup>23</sup>

#### 1.4 Much Ado about Nothing? Women Entrepreneurship and IP

Lost in the division between proponents and opponents of IP are women entrepreneurs innovating mostly in the informal sector and contributing to economic growth. Most women entrepreneurs are neither legally nor economically positioned to benefit from the current IP

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<sup>18</sup> *Ibid.*

<sup>19</sup> Joshua Cooper Ramo, “The Beijing Consensus”, online: *The Foreign Policy Centre* <<https://fpc.org.uk/publications/the-beijing-consensus/>>.

<sup>20</sup> *Ibid* at 4.

<sup>21</sup> Stephen Ezell & Nigel Cory, “The Way Forward for Intellectual Property Internationally”, (25 April 2019), online: *Information Technology & Innovation Foundation* <<https://itif.org/publications/2019/04/25/way-forward-intellectual-property-internationally>>.

<sup>22</sup> Stephen Ezell & Nigel Cory, “The Way Forward for Intellectual Property Internationally” (25 April 2019), online: *Information Technology & Innovation Foundation* <<https://itif.org/publications/2019/04/25/way-forward-intellectual-property-internationally>>.

<sup>23</sup> *Ibid.*

regime. IP laws claim to be gender neutral since they aim to promote innovation and creativity regardless of the gender of the innovator and creator.<sup>24</sup> But several studies<sup>25</sup> have already drawn attention to the various ways that the IP regime disempowers women. Considering gender and IP has revealed “the gendered nature of facially gender-neutral IP doctrines.”<sup>26</sup>

Without taking into consideration “the historical, biological, and sociological differences between men and women and the history of women’s disadvantage in society,”<sup>27</sup> IP regimes can conversely “serve to entrench gender inequality in domains driven by innovation and creativity.”<sup>28</sup> Indeed reports show “that female entrepreneurs are less likely than male entrepreneurs to hold any intellectual property rights (IPRs),”<sup>29</sup> yet they are more likely to engage in product innovation.<sup>30</sup> While male-dominated fields like engineering easily qualify for “authorship” and “invention,”<sup>31</sup> traditionally female fields, such as in the food industry, traditional medicine, fashion as well as the cosmetics industry (the production of shea butter, coconut oil and other locally made cosmetics) are often excluded from IP protection.<sup>32</sup>

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<sup>24</sup> Desmond Oriakhogba, “Working around the Gender Gap in Intellectual Property Regimes: Empowerment of Women Beadworkers through Open, Inclusive Innovation and Social Entrepreneurship in KwaZulu-Natal, South Africa” (2020) Working Paper 23 online: *Open Air* <<https://openair.africa/working-around-the-gender-gap-in-intellectual-property-regimes-empowerment-of-women-beadworkers-through-open-inclusive-innovation-and-social-entrepreneurship-in-kwazulu-natal-south-africa/>>.

<sup>25</sup> Terra Gearhart-Sema, “Women’s Work, Women’s Knowing: Intellectual Property and the Recognition of Women’s Traditional Knowledge” (2009) 21:2 *Yale JL & Feminism* 4; Kara Swanson, “Getting a Grip on the Corset: Gender, Sexuality, and Patent Law” 23 *Yale JL and Feminism* 60; Sonia Katyal, “Performance, Property, and the Slashing of Gender in Fan Fiction” (2006) 14 *Social Policy* 59.

<sup>26</sup> Swanson, *supra* note 25 at 2.

<sup>27</sup> Claire L’Heureux-Dube, “A Conversation about Equity” (2000) 29:65 *Denv J Int’l L & Pol’y* 65 at 70.

<sup>28</sup> Oriakhogba, *supra* note 24.

<sup>29</sup> Emma Williams-Baron, Jessica Milli & Barbara Gault, “Innovation and Intellectual Property among Women Entrepreneurs” (20 July 2018), online: *IWPR* <<https://iwpr.org/iwpr-general/innovation-and-intellectual-property-among-women-entrepreneurs/>>.

<sup>30</sup> *Ibid.*

<sup>31</sup> Jeremy de Beer et al, *Integrating Gender Perspectives into African Innovation Research* (OpenAIR, 2017).

<sup>32</sup> Ann Bartow, “Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law” (2006) 14:3 *Am U J Gender Soc Pol’y & L* 551.

According to de Beer, et al,<sup>33</sup> “inequality compounds when we measure success by quantifying IPRs; i.e. we disadvantage women that cannot outperform men in measurements that typically capture men’s performance.”<sup>34</sup> Indeed women are missing from the fabric of IP and “without acknowledging and appropriately integrating gender into the IP realm, women will continue to be disempowered and absent”<sup>35</sup>

### 1.5 A Tailor-fit IP (Contextualizing IP)

One “targeted measure to overcome the approaches and attitudes that deny women their rights”<sup>36</sup> is a feminist examination of the role of IP in women’s entrepreneurship. The arguments about IP and development expose a gamut of complexities about IP policies and trade in a world destabilized by the “multidirectional impacts of globalization.”<sup>37</sup> These arguments have very strong implications for inclusive economic growth. With changing development aspirations of countries around the world, the classical justification for the importance of IP protection—private rights for the fruit of intellectual endeavor are indispensable for encouraging investment in creative activity<sup>38</sup>—now calls for proper policy levers and parameters to perform a proper calibration analysis. It has become obvious that because each country is different, it should tailor its IP policy to its own development needs. Women entrepreneurs, for instance, should not be considered a “homogenous group with

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<sup>33</sup> de Beer et al, *supra* note 31 at 2.

<sup>34</sup> *Ibid* at 1.

<sup>35</sup> de Beer et al, *supra* note 31.

<sup>36</sup> UN Women, *Report on the UN Women Global Response to COVID-19* (2021),online:<[UN https://www.unwomen.org/en/digital-library/publications/2021/02/report-on-the-un-women-global-response-to-covid-19](https://www.unwomen.org/en/digital-library/publications/2021/02/report-on-the-un-women-global-response-to-covid-19)>.at 21.

<sup>37</sup> Margaret Chon, “Intellectual Property and the Development Divide” (2006) 27 *Cardozo L Rev* 93 at 2838.

<sup>38</sup> See, for instance, the US Supreme Court decision in *Mazer v. Stein* 347 US 201, 219 (1954) cited in William Fisher, “Theories of Intellectual Property,” online:<<http://www.law.harvard.edu/faculty/tfisher/iptheory.html>>

unified problems”<sup>39</sup> that can just be addressed through gender-responsive IP law. Instead, if the IP system is to meet its mandate of rewarding innovation and entrepreneurship, then it must address the specific problems that specific peoples experience in specific places.

## 1.6 Research Questions

This research project therefore seeks to answer the question: How might ownership of intellectual property rights bring about sustainable socioeconomic development for women entrepreneurs in the emerging cosmetics sector of Nigeria? Arising from this broad question, are the following specific research questions:

1. Does the current regulatory framework of intellectual property law in Nigeria have the potential to support women entrepreneurs producing cosmetics to optimize their potential in the marketplace?
2. What role does gender play in the acquisition and exploitation of IPRs in Nigeria?
3. Would a context-driven IP regime help to bridge the economic gap between men and women entrepreneurs in Nigeria?

## 1.7 The Focus of the Research

### *1.7.1 Why Nigeria and Why Women Entrepreneurs?*

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<sup>39</sup> Saskia Vossenbergh, “Beyond the Critique: How Feminist Perspectives Can Feed Entrepreneurship Promotion in Third World Countries” (2014) Maastricht School of Management Working Paper 14, online: Ideas <<https://ideas.repec.org/p/msm/wpaper/2014-14.html>> at 13.

To fail to pay attention to women’s economic activities is both morally indefensible and economically absurd.<sup>40</sup>

Nigeria is a lower middle-income economy with a gross national income per capita between \$1,026 and \$3,986.<sup>41</sup> While Nigeria has made some progress in socio-economic terms in recent years, its human capital development remains weak due to under-investment.<sup>42</sup> Furthermore, the country continues to face developmental challenges such as the need to address insufficient infrastructure, build strong and effective institutions, as well as address governance issues.<sup>43</sup>

Nigeria, often referred to as the “giant of Africa” because of its large population and economy, provides a good example for a case study of Third World countries. It is the most populous country in Africa<sup>44</sup> with more than 90 million of its population under the age of eighteen. It was colonized by Britain and therefore represents a good example of how colonization effected and still affects Third World countries’ IP policies, as will be discussed in this thesis. These variables—economy, size, and political history—are shared by most Third World countries.

The economic empowerment of women is critical to economic growth and stability. Women constitute almost half of the total population in Nigeria according to the 2018 census.<sup>45</sup> Of interest for this thesis, it is reported that Nigeria has the highest number of women entrepreneurs

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<sup>40</sup> Bradford Morse, United Nations Development Program, cited in Vinisha Bose, “An Analysis of Women Entrepreneurship Development Programmes in the State of Kerala” (2013), online: Semantic Scholar <<https://www.semanticscholar.org/paper/An-Analysis-of-Women-Entrepreneurship-Development-Bose/ec9a9e60f27d6da1fd81ca4a408d39b69cc8d5e4>>.

<sup>41</sup> “World Bank Country and Lending Groups—World Bank Data Help Desk”, online: *The World Bank* <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>>.

<sup>42</sup> World Bank, *Nigeria Overview: Development news, research, data* (Nigeria Development Update (NDU), 2021).

<sup>43</sup> “Overview”, online: *World Bank* <<https://www.worldbank.org/en/country/nigeria/overview>>.

<sup>44</sup> “Population in Africa, by country 2021”, online: *Statista* <<https://www.statista.com/statistics/1121246/population-in-africa-by-country/>>.

<sup>45</sup> “Nigeria”, online: *World Economics* <<https://www.world-economics.com/Demographics/Census-Year/Nigeria.aspx>>.

in the world.<sup>46</sup> Entrepreneurship is recognized as a key driver for economic development.<sup>47</sup> As a result, many governments, donors, and development organizations now promote entrepreneurship as a potential pathway out of poverty.<sup>48</sup> This is captured in the Sustainable Development Goals (SDGs) adopted at the United Nations in September 2015. The SDG framework emphasizes that addressing gender inequality in the economic sphere is critical to global progress and provides specific targets to improve women's economic participation, including equality in property ownership and inheritance, and access to financial services, natural resources and technology.<sup>49</sup>

However, despite the benefits of women's economic participation, significant legal, structural, and cultural obstacles persist.<sup>50</sup> Alarming, even though women entrepreneurs in Third World countries like Nigeria play a very significant role in entrepreneurship, their economic status remains low as a result of factors ranging from infrastructural deficiencies, low access to and high cost of finance-as well as legal regimes that do not afford women the same opportunities as their male counterparts.<sup>51</sup> This is due, in part, to deep-rooted discriminatory socio-cultural norms which perceive women only as wives and mothers.<sup>52</sup> Even though Nigeria is a state party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>53</sup>, as well as other international human rights instruments that affirm the improvement of women's

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<sup>46</sup> The Global Entrepreneurship Monitor (2013), online: <<https://harambeetoday.org/images/PDFS/GEM2013Report.pdf>>

<sup>47</sup> "Fostering Entrepreneurship" (1998) online: *OECD* <<https://www.oecd.org/employment/leed/fosteringentrepreneurship.htm>>.

<sup>48</sup> Vossenber, "Beyond the Critique", *supra* note 39.

<sup>49</sup> *Women and Sustainable Development Goals* (UN Women, 2016).

<sup>50</sup> "Growing Economies Through Gender Parity", online: *Council on Foreign Relations* <<https://www.cfr.org/womens-participation-in-global-economy/>>.

<sup>51</sup> OECD, *Gender and Sustainable Development: Maximising the Economic, Social and Environmental Role of Women* (2008) at 17-18.

<sup>52</sup> Funmi Ojediran & Alistair Anderson, "Women's Entrepreneurship in the Global South: Empowering and Emancipating?" (2020) 10:4 *Administrative Sciences* 87.

<sup>53</sup> United Nations, *Convention on the Elimination of All Forms of Discrimination against Women* (United Nations, 1979).

rights, existing national laws that do not actively implement Nigeria's legal obligations with international standards on women's human rights make Nigeria's legal commitments of little effect.<sup>54</sup>

In Nigeria, the major challenge to the implementation of CEDAW lies in the Convention's continued non-domestication in law. After a review of Nigeria's sixth periodic report on its implementation of CEDAW, in 2008, the review Committee expressed concern about the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society. It noted that such discriminatory attitudes and stereotypes constitute serious obstacles to women's enjoyment of their human rights and the fulfillment of the rights enshrined in the Convention.<sup>55</sup> A more recent review in July 2017 by the Women's International League for Peace and Freedom (WILPF) Nigeria, produced a similar report with the review Committee calling on "Nigeria to domesticate the Violence Against Persons Prohibition Act, Child Rights Act, and the CEDAW Convention in all States; to expedite the adoption of the Gender and Equal Opportunities Bill; and to address the root causes of trafficking of women and girls, including by addressing their economic situation."<sup>56</sup>

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<sup>54</sup> See e.g. S26(2) Constitution of the Federal Republic of Nigeria (CFRN) 1999 Cap C23 Laws of the Federation of Nigeria (LFN) 2014, which does not allow a Nigerian woman to transmit her nationality to her foreign spouse on the same basis as a Nigerian man; S55 Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960) 19 LFN, 1990 which allows wife battery as chastisement as long as grievous harm is not inflicted; S55 Labour Act Cap L1 LFN, 2004 which prohibits women from working at night in certain sectors of employment; and S360 Criminal Code Act Cap P19 LFN, 2010 which classifies sexual assault against female victims as a misdemeanor.

<sup>55</sup> UN CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women* (United Nations, 2008)

<sup>56</sup> WILPF International, "Outcome of CEDAW Review of Nigeria: More Action Needed to Implement the WPS Agenda", (8 August 2017), online: *WILPF* <<https://www.wilpf.org/outcome-of-cedaw-review-of-nigeria-greater-action-needed-to-implement-the-wps-agenda/>>.

Indeed, women entrepreneurs in Third World countries have less access than men to production resources, services, and opportunities, putting them at a disadvantage in participating in or contributing to socio-economic growth.<sup>57</sup> Yet, women entrepreneurs are the drivers of the growth of entrepreneurship and have been identified as the “new heroes of the Third World economy.”<sup>58</sup> Despite this growing recognition, national and international economic leaders continue to make and measure policy in ways that undervalue women’s work and do not capitalize on women’s economic participation.<sup>59</sup>

Even though it is claimed that the protection of IP is a strategy to sustain the growth and development of entrepreneurship,<sup>60</sup> there is no evidence that the current framework for IP law supports the potential of women entrepreneurs, such as those innovating in the cosmetic sector, to optimize their potential in the marketplace. Scholars, including Dan Burk<sup>61</sup> and Kara Swanson,<sup>62</sup> have drawn attention to how the IP system and TRIPS do not support the innovation of women.

### 1.7.2. *Why the Cosmetics Sector?*

As the development aspirations of countries across the world has evolved, Third World countries are rejecting the wholesale importation of European laws, Eurocentric-innovation, and conceptualizations of what development must be. This is being expressed in the utilization of

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<sup>57</sup> “Female Entrepreneurship Resource Point”, online: *World Bank* <<https://www.worldbank.org/en/topic/gender/publication/female-entrepreneurship-resource-point-introduction-and-module-1-why-gender-matters>>.

<sup>58</sup> Saskia Vossenber, “Inclusive Economic Growth through Women’s Entrepreneurship Promotion” (2014), online: *ECDPM* <<https://ecdpm.org/great-insights/promoting-development-through-business/inclusive-economic-growth-womens-entrepreneurship/>>.

<sup>59</sup> Gayle Lemmon & Rachel Vogelstein, *Building Inclusive Economies: How Women’s Economic Advancement Promotes Sustainable Growth* (S.I.: Council on Foreign Relations Press, 2017).

<sup>60</sup> Kamil Idris, *Intellectual Property - A Power Tool for Economic Growth* (World Intellectual Property Office, 2003).

<sup>61</sup> Dan Burk, “Bridging the Gender Gap in Intellectual Property” *WIPO* (April 2018), online: *WIPO* <[https://www.wipo.int/wipo\\_magazine/en/2018/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2018/02/article_0001.html)>.

<sup>62</sup> Kara Swanson, “Intellectual Property and Gender: Reflections on Accomplishments and Methodology” (2015) 24:1. *Am U J Gender Soc Pol’y & L* 175.

traditional knowledge and the inward exploitation of human resources as evinced by the thriving Nigerian Nollywood movie industry;<sup>63</sup> revived interest in homemade goods as seen with the replacement of famous Uncle Ben's branded rice with new "Ofada"<sup>64</sup> rice brand and, most significant to this thesis, the renewed appreciation of locally made cosmetics, to name a few.

The cosmetics<sup>65</sup> sector in Nigeria has been experiencing rapid and dynamic growth, providing lucrative opportunities for beauty businesses from around the country and beyond. The market is worth billions of naira<sup>66</sup> "and its value is likely to rise, keeping pace with an increasing number of working women with disposable income."<sup>67</sup> Nigeria is described as a "destination of choice for investment by international companies that aim to seize the opportunities presented by the beauty and personal care markets—ostensibly due to the expected population growth."<sup>68</sup> The cosmetics sector has particularly been jarred to front page as African women, and indeed women from all over the world, have found renewed interest in homegrown natural body care products.<sup>69</sup>

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<sup>63</sup> For more about the Nigerian Nollywood film industry see, Chidi Oguamanam, "The Nollywood Phenomenon: Innovation, Openness, and Technological Opportunism in the Modeling of Successful African Entrepreneurship" (2020) 23:3–4 *The Journal of World Intellectual Property* 518–545.

<sup>64</sup> Ofada rice is a highly nutritious brown rice that is grown in Ofada, Ogun State, Nigeria. Until the last decade, this rice was eaten only by the very indigent. It was a sign of extreme poverty as the poor could not afford Uncle Ben's rice & other imported polished rice. Today however, Nigerians have realized its nutritional value & ironically only the rich can afford Ofada rice now.

<sup>65</sup> The Nigerian National Agency for Food & Drug Administration & Control (NAFDAC) defines cosmetics to include any substance or mixture of substance intended to be rubbed, poured, sprinkled or sprayed, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the complexion, skin, hair or teeth and includes deodorants & detergent powder. See S31 National Agency For Food & Drug Administration & Control (NAFDAC) Act Cap N.1 LFN 2004

<sup>66</sup> "Beauty and personal care: sales by product category Nigeria 2017", (February 2022), online: *Statista* <<https://www.statista.com/statistics/1064783/sales-beauty-and-personal-care-products-nigeria/>>.

<sup>67</sup> "Nigerian Beauty & Cosmetics Market Overview", (2021), online: *Beauty West Africa* <<https://www.beautywestafrica.com/market-overview/>>.

<sup>68</sup> *Ibid.*

<sup>69</sup> Minakshi Sharma et al, "Organic Personal Care Products: Framework for Review of Literature" (2021) 12:3 *IJM*, online: <[https://www.academia.edu/53252662/ORGANIC\\_PERSONAL\\_CARE\\_PRODUCTS\\_FRAMEWORK\\_FOR\\_REVIEW\\_OF\\_LITERATURE](https://www.academia.edu/53252662/ORGANIC_PERSONAL_CARE_PRODUCTS_FRAMEWORK_FOR_REVIEW_OF_LITERATURE)>; Bruno Fonseca-Santos, Marcos Corrêa & Marlus Chorilli, "Sustainability, natural and organic cosmetics: Consumer, products, efficacy, toxicological and regulatory considerations" (2015) 51 *Brazilian Journal of Pharmaceutical Science* 17–26.

In the new knowledge economy of the global system, intangible assets- including innovative ideas, information, and know-how- have become central business assets. Enterprises worldwide are acknowledging the value of their IP assets and investors; stock market brokers and financial advisors are becoming increasingly aware of the value of IP assets.<sup>70</sup> Virtually all regimes of intellectual property are implicated at the interface of women entrepreneurship and the cosmetic industry in Nigeria. Importantly, the registration of trademark is a precondition for the registration of cosmetics by the National Agency for Food and Drug Administration and Control (NAFDAC).<sup>71</sup> Also, as a result of low awareness of IP or difficulty in accessing IP protection mechanisms, entrepreneurs operating in the informal sector generally use less formal IP protection but when they do use IP, trademarks are considered important.<sup>72</sup> Other forms of IP protection like patents, trade secrets, as well as semi-formal IP protection like confidentiality agreements, also have implications for their businesses. The locally made cosmetics industry which is the focus of this thesis is typically inspired from traditional knowledge, as women entrepreneurs are producing handmade cosmetics from natural and endemic produce like shea butter, herbs, fruits, etc. This makes research into the role of IP in this sector very significant. To ensure a rigorous analysis, I choose trademarks as a formal IPR as well as semi formal and informal IP mechanisms, for consideration of the effect of IPRs on women entrepreneurs producing cosmetics in Nigeria. With right policy interventions, the country is in a strong position to take advantage of market growth, especially as it has a natural advantage in the availability of raw materials.

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<sup>70</sup> note 9.

<sup>71</sup> *National Agency for Food and Drug Administration and Control (NAFDAC) Act Cap N.1 LFN 2004* (NAFDAC).

<sup>72</sup> Jeremy de Beer, Fu Kun & Sacha Wunsch-Vincent, "Appropriation and Intellectual Property in the Informal Economy" in *Sacha Wunsch-Vincent & E Kraemer-Mbula, eds, The Informal Economy in Developing Nations: Hidden Engine of Innovation? New economic insights and policies* (Cambridge: Cambridge University Press, 2016).

### 1.7.3 Relevance of Women in the Cosmetic Sector

The cosmetics sector is generally made up of both women and men entrepreneurs who are involved at different levels of the cosmetics value chain. While the beauty industry does have better representation of women in leadership roles than other industries,<sup>73</sup> men still dominate the boardrooms in big cosmetics companies. What, then, is the relevance of women producing cosmetics to this thesis?

The focus of this thesis is women entrepreneurs in the cosmetics sector innovating at the various levels of the cosmetics value chain:

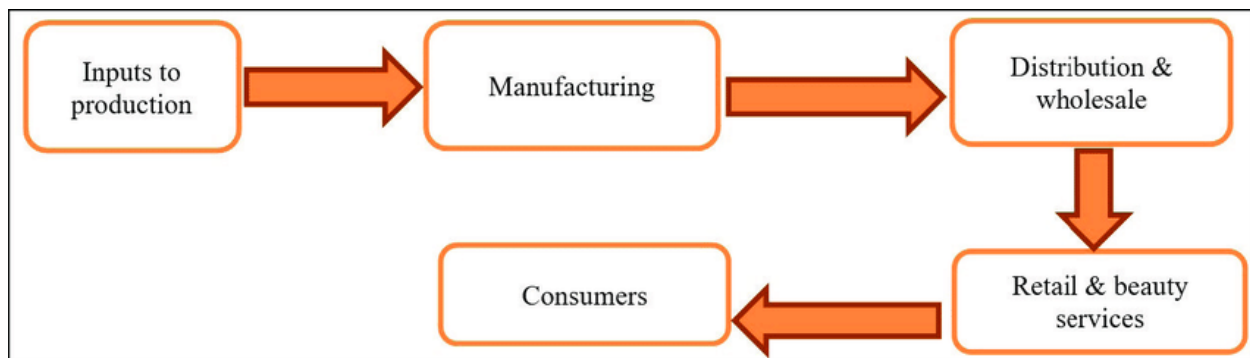


Figure 1: Cosmetics value chain<sup>74</sup>

As discussed above, the economies of Third World countries have begun to focus their interests on the commoditization of products derived from natural resources. This has fueled interest in, and appreciation for, “natural” body products. Many women entrepreneurs in this sector are found at

<sup>73</sup> Women entrepreneurs like Toyin M. Odulate CEO, Olori Cosmetics, an African-themed cosmetics manufacturing start-up in Nigeria, Tara Fela-Durotoye, a Nigerian makeup artist & founder & current CEO of House of Tara International, Oke Maduewesi, CEO of Zaron group of companies amongst several others, who have broken the glass ceiling and are in top management positions.

<sup>74</sup> Nóra Amberg, *The Aspects of Sustainability in the Cosmetics Industry in Eszterházy Károly Egyetem Gyöngyösi Károly Róbert Campus* (Hungary, 2019).

the level of inputs to production, where they apply their traditional knowledge to extract raw materials. While it is impossible to claim that only women innovate at this level because there are few areas of knowledge that may be strictly attributed to one gender or the other, there are general categories that are largely associated with women, such as weaving, housework, cooking, and childcare.<sup>75</sup> Shea nuts, for instance, are picked and processed mainly by rural women. The nuts are also sold by women in the local markets, where they are bought by different actors including nut exporters and manufacturers of cosmetics.<sup>76</sup> The United Nations Development Program (UNDP) estimates that, on average, three million African women benefit directly or indirectly from shea butter production.<sup>77</sup> With the right policy intervention more women could benefit from shea butter and other natural cosmetics production at all levels of the chain.

Women are often more intricately tied to various agricultural products, that is the raw materials for natural cosmetic production because they initiate the process of production through the mobilization of labor from household, extended families, or the socio-political networks of their community. In rural areas, they often have to contend with social norms that limit their ability to combine work, family, and other social and personal responsibilities.<sup>78</sup> And, in agriculture, women tend to dominate the subsistence production sphere, even in situations where other non-traditional and commercial farming opportunities exist.<sup>79</sup> As a result of poverty and illiteracy,

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<sup>75</sup> Gearhart-Sema, “Women’s Work, Women’s Knowing”, *supra* note 25.

<sup>76</sup> Brenda Chalfin, *Shea Butter Republic: State Power, Global Markets, and the Making of an Indigenous Commodity*. (Routledge ProQuest Ebook Central, 2004).

<sup>77</sup> “Shea butter nourishes opportunities for African women”, (19 July 2013), online: *Africa Renewal* <<https://www.un.org/africarenewal/magazine/august-2013/shea-butter-nourishes-opportunities-african-women>>.

<sup>78</sup> “Gender Differences in Employment and why they Matter” in *World Development Report 2012* World Development Report (The World Bank, 2011) 198.

<sup>79</sup> *Indigenous Technology and Rural Women’s Economic Empowerment in Sub-Saharan Africa: A Report*, by Chika Ezeanya-Esiobu.

women invariably turn to traditional methods and techniques.<sup>80</sup> These are now sought-after attributes in natural body products, making them valuable.

Furthermore, this thesis focuses on women entrepreneurs who manufacture, distribute, and retail cosmetics in the informal sector. These women have start-up cosmetics production businesses. They not only extract the raw materials but move up the production chain as they produce and market the cosmetics themselves. They acquire training and develop the cosmetic product with limited revenue, on a very small scale, as well as provide beauty services. These levels in the cosmetic value chain are dominated by women until they become profitable and qualify as “big businesses.” At that point, unfortunately, men may appropriate ideas that were originally part of women’s knowledge, but which were taken over after they proved to be profitable or useful.<sup>81</sup>

## 1.8 Thesis

My core argument can be summarized thus: Women entrepreneurs producing knowledge (natural cosmetics) in the informal sector of Nigeria are missing from the quilt of intellectual property (IP) as they are embroiled in the double jeopardy of being women and being entrepreneurs in a Third World country. I will apply feminist theories to argue, first, that this is because of the split in the valuation of different types of knowledge within the IP regime caused by historical misogyny and patriarchy. Secondly, I will employ the Third World Approaches to International Law (TWAIL) to argue that this jeopardy is exacerbated by the fact that international intellectual property law, from where national IP policies are spawned, are riddled with Eurocentric

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<sup>80</sup> *Ibid.*

<sup>81</sup> Gearhart-Sema, “Women’s Work, Women’s Knowing”, *supra* note 25.

understandings of innovation as well as conceptualizations of intellectual property without regard for the individual realities (development needs) of different societies.

While it is impossible to proffer a one-time solution to this problem, this thesis argues that a starting point should be an intersectional analysis of IP laws and women's entrepreneurship in the informal sector of a Third World country, along with an examination of what role gender-responsive IP policies could play in achieving sustainable socioeconomic development for women entrepreneurs in the emerging cosmetics sector of Nigeria.

### 1.9 Importance and Originality of this Thesis

The literature review in chapter two reveals a gap in the studies of gender (from the perspective of feminist legal theory) and development (from the perspective of TWAIL), in relation to intellectual property. Intersectionality is an analysis of the interconnected nature of social categorizations, such as gender and development, to show how systems of oppression overlap.<sup>82</sup> Information about the nuanced intersectional nature of women's experiences within the IP system in Third World countries as entrepreneurs producing cosmetics in Nigeria's informal economy is missing in the literature. For this analysis, I will analyse the trademark legal framework as an example of a formal intellectual property right (IPR), and semi-formal and informal means of appropriating IP to provide context.

I adopt trademarks as a formal IPR for consideration of the effect of IPRs on women entrepreneurs producing cosmetics in Nigeria principally because the registration of trademark is a precondition for the registration of a cosmetic by NAFDAC<sup>83</sup> which regulates and controls the

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<sup>82</sup> Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 *Stanford Law Review* 1241–1299.

<sup>83</sup> *National Agency for Food and Drug Administration and Control (NAFDAC) Act Cap N.1 LFN 2004* (NAFDAC).

manufacture, importation, exportation, distribution, sale, and use of cosmetics as well as other regulated products.<sup>84</sup> The NAFDAC Guidelines for Registration of Cosmetics made in Nigeria<sup>85</sup> specifically requires “Evidence of Registration of Brand Name with Trademark Registry in the Federal Ministry of Industry, Trade and Investment”<sup>86</sup> as a precondition for registration of a cosmetic product made in Nigeria.<sup>87</sup> Trademarks are also important to entrepreneurs operating in the informal sector who are often unaware of, or unable to assess other formal IP protection mechanisms.<sup>88</sup> The thesis therefore considers trademarks as a formal IPR that could be most relevant to women entrepreneurs producing cosmetics—women who may often not have the relevant financial or legal exposure to pursue other IPRs, such as patents. However, as the analysis will show, very few women entrepreneurs use formal IP mechanisms. Rather semi-formal and informal means of appropriating IP are very common among women entrepreneurs producing cosmetics. For this reason, I also provide an analysis of semi-formal and informal IP mechanisms.

Guided by Crenshaw’s concept of intersectionality, I will examine the intersectional experience of women entrepreneurs in the IP system: first, as women who are mostly innovating in Nigeria’s informal economy, and secondly, as women from a Third World country. I situate and contextualize the understanding of race, by and through examination of IP governance and the racial stories which are told around trademarks and other semi-formal and informal IP mechanisms like secrecy. I use race as a broad intersectional and transnational category of analysis that leaves space for discussions of the Third World with respect to distributive justice, access to knowledge,

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<sup>84</sup> “About NAFDAC – NAFDAC”, online: <<https://www.nafdac.gov.ng/about-nafdac/>>.

<sup>85</sup> *Guidelines for Registration of Cosmetics made In Nigeria*. (National Agency for Food & Drug Administration & Control (NAFDAC), 2018).

<sup>86</sup> 3.1.4 *ibid*.

<sup>87</sup> The justification for this requirement will be discussed later in the thesis in chapter five

<sup>88</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

and neo-coloniality.<sup>89</sup> The study of women's development in the context of intellectual properties<sup>90</sup> must be an intersectional enterprise, involving the coordinated examination of categories such as gender, race<sup>91</sup> and the economic sector. In this research, I weave an "Intersectional Feminist TWAIL" (IFTWAIL) framework together to address the tension of the intersection of gender and race in the IP regime.

Even more urgent is the realization that Nigeria particularly lacks any scholarship directed generally at the impact of IP on women entrepreneurs or specifically on their innovation in the cosmetic sector. This thesis advances the literature by providing context-driven research relevant for Nigeria and other Third World countries. My thesis likewise provides new knowledge specifically regarding women entrepreneurs producing cosmetics in Nigeria. As agreed by WIPO,<sup>92</sup> much more work is needed to ensure that both women and men can equally access and use the IP system, and profit fully from their creative and innovative assets.

Analytical inquiries that explore the rights of minorities, women, and Indigenous peoples enhance the debate about IP reforms.<sup>93</sup> The purpose for this research is therefore twofold. First, the thesis aims to draw women entrepreneurs into the ongoing debates about the role of IP in Third World countries. Second, the thesis aims to find and propose gender transformative reforms to the IP system that may help to create an equal playing field<sup>94</sup> in the IP process, bridging the gender

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<sup>89</sup> Anjali Vats & Deidre Keller, "Critical Race IP" (2018) 36 *Cardozo Arts & Entertainment Law Journal*, online: <<https://papers.ssrn.com/abstract=3050898>>.

<sup>90</sup> *Ibid.*

<sup>91</sup> Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" 1989:1: 8 *U Chicago Legal F* 31.

<sup>92</sup> "WIPO Policy on Gender Equality" Office Instruction No 47/2014 5.

<sup>93</sup> Shubha Ghosh, "Race Specific Patents, Commercialization, and Intellectual Property Policy" (2008) 56 *SSRN Electronic Journal*.

<sup>94</sup> Burk, *supra* note 62.

gap by reducing the barriers faced by women entrepreneurs in Third World countries in the current IP system and unlocking the full potential of women to achieve economic goals.

### 1.10 Thesis Structure

To answer the research questions, this thesis is divided into six chapters. This first chapter provides the outline and conceptual clarification of the thesis. The second chapter presents a synopsis of literature reviewed, the theoretical framework for this research as well as the methodology utilized to answer the research question.

The third chapter examines the international and national legal framework for trademarks. It deploys the feminist method of asking the woman question to scrutinize the language of the provisions. The language is particularly important because “it is through language that a particular meaning is fixed and naturalized within a regime.”<sup>95</sup> In this chapter, I therefore apply the feminist technique of deconstruction to analyze the international and existing national IP frameworks for trademarks to see how the current mechanism is designed and developed in a way that corresponds with the thesis questions and allows for a more interpretative or cognitive approach<sup>96</sup> that will elucidate the role of ideas, knowledge, and discourse in explaining the nature of IP regimes.<sup>97</sup> The aim of this chapter is to critically assess the extent to which the existing regime for trademarks accommodates the protection of the innovations of women entrepreneurs in the field of cosmetics production.

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<sup>95</sup> Valbona Muzaka, “A dialogic approach to understanding regime conflicts: the case of the development agenda” (2017) 38:1 Third world quarterly 61.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

In the fourth chapter, I carry out an analysis of semi-formal IP protection. Having found in chapter three the problems associated with the current framework for trademarks, chapter four is an examination of how other forms of appropriation mechanisms are designed or can be developed in a way that can address one of the thesis questions, —Would a context-driven IP regime help to bridge the economic gap between men and women entrepreneurs in Nigeria? Using two examples of communities (the Igbo Apprenticeship System (IAS) in Nigeria and the Informal Manufacturing of Home and Personal Care Products in South Africa) that utilize informal IP protection, I provide a contextual exploration of the appropriation of semi-formal IP protection. The aim of the chapter is to broadly examine the concept of semi-formal IP protection to assess its potential usefulness for women entrepreneurs producing cosmetics.

Chapter five is a case study of Nigerian women entrepreneurs producing cosmetics. Flowing from chapter four, where semi-formal and informal forms of IP appropriation were explored and their potential usefulness for women entrepreneurs producing cosmetics were revealed, this chapter provides an example of how semi-formal and informal forms of IP appropriation are, or can be, appropriated. The chapter is a critical analysis of the data from my desk review regarding the interactions of Nigerian women entrepreneurs producing cosmetics with IP. To effectively answer one of the thesis questions—What role would gender play in the acquisition and exploitation of IPRs by women producing cosmetics in Nigeria? —I apply feminist approach to examine how gender plays in the decision of women entrepreneurs producing natural cosmetics in Nigeria to acquire and utilize IP, and how gendered conceptions in the society could influence their engagement with the IP regime. I carry out an intersectional analysis of the data to distinguish, first, the interactions of women innovating in the informal sector from those innovating in the formal sector with the IP regime; and second, how women entrepreneurs

producing cosmetics in a Third World country like Nigeria experience IP in radically different ways. The aim of this chapter is to expose the nuances of the role of IP in women entrepreneurship and draw attention to the differences that call for a contextualized IP regime. Through an intersectional analysis of the overt and covert influence of social agents in the appropriation of IP, this research exposes the power relations and privileged categories that undermine the economic empowerment of women entrepreneurs.<sup>98</sup>

Chapter six is the final chapter. It summarizes the findings of this study and gives recommendations arising from the case study as well as recommendations for possible reforms for the IP regime and concludes that the IP regime as currently operated plays no role in the development of women (producing cosmetics) in Nigeria. The analysis underscores the need for the Third World to adapt and innovate IP protection, within their own realities instead of importing IP laws and policies wholesale.

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<sup>98</sup> Carla Rice, Elisabeth Harrison & May Friedman, “Doing Justice to Intersectionality in Research” (2019) 19:6 *Cultural Studies ↔ Critical Methodologies* 409.

## Chapter Two- Literature Review, Theoretical Framework, and Methodology

### **2.0 Introduction**

This chapter reviews relevant literature and the theoretical framework for this research as well as the methodology utilized to answer the research questions. The chapter is divided into three sections. The first section is an analysis of literature around the various themes that connect this research. These are the themes of intellectual property (IP) and development in Third World countries, IP and feminism, IP and women's innovation and entrepreneurship, and cosmetics production. This literature review shows how radically the trajectory of academic discourse in Third World countries is changing as scholars have made new inroads in unmasking previously unknown (or ignored) perspectives of development, gender, women's innovation and entrepreneurship in Third World countries and the role the protection of IP plays. The literature review however reveals a gap that this research sets out to fill, as these discourses have not focused on women entrepreneurs and the unique experiences they are having (or not having) in the IP system, and how that impacts women's development.

Section two is an examination of the theoretical frameworks this research employs, namely, feminist legal theory, intersectionality, and TWAIL. This section is subdivided into three parts. In the first part, I discuss feminist legal theory with the aim of extrapolating the processes through which inequalities are produced in women's entrepreneurship and consider how to begin to eradicate those inequalities. This thesis draws attention to the politics of gender in the IP system and how women entrepreneurs are affected by it. One way of achieving this is through an

intersectional analysis. Therefore, in the second part of this subsection I discuss intersectionality<sup>99</sup> as an approach of conceptualizing the relationship between systems of oppression, which construct women's multiple identities and their social locations. In the third part of this section, I discuss TWAIL, extending the discussion on gender to racism to examine how race and geographical location (Third World) of women entrepreneurs affect / control the way they experience IP.

In the third and final section, I discuss the methodology used to undertake this research. The primary methodology I employ is legal doctrinal research, which engages the feminist method of asking the woman question.<sup>100</sup> To investigate the role of intellectual property rights (IPRs) as a development tool for women entrepreneurs producing cosmetics in Nigeria, my analysis searches for silences, and engages in the textual practice of deconstruction, feminist practical reasoning, consciousness raising, and "self study."<sup>101</sup>

## 2.1 Literature Review

### 2.1.1 Development and IP Literature

The ends and means of development require examination and scrutiny for a fuller understanding of the development process...Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy.<sup>102</sup>

Third World countries have come a long way from the era when development was mostly dependent on the ability to adapt to the uncertainties of rainfall and diseases or to warfare.<sup>103</sup> From

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<sup>99</sup> Crenshaw, "Mapping the Margins", *supra* note 83.

<sup>100</sup> Katharine Bartlett, "Feminist Legal Methods" (1989) 103 Harvard Law Review 829.

<sup>101</sup> Government of Canada, *Scope: Interagency Advisory Panel on Research Ethics* (2016) Last Modified: 2022-02-09.

<sup>102</sup> Sen, *supra* note 15 at 14.

<sup>103</sup> Jeremy de Beer et al, "Knowledge and Innovation in Africa: Scenarios for the Future" (2013), online: <<https://papers.ssrn.com/abstract=2660957>>.

asserting their independence to positioning themselves in the global economy, the trajectory of development discourse in Third World countries is changing radically. Consequently, there has been animated discourse among several scholars (Ruth Okediji,<sup>104</sup> Chidi Oguamanam,<sup>105</sup> Caroline Ncube,<sup>106</sup> Rosemary Coombe,<sup>107</sup> Margaret Chon,<sup>108</sup> Rafik Bawa<sup>109</sup>) about the place of intellectual property in the current development strategy of Third World countries.

Inculcating development into the growing rights discourse, policy strategists have included IP decolonization strategies to ensure the growth of Third World economies. “Decolonization, once viewed as the formal process of handing over the instruments of government, is now recognized as a long-term process involving the bureaucratic, cultural, linguistic and psychological divesting of colonial power.”<sup>110</sup> This is visible in the IP system where scholars have realized that IP policies in place after decolonization were not independently created and the laws were mostly a regurgitation of existing colonial laws. As Peter Drahos argues, Third World countries “in adjusting their intellectual property laws to suit their national interests, were only doing what they had observed developed countries doing.”<sup>111</sup>

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<sup>104</sup> Ruth Okediji, “Africa and the Global Intellectual Property System: Beyond the Agency Model” (2004) 12 *African Yearbook of International Law*, online: <<https://experts.umn.edu/en/publications/africa-and-the-global-intellectual-property-system-beyond-the-age>>.

<sup>105</sup> Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question*, 1st edition ed (Milton Park, Abingdon, Oxon; New York: Routledge, 2011).

<sup>106</sup> Caroline Ncube, “Decolonising Intellectual Property Law in Pursuit of Africa’s Development” (2016) 8:1 *The WIPO Journal: Analysis of Intellectual Property Issues* 34.

<sup>107</sup> Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*. (Durham, NC: Duke University Press., 1998).

<sup>108</sup> Chon, *supra* note 37.

<sup>109</sup> Rafik Bawa, “The North-South Debate over the Protection of Intellectual Property” (1997) 6:1 *Dalhousie Journal of Legal Studies* 3.

<sup>110</sup> Bob Joseph, “A Brief Definition of Decolonization and Indigenization”, (29 March 2017), online: *Indigenous Corporate Training* <<https://www.ictinc.ca/blog/a-brief-definition-of-decolonization-and-indigenization>>.

<sup>111</sup> Peter Drahos, “Third World countries and International Intellectual Property Standard-Setting” (2005) 5:5 *The Journal of World Intellectual Property* 765 at 768.

This realization has led to a sharp distinction in the approach of First World countries and Third World countries to IP. In the “North and South debate,” Rafik Bawa describes the contention thus:

...it is the North’s predominant contention that a uniform standard of intellectual property protection will be of benefit to all countries. Developed countries point to the incentive effects of intellectual property protection on innovative activity and the importance of such incentives to the development needs of the South. In contrast, the South, or less developed countries, reject these arguments, emphasizing their special circumstances and requirements which are essential to progress along the road to development.<sup>112</sup>

Legal scholars such as Keith Aoki,<sup>113</sup> Rosemary Coombe,<sup>114</sup> Margaret Chon,<sup>115</sup> and Ruth Okediji<sup>116</sup> have tackled questions regarding the racial and neo-colonial inequality that intellectual property law produces. Since the World Trade Organization (WTO) incorporated IP into the trade regime through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), questions have been raised about the suitability of the WTO standards for IP in Third World countries<sup>117</sup> and of how the intellectual property standards, as harmonized through TRIPS, will affect Third World countries.<sup>118</sup> TRIPS has been severely criticized for its hegemonic top-down approach, which tends to ignore social realities and different levels of development in countries.<sup>119</sup>

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<sup>112</sup> Bawa, *supra* note 110 at 78.

<sup>113</sup> Keith Aoki, “(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship” in *Globalization and Intellectual Property* (Routledge, 2006).

<sup>114</sup> Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*. (Durham, NC:Duke University Press, 1998).

<sup>115</sup> Margaret Chon, “Intellectual Property and the Development Divide” (2006) 27 *CARDOZO LAW REVIEW* 93.

<sup>116</sup> Okediji, “Africa and the Global Intellectual Property System”, *supra* note 105.

<sup>117</sup> Peter Yu, “Five Decades of Intellectual Property and Global Development” (2016) 8:1 *The WIPO Journal* 1.

<sup>118</sup> Drahos, *supra* note 112.

<sup>119</sup> Chon, *supra* note 37.

Margaret Chon argues that “IP, while purporting to heed the issues of development, often runs rough-shod over the central concerns of development.”<sup>120</sup>

To this end several scholars have proffered a way forward for the utilization of IP for Third World countries. For Okediji, the way forward is for Third World countries to advocate for copyright laws that are sensitive to their history.<sup>121</sup> Caroline Ncube further suggests that “the decolonization of IP consists of concerted efforts to sever African States’ IP regimes from advancing colonial and neo-colonial interests to more closely align their IP systems with their development contexts and aspirations.”<sup>122</sup> This is articulated as the calibration of IP. According to Ncube, “the decolonization of IP law falls within the same tradition as it is primarily development-centered. It contends that calibration is an important decolonizing tool as it enables states to craft IP regulatory systems that are best suited to their developmental conditions and aspirations.”<sup>123</sup>

Expounding on the calibration of IP, Daniel Gervais distinguishes between structural and strategic calibration. For Gervais, “structural calibration recognizes appropriate differences among regions, countries, and industries”<sup>124</sup> while a strategic calibration “suggests that, by developing a comprehensive IP strategy focused on innovation and welfare improvements, a country can limit the negative impact of transitioning to higher IP protection and increase its chances of reaping the benefits of IP protection.”<sup>125</sup>

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<sup>120</sup> *Ibid* at 2823.

<sup>121</sup> “Why Decolonization of IP matters - with Prof R Okediji | South African Research Chair: Intellectual Property, Innovation and Development”, online: UCT <<http://www.ipchair.uct.ac.za/ProfOkedijiSeminar>>.

<sup>122</sup> Ncube, *supra* note 107 at 34.

<sup>123</sup> *Ibid*.

<sup>124</sup> Daniel J Gervais, “IP Calibration” in *Intellectual Property, Trade and Development* (Oxford: University Press, 2014).

<sup>125</sup> *Ibid*.

There is now a great divide between First World and Third World countries about the legitimacy and utility of IPRs in the developing world.<sup>126</sup> The divide, as argued by Margaret Chon, “does not only allude to the material divide figuring in other debates on intellectual property,”<sup>127</sup> but also to an “unnecessary ideological divide between efficiency and distributional driven understandings of development.”<sup>128</sup> Keith Aoki, writing about copyright law, warns that “on the international level, we need to reexamine the tendency to expand and harden IPRs and the need to reconceive intersections and interactions between the global and the local as opportunities rather than as impediments to a universal regime.”<sup>129</sup>

This thesis extends the above arguments by alluding to the divide between development in the general context of Third World countries and women’s development. Literature abounds on the role of IP in the development strategy of Third World countries but there is less research that approaches this subject from the perspective of the role of IP in gender and development. This is crucial because as Deborah Halbert contends, “in the political economy of the information age, the user, the sick, the student, the global South, the music fan, the movie buff, the small business, and many more are those who either don’t care about IP rights or who can’t afford to protect what rights they might have anyway.”<sup>130</sup>

Women arguably make up a significant percentage of these groups. Most relevant to this study, women entrepreneurs producing cosmetics innovate mostly in the informal sector, carrying out small businesses. What is the relevance of IP to them? Discussions on IP and development

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<sup>126</sup> Okediji, “Africa and the Global Intellectual Property System”, *supra* note 105 at 232.

<sup>127</sup> Chon, *supra* note 37 at 2831.

<sup>128</sup> *Ibid.*

<sup>129</sup> Keith Aoki, “(Intellectual) Property and Sovereignty: Notes toward a Cultural Geography of Authorship”, (1996), online: <<https://www.jstor.org/stable/1229388?seq=1>> at 1353.

<sup>130</sup> Debora Halbert, “The politics of IP maximalism” (2011) 3:1 The WIPO Journal 81–93.

must be inclusive if development is to be more concerned with enhancing the lives we lead and the freedoms we enjoy.<sup>131</sup> The implications of IP for the development of women in the Third World must be specifically addressed in an integrative way if the goal of gender equality<sup>132</sup> is to be achieved. Where are women entrepreneurs situated in the discussions about IP and development? This is the gap that exists in the analysis that this thesis fills.

### 2.1.2 Feminism and IP Literature

Academic discourses have also come a long way from the days when debates about the unique experiences and knowledge of women were considered politically foolish.<sup>133</sup> At that time, the intersection of intellectual property and gender was largely unexplored.<sup>134</sup> In “Intellectual Property in the Information Age: The Politics of Expanding Property Rights,” Debora Halbert<sup>135</sup> drew attention to the underlying masculine assumptions existing in the construction of intellectual property as well as highlighting a political economy of intellectual property that has historically benefited men more than women.<sup>136</sup> Several years later, the IP / Gender symposia<sup>137</sup> was organized and further drew attention to this area of research. It is still doing so 19 years later. From

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<sup>131</sup> Sen, *supra* note 15.

<sup>132</sup> See Goal 5, UN Sustainable Development Goals, online: UN < <https://sdgs.un.org/goals> >

<sup>133</sup> Richard Epstein, “Legal Education and the Politics of Exclusion” (1993) 45:6 Stanford Law Review 1607 at 1621. Here, Epstein challenged the value and the utility of feminist scholarship in the academy, posing the question whether feminism had something, anything, to say about a variety of legal doctrines. Referring to feminist analysis, Epstein, mirroring the thought of many at the time, claimed that

It is an act of political foolishness to fashion the basic rules of discourse on the assumption that one side of the discussion is known to be correct before the debate itself begins. And it would be a task of pointless complexity to seek to create different rules of speech for different groups and to peg their respective privileges to their current success in the ongoing social revolution.

<sup>134</sup> Swanson, “Intellectual Property and Gender”, *supra* note 63.

<sup>135</sup> Debora Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (Westport, Conn: Praeger,1999).

<sup>136</sup> *Ibid.*

<sup>137</sup> A series of symposia that have been jointly sponsored since 2004 by the American University’s Washington College of Law, Program on Information Justice and IP, the Women and the Law Program and the Journal of Gender, Social Policy and the Law.

“Unmapped Connections,”<sup>138</sup> to “Gender and IP—Addressing the Gap,”<sup>139</sup> the symposium has led to a variety of refereed journal articles and books<sup>140</sup> that have considered the impact of different forms of IPRs on women as well as the social and cultural context within which laws and policies are formulated, enforced, and interpreted. This is instructive for women’s development because as Cynthia Enloe explains, “the whole cluster of ideas about gender drives decision-making, drives alliances, and drives hostilities; it allows for certain kinds of structures to seem normal and therefore unchallengeable—until a feminist comes along.”<sup>141</sup>

Ten years after the IP symposium began, Kara Swanson<sup>142</sup> examined the scholarship of IP and gender produced over the previous ten years and documented what has been accomplished in terms of quantity and publication venues as evidence of shifting conversations and community building. She argues that

with respect to traditional IP, that is, copyright, patent, and trademark, considering gender and IP has yielded results in three areas: identifying gender disparity in participation in IP systems and its causes, identifying disparity in the application of IP doctrines to subject matter that involves gender and sexuality, and revealing the gendered nature of facially gender-neutral IP doctrines.<sup>143</sup>

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<sup>138</sup> The first symposium in 2004 was subtitled “Unmapped Connections”, acknowledging the near absence of any acknowledgement that IP and gender had any interaction.

<sup>139</sup> The 19<sup>th</sup> symposium took place in February 2020 and was titled “Gender & IP – Addressing the Gap”. Positive steps are being taken now to address the gap. Discussions at the symposium included the inclusion of women at all levels of the legal system.

<sup>140</sup> Including, Irene Calboli and Srividhya Ragavan, eds, *Diversity in Intellectual Property: Identities, Interests, and Intersections* (New York, NY, USA: Cambridge University Press, 2015).

<sup>141</sup> Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics*, 2d ed (University of California Press, 2014) cited in P Schouten & H Dunham, “Cynthia Enloe on Militarization, Feminism, and the International Politics of Banana Boats” (2012) 12.

<sup>142</sup> Swanson, “Intellectual Property and Gender”, *supra* note 36.

<sup>143</sup> *Ibid* at 2.

Indeed, as Kevin Greene<sup>144</sup> explains, “IP itself is in a period of analytical and practical turbulence, and a focus on critical perspectives can be invaluable to re-imagining an IP system that actually provides real incentives to artists at the bottom of society, rather than multi-national conglomerates concentrated across IP industries.”<sup>145</sup> Such critical perspectives have been argued by various authors who have examined how different forms of IP affect women (Gearhart-Sema<sup>146</sup> and Goswami and Nandi<sup>147</sup> on traditional knowledge; Sonia Katyal<sup>148</sup> and Ann Bartow<sup>149</sup> on copyrights; Dan Burk,<sup>150</sup> on patents). Kara Swanson<sup>151</sup> extends her study of feminist interpretations of IP to patents and provides a feminist analysis of patent law. Using the corset as a starting point for a feminist analysis of patent law, she combines the methodological approach of following both the women and the technology (a consideration of women and their actual experiences) to probe women’s role in patenting. The current study relies on this approach as a useful guide to elaborate the role of IPRs on women entrepreneurs. Carys Craig<sup>152</sup> exposes how a critical race critique of IP law from a feminist perspective reveals the capacity of the law to conceal underlying motivations, to disguise loaded assertions as mere truisms, and so to foreclose the kinds of questions and deliberations that ought to be brought to bear when such rights are created and allocated.

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<sup>144</sup> Kevin Greene, “Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues” (2008) 16 *Social Policy* 22.

<sup>145</sup> *Ibid* at 385.

<sup>146</sup> Terra Gearhart-Sema, “Women’s Work, Women’s Knowing: Intellectual Property and the Recognition of Women’s Traditional Knowledge” (2009) 21:2 *Yale Journal of Law & Feminism* 4.

<sup>147</sup> Ruchira Goswami & Karubakee Nandi, “Presentation: Naming the Unnamed: Intellectual Property Rights of Women Artists from India” (2008) 16 *Social Policy* 26.

<sup>148</sup> Sonia Katyal, “Performance, Property, and the Slashing of Gender in Fan Fiction” (2006) 14 *Social Policy* 59.

<sup>149</sup> Bartow, “Fair Use and the Fairer Sex”, *supra* note 32.

<sup>150</sup> Dan Burk, “Do Patents Have Gender?” (2016) 19:3 *American University Journal of Gender, Social Policy and the Law* 881–919.

<sup>151</sup> Kara Swanson, “Getting a Grip on the Corset: Gender, Sexuality, and Patent Law” 23 *Yale JL & Feminism* 60.

<sup>152</sup> Carys Craig, “Critical Copyright Law and the Politics of ‘IP’” in *Research Handbook on Critical Legal Theory*, edited by Emiliios Christodoulidis, Ruth Dukes, & Marco Goldoni (Edward Elgar Publishing, 2019).

The literature has a considerable number of studies about the construction of knowledge and reveals insight into how intellectual property law has been developed based upon gendered assumptions, upon which this study builds. However, the literature has not focused on women entrepreneurs and the unique experiences they are having (or not having) in the IP system. My thesis therefore contributes new knowledge specifically regarding women entrepreneurs producing cosmetics, with a jurisdictional focus on Nigeria.

### 2.1.3 Literature on Gender, Innovation, Entrepreneurship, and IP

Entrepreneurship is assumed to be gender neutral. No definition of entrepreneurship has a gender bias and hence, it encompasses women entrepreneurs without reservation.<sup>153</sup> However, this thesis applies a feminist approach to entrepreneurship in order to see value in, and explicitly include what is usually ignored and under-valued in the policy-making process of problem definition and evaluation.<sup>154</sup> This is important because the economic sustainability of women-led microenterprises in Third World countries, in particular, is recognized as an area of concern.<sup>155</sup> Locating and empowering women entrepreneurs is an economic imperative if sustainable development is to be achieved.<sup>156</sup> This underpins the fact that the phenomenon of the role of IP in women's entrepreneurship needs to be understood in a specific context and in the context of which

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<sup>153</sup> The OECD analysis does define entrepreneurial activity by women as: 'the establishment, management, growth & death of independent firms. See OECD, *Promoting Entrepreneurship and Innovative SMEs in a Global Economy*. (2004), online: OECD<<https://www.oecd.org/cfe/smes/31919590.pdf>>

<sup>154</sup> Vossenbergh, "Beyond the Critique", *supra* note 39.

<sup>155</sup> Hina Shah & Punit Saurabh, "Women Entrepreneurs in Developing Nations: Growth and Replication Strategies and their Impact on Poverty Alleviation" (2015) 5:8 Technology Innovation Management Review 34.

<sup>156</sup> *Ibid.*

“gendered power structures are key to shaping specific entrepreneurial experiences and behaviors.”<sup>157</sup>

To achieve this, women entrepreneurs should not be considered a “homogenous group with unified problems that can be addressed”<sup>158</sup> through gender-responsive IP law. Instead, if the IP system is to meet its mandate of rewarding innovation and entrepreneurship, then it must address the specific problems that specific peoples experience in specific places. The claim made in this thesis is that gender inequalities and gendered outcomes of entrepreneurship can be addressed, transformed, and eradicated by applying a feminist lens and gender transformative approach in IP scholarship and reforms.

Such an approach can uncover where stereotypes come from to enhance the “understanding of how such stereotypes exert influence on women’s entrepreneurial propensity and would account for much of the difference in entrepreneurial activity”<sup>159</sup> between women and men. For example, Sullivan and Meek<sup>160</sup> highlight how the societal attribution of gender roles and gendered socialization processes create unique barriers to entry for women, such as unequal access to assets, skewed educational focus areas, and gendered daily activity expectations among women and men.<sup>161</sup>

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<sup>157</sup> Saskia Vossenber, “Beyond the Critique”, *supra* note 151

<sup>158</sup> Vossenber, “Beyond the Critique”, *supra* note 151 at 13.

<sup>159</sup> Susan Clark Muntean & Banu Ozkazanc-Pan, “A Gender Integrative Conceptualization of Entrepreneurship” (2015) 18:1 *New England Journal of Entrepreneurship* 3.

<sup>160</sup> Diane Sullivan & William Meek, “Gender and Entrepreneurship: A Review and Process Model” (2012) 27:5 *Journal of Managerial Psychology* 428.

<sup>161</sup> *Ibid.*

My thesis applies a socialist feminist<sup>162</sup> critique of entrepreneurship because of the strength of cultural experiences that shape the way women entrepreneurs view their roles in society and their chances of success in the marketplace.<sup>163</sup> Embracing a socialist feminist stance means that when there are gender differences (biological, socially constructed, or otherwise), unequal economic power relations associated with such differences are acknowledged. The environment should acknowledge and embrace gender role differences instead of dismissing or removing them.

The importance of context cannot be over emphasized. Context has led to a concept within the field of entrepreneurship, innovation and economic development called entrepreneurship (or entrepreneurial) ecosystems.<sup>164</sup> The concept of entrepreneurial ecosystems (EE) is now used by academic as well as policy practice and advice communities.<sup>165</sup> Mason and Brown<sup>166</sup> distill from literature that “an EE is a set of inter-connected entrepreneurial actors, entrepreneurial organizations, institutions and entrepreneurial processes whose interactions build a local entrepreneurial environment.”<sup>167</sup> Daniel Isenberg<sup>168</sup> outlined nine prescriptions for creating an entrepreneurship ecosystem and writes that “the entrepreneurship ecosystem consists of a set of individual elements—such as leadership, culture, capital markets, and open-minded customers—that combine in complex ways.”<sup>169</sup> While these elements may individually influence entrepreneurship, they must work together to sustain it. One of Isenberg’s prescriptions, integral

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<sup>162</sup> “Socialist feminists acknowledge the life-long socialization processes that shape women to be equal, but different than men in the ways in which they view the world”. See Clark Muntean & Ozkazanc-Pan, *supra* note 156 at 2.

<sup>163</sup> *Ibid.*

<sup>164</sup> Tsvetkova Tsvetkova, Jana Schmutzler & Rhiannon Pugh, *Entrepreneurial Ecosystems Meet Innovation Systems* (Cheltenham, UK, 2020).

<sup>165</sup> *Ibid.*

<sup>166</sup> Colin Mason & Ross Brown, “Entrepreneurial Ecosystems and Growth Oriented Entrepreneurship” (2014) OECD 38.

<sup>167</sup> *Ibid* at 5.

<sup>168</sup> Daniel Isenberg, “The Big Idea: How to Start an Entrepreneurial Revolution” *Harvard Business Review* (1 June 2010), online: <<https://hbr.org/2010/06/the-big-idea-how-to-start-an-entrepreneurial-revolution>>.

<sup>169</sup> *Ibid* at 3.

to this thesis, is to “shape the ecosystem around local conditions.”<sup>170</sup> While admitting the difficulty of governments to fashion their own local entrepreneurship style, Isenberg emphasizes that “leaders can and must foster homegrown solutions—ones based on the realities of their own circumstances, be they natural resources, geographic location, or culture.”<sup>171</sup>

This is similarly captured by de Beer, et al<sup>172</sup> in “Frameworks for Analysing African Innovation: Entrepreneurship, the Informal Economy and Intellectual Property,” where the authors analyze links between IP, the informal economy and entrepreneurship, and suggest that African policymakers must seek more holistic approaches to facilitating innovation and, in turn, to fostering socio-economic development in African nations. The authors examine the Wennekers and Thurik,<sup>173</sup> and Global Entrepreneurship Monitor (GEM)<sup>174</sup> models of building entrepreneurship in relation to IP and development and consider how both models provide distinct avenues through which to examine the potential for bolstering economic development through IP.<sup>175</sup>

Although these models, as well as the EE theory, do not use a feminist approach, they all align with the context-based approach of socialist feminism, providing a theoretical framework for analyzing how changes to IP law and policy could affect attitudes, motives, and assessment of

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<sup>170</sup> *Ibid* at 4.

<sup>171</sup> *Ibid*.

<sup>172</sup> Jeremy de Beer, Izabella Sowa & Kristen Holman, “Frameworks for Analysing African Innovation: Entrepreneurship, the Informal Economy and Intellectual Property” in *The Collaborative Dynamics of Innovation and Intellectual Property in Africa* (Cape town: UCT Press, 2014).

<sup>173</sup> Sander Wennekers & Roy Thurik, “Linking Entrepreneurship and Economic Growth” (1999) 13:1 *Small Business Economics* 27.

<sup>174</sup> *Global Entrepreneurship Monitor: 1999 Executive Report*, by Paul Reynolds (2000).

<sup>175</sup> While the Wennekers & Thurik Model proposes that changing perceptions at the individual level will be the primary way to increase innovation at the firm level and, in turn, to foster high productivity in the broader economy, the GEM lends support to the notion that innovative capacity is impacted predominantly at the macro level and must trickle downwards.

market risk in the economy for women entrepreneurs producing cosmetics. My thesis therefore borrows the ideological underpinnings of these models of entrepreneurship to identify women entrepreneurs while carrying out a socialist feminist critique of how changes to IP law and policy could affect women entrepreneurs producing cosmetics.

The World Intellectual Property Organization (WIPO) acknowledges that even though men and women are equally creative and innovative, women remain under-represented in many areas.<sup>176</sup> WIPO reiterated the organization's commitment to promoting gender equality and women's empowerment both within the organization and in the wider world of IP. WIPO's Policy on Gender Equality,<sup>177</sup> adopted in 2014, aims to provide a general framework for how the organization aims to integrate a gender perspective in its policies and programs. However, the organization admits that despite general improvements in gender equality around the world, gender gaps in patenting, persist. WIPO's latest data<sup>178</sup> show that just 30.5% of the international patent applications filed via the organization included at least one women inventor. It also admits that only limited data is available with which to measure women's contributions in other areas of intellectual property, such as trademarks and copyright.<sup>179</sup>

Some of the reasons for the absence of women discussed in this thesis are the fact that most women are innovating in the informal sector where they largely rely on trade secrets to protect their contributions,<sup>180</sup> as well as the difficulty of labeling their IP when they do not fit into

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<sup>176</sup> "Gender Equality and Intellectual Property", online: WIPO<<https://www.wipo.int/women-and-ip/en/>>.

<sup>177</sup> note 93.

<sup>178</sup> "Patent Cooperation Treaty Yearly Review - 2017", online: WIPO<<https://www.wipo.int/publications/en/details.jsp?id=4196>>.

<sup>179</sup> "Patent Cooperation Treaty Yearly Review - 2017" online: WIPO<<https://www.wipo.int/publications/en/details.jsp?id=4196>>.

<sup>180</sup> Studies have shown that trade secret is perhaps the most widely used IP protection in informal economies. See James Pooley, "Trade Secrets: the other IP right" (2013), online: WIPO

traditional IP rights. What qualifies as innovation? This situation is succinctly explained by de Beer et al, in “Innovation in the Informal Economy:”

while evidence shows that informal entrepreneurs can drive innovation, research on innovation in developing countries has been devoted mostly to formal sectors, organizations and institutions. What is lacking are studies assessing the role of innovation emanating within and from the informal sector. Who is the archetypical innovator in the informal economy? What types of innovations are generated? What is different from what one would encounter in the formal economy? Finding answers to these questions is a new field of research. On the one hand, the literature devoted to the study of the informal sector does not directly address the topic of innovation. In fact, the ability of the informal economy to do ‘new things in a different way,’ its inventive ingenuity, rarely features as a topic at all. On the other hand, the equally vast literature on national innovation systems in countries at different stages of development largely overlooks the informal sector.<sup>181</sup>

Jeremy de Beer, Chidi Oguamanam, and Tobias Schonwetter in *Innovation, Intellectual Property and Development: Narratives in Africa*, explain further that

the issue is, therefore, not whether there is African innovation, but rather whether Africa’s real and potential contributions to innovation are properly identified or valued by IP. It seems likely that certain formal, or informal, or mixed formal–informal, modes of innovation and creativity in Africa cannot be fully or properly accounted for through the Western-oriented prism of patents, copyrights, trademarks and other formal IP outputs. Many measurements used in developed countries, and exported to developing countries, betray apparent misunderstandings of the nuances of IP law, policy and practice.<sup>182</sup>

The subject matter of this thesis—women entrepreneurs producing cosmetics in the informal sector of a Third World economy—is missing from WIPO’s data simply because their inventions

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<[https://www.wipo.int/wipo\\_magazine/en/2013/03/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2013/03/article_0001.html)>; Bronwyn Hall, Christian Helmers, Mark Rogers, & Vania Sena, “The Choice between Formal and Informal Intellectual Property: A Review” (2014)52:2 *Journal of Economic Literature* 375, online: JSTOR<[www.jstor.org/stable/24433813](http://www.jstor.org/stable/24433813)>.

<sup>181</sup> Jeremy de Beer, Kun Fu & Sacha Wunsch-Vincent, in *Sacha Wunsch-Vincent & E Kraemer-Mbula, Eds, the Informal Economy in Developing Nations: Hidden Engine of Innovation? New Economic Insights and Policies* (Cambridge: Cambridge University Press, 2016) at 53.

<sup>182</sup> Jeremy de Beer, Chidi Oguamanam & Tobias Schonwetter, “Innovation, Intellectual Property and Development Narratives in Africa” in *Jeremy de Beer et al, eds, The Collaborative Dynamics of Innovation and Intellectual Property in Africa* (Cape Town: UCT Press, 2014) 1 at 6.

do not fit in with the IP status quo. In “Appropriation and Intellectual Property in the Informal Economy,”<sup>183</sup> Jeremy de Beer et al, explore how innovation is appropriated in the informal sector and summarize the practical challenges that actors in the informal economy face in using IP. The authors seek to know how individual entrepreneurs and small enterprises manage knowledge in the informal economy; whether they conceive of IP in the same way as managers in the formal sector; whether they adopt similar strategies for appropriating value and competitive advantage from knowledge; and what obstacles they face in protecting their innovations.<sup>184</sup> Similarly, Erika Kraemer-Mbula in “Informal Manufacture of Home and Personal Care Products in South Africa,”<sup>185</sup> adopts a systemic approach to examine the informal economic activities generated around the manufacture of home and personal care products, exploring these activities as part of a broader economic, social and institutional system in which informal manufacturers operate.

Extending the debate further, Maria Minniti and Carlo Nardone in “Being in Someone Else’s Shoes: The Role of Gender in Nascent Entrepreneurship,”<sup>186</sup> investigate what variables cause differences in entrepreneurial behavior across genders and whether those differences are independent from country effects. To understand the gender gap, Susan Muntean and Banu Özkazanç-Pan<sup>187</sup> deploying a feminist framework, suggest that the focus must be on institutional and structural barriers women entrepreneurs face. They propose that entrepreneurship should be conceptualized in a way that illuminates gender bias and call attention to the interrelated

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<sup>183</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>184</sup> *Ibid.*

<sup>185</sup> Erika Kraemer-Mbula, “Informal Manufacturing of Home and Personal Care Products in South Africa” in Erika Kraemer-Mbula & Sacha Wunsch-Vincent, eds, *The Informal Economy in Developing Nations: Hidden Engine of Innovation?* Intellectual Property, Innovation and Economic Development (Cambridge: Cambridge University Press, 2016) 146 at 16.

<sup>186</sup> Maria Minniti & Carlo Nardone, “Being in Someone Else’s Shoes: The Role of Gender in Nascent Entrepreneurship” (2007) 28:2 *Small Bus Econ* 223.

<sup>187</sup> Clark Muntean & Ozkazanc-Pan, *supra* note 160.

individual, institutional, and structural barriers in the entrepreneurial process that arrive out of societal and cultural gender norms.<sup>188</sup>

However, as de Beer et al point out,<sup>189</sup> studies assessing the role of innovation emanating within and from the informal sector are lacking. Even more scarce is a study that intersects women entrepreneurs and innovation in an informal economy. I have not found existing studies of women (from the perspective of feminist legal theory), or development (from the perspective of TWAIL) that have examined the nuanced intersectional nature of women's experiences in Third World countries and their experiences as entrepreneurs producing cosmetics in Nigeria's informal economy.<sup>190</sup> The excellent scholarship of Kraemer-Mbula and Wunsch-Vincent,<sup>191</sup> gives a very close picture of what such a study would entail but did not have as its focus *women* in the informal economy, focusing instead on the informal economy writ large. Similarly, the studies by de Beer et al,<sup>192</sup> which included a case study of Nigerian Leather and Textile Products,<sup>193</sup> are a robust example of a study of the IP regime and the informal sector, but do not focus on women.

As Saskia Vossenbergh argues, "feminist perspectives can enhance our understanding of entrepreneurship as a thoroughly gendered process which may shed light on how and why

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<sup>188</sup> *Ibid.*

<sup>189</sup> de Beer, Fu & Wunsch-Vincent, *supra* note 182.

<sup>190</sup> Ghazaleh Jerban's doctoral research, "Does Traditional Knowledge Have Gender? Unmasking the Experience of Female Traditional Knowledge-Holders in the Production of Iranian Saffron and Handwoven Carpets," which reconceptualized the TK issue as a gender issue to which TK law and policy fora should respond with gender-sensitive instruments, implementation plans, and adequate resources, is quite similar to this research in approach but differs in subject matter as this research focusses on the trademark regime and women entrepreneurs producing cosmetics in Nigeria. An abstract of Jerban's research can be found here: "Ghazaleh Jerban successfully defended her doctoral thesis", online: *CDTS / CLTS uOttawa* <<https://techlaw.uottawa.ca/news/ghazaleh-jerban-successfully-defended-her-doctoral-thesis>>

<sup>191</sup> Erika Kraemer-Mbula & Sacha Wunsch-Vincent, *The Informal Economy in Developing Nations: Hidden Engine of Innovation?* (Cambridge: Cambridge University Press., 2016).

<sup>192</sup> Jeremy de Beer et al, eds, *Innovation & Intellectual Property: Collaborative Dynamics in Africa*, illustrated edition ed (Claremont, South Africa: University of Cape Town Press, 2014).

<sup>193</sup> Adebambo Adewopo, Helen Chuma-Okoro & Adejoke Oyewunmi, "A Consideration of Communal Trademarks for Nigerian Leather and Textile Products" *Ibid* at 110.

businesses (don't) grow or graduate, if and how it leads to women's economic empowerment and how it contributes to gender inclusive growth.”<sup>194</sup> A gap therefore exists in the literature which this thesis sets out to fill.

#### 2.1.4 Literature on Women, Cosmetics production, and IP

Different IPRs could be appropriated at different stages of cosmetics production. They could be in the context of patent, trademark registration, manufacturing techniques, formulation as trade secrets, package design, and packaging techniques.<sup>195</sup> Women entrepreneurs operate at the various levels of cosmetics production chain. At the levels of the inputs to production and manufacturing of cosmetics, women in the informal sector can be found applying their traditional knowledge to extract raw materials for cosmetic production. The process of making butter from shea nuts, for example, represents an ancient knowledge system that has been passed on generationally from mother to daughter. Brenda Chalfin, in *Shea Butter Republic: State Power, Global Markets, and the Making of an Indigenous Commodity*, describes in detail the role of women in Shea butter production and their economic relevance. She writes, “it is women who hold knowledge of shea location, tree history, and maturation.”<sup>196</sup>

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<sup>194</sup> Vossenbergh, “Beyond the Critique”, *supra* note 39 at 12.

<sup>195</sup> Evren Yapar, “Intellectual Property and Patent in Cosmetics” (2017) 21 Marmara Pharmaceutical Journal 419–424 at 420.

<sup>196</sup> Brenda Chalfin, *Shea Butter Republic: State Power, Global Markets, and the Making of an Indigenous Commodity*. (Routledge ProQuest Ebook Central, 2004) at 7; See also for further discussion on Shea production, David Glew & Peter Lovett, “Life Cycle Analysis of Shea Butter Use in Cosmetics: From Parklands to Product, Low Carbon Opportunities” (2014) 68 Journal of Cleaner Production 73–80.

The tension of traditional knowledge protection in cosmetics production becomes obvious at this stage. Chidi Oguamanam<sup>197</sup> explores the attempts by international law to recognize and protect the knowledge of Indigenous and local communities. However, as he concludes,

Seeking to protect indigenous knowledge by means of mainstream intellectual property rights, even in their suggested *sui generis* forms without accommodating the idea of epistemic pluralism may be counterproductive to the goal of protecting indigenous knowledge. In the context of traditional medicine, intellectual property privileges Western biomedicine because of the former's appeal to a narrow view of science. Consequently, the psychosocial foundation of traditional therapeutic culture is not accounted for by mainstream intellectual property.<sup>198</sup>

Similarly, Terra Gearhart-Sema<sup>199</sup> discusses the ways the IP regime disempowers women's traditional knowledge holders. Catherine Bell<sup>200</sup> suggests that when it comes to using IP law to protect traditional knowledge, there is the need to "step outside the IP box and take an integrated approach across many areas of national and international law."<sup>201</sup> Regarding patents, Kara Swanson<sup>202</sup> and Dan Burk<sup>203</sup> have drawn attention to the difficulty of the knowledge of women meeting the statutory requirements for patentability. This thesis will not attempt to find or fit women entrepreneurs producing cosmetics within the patent system.

When it comes to formal IP rights, trademarks hold more potential for women entrepreneurs than patents. Trademarks are for end products and cost less than patents which are cost intensive,

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<sup>197</sup> Chidi Oguamanam, *International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity, and Traditional Medicine* (Toronto: University of Toronto Press, Scholarly Publishing Division, 2006).

<sup>198</sup> *Ibid* at ii.

<sup>199</sup> Gearhart-Sema, "Women's Work, Women's Knowing", *supra* note 25.

<sup>200</sup> Catherine Bell, "Intellectual Property and Indigenous Cultural Heritage: Ongoing Research and Issues of Reform" (2011) 1 York Centre for Public Policy & Law 13.

<sup>201</sup> *Ibid* at 7.

<sup>202</sup> Swanson, *supra* note 25.

<sup>203</sup> Burk, *supra* note 151.

high-tech, and rooted in conventional R&D, and are used only by a minority of firms.<sup>204</sup> “Entrepreneurs operating in the informal sector use less formal IP protection but when they do use IP, trademarks are particularly important.”<sup>205</sup> This is especially so for women involved in the marketing and retailing of cosmetics, as well as for those providing beauty services. Alexandra Mogyoro’s<sup>206</sup> discussion on pseudo marks is quite instructive for this thesis. She discusses the “ecosystem” of trademark law as composed of various marks, such as individual trademarks, collective marks, certification marks and other pseudo-marks<sup>207</sup> that are or could be accommodated under trademark law.

Similarly, George Essegbey and Stephen Awuni’s research<sup>208</sup> on herbal medicine in the informal sector of Ghana provides a lot of insight on how most entrepreneurs in the informal sector typically rely on the “traditional protection strategy of secrecy”<sup>209</sup> to protect their IP. While the protection of geographical indications (GI) may hold some potential for women producing cosmetics in Nigeria, as Irene Calboli<sup>210</sup> points out “the arguments in favor and against the expansion of GI protection raise important and serious concerns.” She argues that “the major problem of GI is the precise boundaries of the rationale and scope of their protection and the defenses applicable to their unauthorized uses.”<sup>211</sup> Calboli warns that “GIs represent a unique type

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<sup>204</sup> de Beer, Fu & Wunsch-Vincent, *supra* note 81.

<sup>205</sup> *Ibid* at 238.

<sup>206</sup> Alexandra Mogyoros, “Pseudo-Certification Marks” (2021) 43:4 EIPR 17.

<sup>207</sup> *Ibid*.

<sup>208</sup> George Owusu Essegbey & Stephen Awuni, “Herbal Medicine in the Informal Sector of Ghana” in *The Informal Economy in Developing Nations: Hidden Engine of Innovation?* (Cambridge University Press, 2016) 194.

<sup>209</sup> *Ibid* at 225.

<sup>210</sup> Irene Calboli, “Expanding the Protection of Geographical Indications of Origin Under Trips: Old Debate or New Opportunity?” (2006) Marq Intell Prop L Rev 181.

<sup>211</sup> *Ibid* at 202.

of IPR, such that overprotection and abuse could be very detrimental to the international community.”<sup>212</sup>

More importantly, GIs may not be helpful to women entrepreneurs in the informal sector who often favor direct sales or short distribution channels and lack the advanced supply structure that is required for the success of efficiently marketing GI in Third World countries. Rather, semi-formal IP protection holds some potential for women entrepreneurs producing cosmetics in Nigeria. In “Appropriation and Intellectual Property in the Informal Economy,”<sup>213</sup> de Beer et al discuss extensively about the role of semi-formal IP protection<sup>214</sup> in informal economies. The discussion offers insights to other possibilities for women entrepreneurs producing cosmetics in Nigeria, as they could benefit from these semi-formal mechanisms mostly because of their ease of administration and cheaper cost of acquisition.

The literature reviewed so far provides just enough illumination for this thesis to proceed. A gap exists in the literature in that the bulk of research has not focused on women entrepreneurs and the unique experiences they are having (or not having) in the IP system, and how that impacts women’s development.

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<sup>212</sup> *Ibid.*

<sup>213</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>214</sup> They could take the form of formal contractual or informal arrangements primarily among private actors, such as secrecy, publishing, non-competition clauses, non-disclosure agreements, contracts & others

## 2.2 Theoretical Framework

Is the gender of the knower epistemologically significant?<sup>215</sup>

This thesis engages in an intersectional analysis of the potential role of intellectual property rights as a development tool for women entrepreneurs producing cosmetics, who are innovating in the informal economy of a Third world country—Nigeria. It exposes the multiplicative effects of different but interdependent categories and factors<sup>216</sup> affecting women entrepreneurs in the IP system utilizing insights from feminist legal theory and Third World Approaches to International Law.

### 2.2.1 Feminist Legal Theory

This thesis constitutes feminist research because its goal is to increase “understanding of the processes through which inequality...are reproduced with an eye toward eradication of that inequality.”<sup>217</sup> Cynthia Enloe<sup>218</sup> articulates the idea of “feminist curiosity” as a way of saying that feminism is about the questions you ask, not just the answers you give. She links women’s roles in economic markets to women’s everyday lives. According to Enloe, “feminism has stirred up what is normally silenced, backgrounded and relayed to the margins, by starting from the seemingly simple question: where are the women?”<sup>219</sup> Like Enloe, this thesis draws attention to

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<sup>215</sup> Lorraine Code & Sandra Burt, *Changing Methods: Feminists Transforming Practice*. (Peterborough, Ontario, Canada: Broadview Press 1995.) cited in Andrea Doucet & Natasha Mauthner, “Feminist Methodologies and Epistemology” in *C D Bryant and D L Peck (Eds), Handbook of 21st Century Sociology* (Thousand Oaks, CA: Sage, 2006) 36 at 36.

<sup>216</sup> Leslie McCall, “The Complexity of Intersectionality” (2005) 30:3 *Signs: Journal of Women in Culture and Society* 1771.

<sup>217</sup> Shannon Davis & Angela Hattery, “Teaching Feminist Research Methods: A Comment and an Evaluation” (2018) 15:15 *Journal of Feminist Scholarship* 49–60 at 51.

<sup>218</sup> Enloe, *supra* note 142.

<sup>219</sup> P Schouten & H Dunham, “Cynthia Enloe on Militarization, Feminism, and the International Politics of Banana Boats” (2012) 12 at 2.

the politics of gender in the IP system to understand not just the way states operate, but how women entrepreneurs are affected by it. For Enloe,

the whole cluster of ideas about gender drives decision-making, drives alliances, and drives hostilities; it allows for certain kinds of structures to seem normal and therefore unchallengeable—until a feminist comes along. It makes certain kinds of hierarchies—racial and class, both race as gender and class as gender—seem as though they are rational and efficient, either internationally or at other levels.<sup>220</sup>

Indeed, investigating the prioritization of knowledge and differentiated treatment in the United Nations Guiding Principles on Business and Human Rights, Simons and Handl<sup>221</sup> argue that “the text, structure, and nature of the United Nations Guiding Principles not only fail to acknowledge women’s experiences or to protect women’s rights in the realm of resource extraction but also help to perpetuate the patriarchal and neo-liberal structures that oppress women.”<sup>222</sup> IP laws also claim to be gender-neutral but the language of non-discrimination and equality in the text of international instruments, such as WTO and TRIPS, “only gives women access to a world already constituted.”<sup>223</sup>

It has been similarly observed that even international human rights instruments that specifically address women include a “norm of formal non-discrimination, providing that, in particular or general contexts, women should be treated the same as men.”<sup>224</sup> This is the problem for women in the IP system. It is inequitable to treat vulnerable groups equally with non-vulnerable

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<sup>220</sup> *Ibid* at 6.

<sup>221</sup> Penelope Simons & Melisa Handl, “Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction” (2019) 31:1 *CJWL* 113.

<sup>222</sup> *Ibid* at 134.

<sup>223</sup> Simons & Handl, “Relations of Ruling”, *supra* note 122 citing Hilary Charlesworth, “What Are ‘Women’s International Human Rights?’” in Rebecca J Cook, ed, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994).

<sup>224</sup> *Ibid*.

groups. Timo Makkonen argues that “political equality is about giving vulnerable groups a voice, especially in matters that are of particular concern to them, with a view to preventing their de facto disenfranchisement from decisions that have a profound effect on their life.”<sup>225</sup>

My thesis utilizes Enloe’s feminist approach (which led to remapping the boundaries of international relations) to examine the role of IPRs on women entrepreneurs with the objective of similarly contributing towards remapping the boundaries of the international IP system by deliberately adding women to the IP system. This is motivated by the realization that women are missing from the quilt of IP as a result of what Gearhart-Sama describes as “a split in the valuation of different types of knowledge that stems not only from a patriarchal natural-feminine / rational-masculine divide, but also from the vestiges of colonialism, in which the colonizing nations and their associated knowledge viewed colonized societies as natural and undeveloped (gendered feminine).”<sup>226</sup> This disappearance is equally fueled by the general assumption that IP laws are neutral.<sup>227</sup> Such an assumption can be countered through a feminist analysis.

Feminist analyses expose the underlying power, social structures, and theory of IP that would remain neglected if the dominant mode of analysis in the discourse continue to be adopted.<sup>228</sup> For instance, by remaining silent on gender, the United States Patent Act of 1790

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<sup>225</sup> Timo Makkonen, *Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response thereto in Europe*, The Erik Castrén Institute monographs on international law and human rights v. 13 (Leiden ; Boston: Martinus Nijhoff Publishers, 2012).

<sup>226</sup> Gearhart-Sama, “Women’s Work, Women’s Knowing”, *supra* note 25 at 383.

<sup>227</sup> See Dan Burk, “Bridging the Gender Gap in Intellectual Property” *WIPO* (April 2018), online: WIPO <[https://www.wipo.int/wipo\\_magazine/en/2018/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2018/02/article_0001.html)>; Swanson also explains that “facially neutral IP law is not neutral but imbued with the assumptions of those who wrote it and interpret it, . . . Identifying this problem is a first step toward addressing the problem.” See Swanson, “Intellectual Property and Gender”, *supra* note 71.

<sup>228</sup> Debora Halbert, “Feminist Interpretations of Intellectual Property” (2006) 14 *Social Policy* 31 at 432; Feminist scholars and women scientists have criticized science because they believe it presents itself as objective and neutral while ignoring its inherent gender bias. Some feminists criticize traditional scientific discourse as being historically biased towards a male perspective. See e.g. Londa Schiebinger, “Has Feminism Changed Science?” (2000) 25:4 *Signs*

purported to offer women the same patenting privileges as men, ignoring the social, psychological, and economic obstacles that prevented women from taking advantage of those privileges for many years.<sup>229</sup> While some women may have surmounted barriers (social prohibitions) in the patent system, they still face “the new ‘social, psychological, and economic obstacles’ to women’s attainment of IPRs which stem from the type of knowledge in question.”<sup>230</sup>

Today, if a woman creates knowledge within the male-dominated invention paradigm, she could get a patent for the invention if she is able to overcome today’s barriers, which include a lack of access to capital among others. But if a woman wants recognition within the framework of IP law for the knowledge that her mother passed down to her and which she uses in common with other women in her community, such as in the production of shea butter from shea nuts,<sup>231</sup> then her chances become very limited. Women still lack the ability to gain recognition as authors of their knowledge when such knowledge (traditional knowledge) is inextricably linked to the community of women and passed down through generations. This has several ramifications for women entrepreneurs in the IP system.

A feminist analytical lens allows us to view social actions and policy making differently and to uncover underlying assumptions about social action.<sup>232</sup> Halbert argues that “feminist theory can be used to create a critique of expanding intellectual property rights.”<sup>233</sup> It can

make visible the underlying masculine assumptions existing in the construction of intellectual property as well as highlight a political economy of intellectual property

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1171–1175; Sandra Harding, “Introduction: Is There a Feminist Method?” in *Nancy Tuana, (ed), Feminism & Science* (Indiana University Press, 1989).

<sup>229</sup> Gearhart-Sema, “Women’s Work, Women’s Knowing”, *supra* note 23 at 387, citing Anne MacDonald, *Feminine Ingenuity: Women and Invention in America*, illustrated edition (New York: Ballantine Books, 1994).

<sup>230</sup> *Ibid* at 387.

<sup>231</sup> Chalfin, *supra* note 77.

<sup>232</sup> Halbert, *supra* note 229 at 431.

<sup>233</sup> *Ibid*.

that has historically benefited men more than women. Furthermore, the value of a feminist analysis is that it can be used politically—to think actively about what the future may hold by avoiding choices that privilege men more than women.<sup>234</sup>

This thesis employs intersectionality as a paradigm for contemporary feminist theory.

### 2.2.1.1 Intersectionality

Intersectionality is now a pivotal approach of conceptualizing the relation between systems of oppression which construct women’s multiple identities and their social locations in hierarchies of power and privilege.<sup>235</sup> The metaphor of intersecting categories of discrimination was introduced and later elaborated on by Kimberlé Williams Crenshaw<sup>236</sup> to show how systems of oppression overlap.<sup>237</sup> According to Kathy Davis,<sup>238</sup> “intersectionality addresses the most central theoretical and normative concern within feminist scholarship: namely, the acknowledgement of differences among women,”<sup>239</sup> and is now recognized as a “theoretical and political remedy”<sup>240</sup> to the problem of exclusions facing contemporary feminism.<sup>241</sup> In “Gender and Intersectionality in Business and Human Rights Scholarship,” Handl et al<sup>242</sup> highlight some themes that transect most scholarship on intersectionality and resonate with this research. Some of these are: 1) Intersectionality is anti-essentialist. In an anti-essentialist approach, complex experiences are defined “as closely to their full complexity as possible and that we do not ignore voices at the

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<sup>234</sup> *Ibid* at 433.

<sup>235</sup> Anna Carastathis, “The Concept of Intersectionality in Feminist Theory” (2014) 9:5 *Philosophy Compass* 304.

<sup>236</sup> Crenshaw, “Mapping the Margins”, *supra* note 83.

<sup>237</sup> *Ibid*.

<sup>238</sup> Kathy Davis, “Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful” (2008) 9:1 *Feminist Theory* 67.

<sup>239</sup> *Ibid* at 70.

<sup>240</sup> Carastathis, *supra* note 236.

<sup>241</sup> Kathy Davis, “Intersectionality as Buzzword”, *supra* note 144

<sup>242</sup> Melisa Handl, Sara Seck & Penelope Simons, “Gender and Intersectionality in Business and Human Rights Scholarship” (2022) *Business and Human Rights Journal* 1.

margin.”<sup>243</sup> Understanding complexity is vital to this research because “people are only (but fully) seen in all their complexity in terms of their location and relationships with others.”<sup>244</sup> Consequently, as argued in this research, “other identity categories such as class, race, geopolitical location or the legacies of colonialism cannot, therefore, simply be subtracted from gender; they are ‘inextricable from gender.’”<sup>245</sup> 2) “Social identity categories are relational and linked to the power structures that define them and they ‘cannot be meaningfully understood without reference to the wider historical contexts that shape [them]’”<sup>246</sup> In this sense, context is critical to knowing, which would include “contexts of structural inequality, affective economies, ideological forces, history, social location.”<sup>247</sup> What intersectionality offers this research is tools to explore the different nuances of entrepreneurship that could implicate the utilization of IP. 3) Intersectionality is not additive. “Systems of oppression and of privilege do not work together as the mere sum of their individual effects. Rather, they intersect and thus create a distinct, unique and discrete form of oppression.”<sup>248</sup> Indeed, intersectionality theory is celebrated as the “most important contribution that women’s studies have made so far.”<sup>249</sup>

Intersectionality therefore has theoretical benefit for this thesis because unlike monistic approaches, it captures experiential and structural complexities. Leslie McCall<sup>250</sup> distinguishes three kinds of complexity that intersectionality as a heuristic offer: the attempt to manage

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<sup>243</sup> Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10:1 Berkeley Journal of Gender, Law & Justice 16 at 22.

<sup>244</sup> Shreya Atrey, “Beyond Universality: An Intersectional Justification of Human Rights” in *S Atrey and PDunne(eds), Intersectionality and Human Rights Law* (Oxford: Hart Publishing, 2020) at 34.

<sup>245</sup> Handl, Seck & Simons, *supra* note 243 at 6.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> Davis, “Intersectionality as buzzword”, *supra* note 239 at 1771.

<sup>250</sup> McCall, *supra* note 217.

complexity,<sup>251</sup> what the author calls the inter-categorical approach,<sup>252</sup> the intra-categorical approach,<sup>253</sup> and the anti-categorical approach.<sup>254</sup> I turn to each below.

Each of these three approaches are defined in terms of how they treat categories, that is, how they understand and use analytical categories to explore the complexity of intersectionality in social life. The inter-categorical begins on the premise that there are relationships of inequality among already constituted social groups, such as women entrepreneurs, and takes these relationships as the center of analysis. This approach requires that scholars provisionally adopt existing analytical categories to document relationships of inequality among social groups and changing configurations of inequality along multiple and conflicting dimensions.<sup>255</sup> The intra-categorical complexity interrogates the boundary-making and boundary-defining process itself, and tends to focus on particular social groups at neglected points of intersection, that is, people whose identity cross the boundaries of traditionally constructed groups to reveal the complexity of lived experiences within such groups.<sup>256</sup> The anti-categorical approach is based on a methodology that deconstructs analytical categories. Here, social life is considered too irreducibly complex to force fixed categories.<sup>257</sup>

Managing complexity is a key part of this thesis as it aims to tease out nuances in the experiences of women entrepreneurs that may encourage or inhibit their engagement with the IP system as well as the role that engagement (or lack of it) plays on their economic development.

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<sup>251</sup> *Ibid* at 1773.

<sup>252</sup> *Ibid* at 1786.

<sup>253</sup> *Ibid* at 1774.

<sup>254</sup> *Ibid* at 1773.

<sup>255</sup> *Ibid* at 1786.

<sup>256</sup> *Ibid* at 1774.

<sup>257</sup> *Ibid* at 1773.

Hancock's<sup>258</sup> definition of intersectionality as a body of normative theory and empirical theory that proceeds under six key assumptions,<sup>259</sup> sums this up succinctly and is instructive to my thesis. The assumptions are stated thus:

1. More than one category of difference (e.g., race, gender, class) play a role in examinations of complex political problems and processes such as persistent poverty, civil war, human rights abuses, and democratic transitions.
2. While these various categories of difference should be equally attended to in research, the relationship among the categories is an open empirical question. The intersections of these categories are more than the sum of their parts. They are not additive, rather the parts make up a process of interaction that create a unique form of oppression that varies according to time and place.
3. Categories of difference are conceptualized as dynamic productions of individual and institutional factors. Such categories are simultaneously contested and enforced at the individual and institutional levels of analysis. Intersectionality research demands attentiveness to these facts.
4. Each category of difference has within-group diversity that sheds light on the way we think of groups as actors in politics and on the potential outcomes of any political intervention.
5. An intersectional research project examines categories at multiple levels of analyses—not simply by adding together mutually exclusive analyses of the

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<sup>258</sup> Ange-Marie Hancock, "Intersectionality as a Normative and Empirical Paradigm" (2007) 3 *Politics & Gender* 248.

<sup>259</sup> *Ibid* at 251.

individual and institutional levels but by means of an integrative analysis of the interaction between the individual and institutional levels of the research question.

6. Intersectionality's existence as a normative and empirical paradigm requires attention to both empirical and theoretical aspects of the research question. The conventional wisdom among intersectionality scholars considers multiple methods necessary and sufficient.<sup>260</sup>

This thesis utilizes intersectionality as a paradigm for contemporary feminist theory guided by the above six assumptions. This is because these assumptions resonate deeply with the research questions and provide a guide to carry out a multi-layered examination of the “actual” role of IP as a development tool for women producing cosmetics in Nigeria. In the first place, women entrepreneurs face intersecting forms of discrimination that cannot be reduced to a single category. These assumptions provide a guide for me to carry out an intersectional analysis of the various but interconnected factors and social qualities such as gender, literacy, lack of access to funds, poor infrastructure, poor governance, and so on. These are factors that contribute to the eventual result of utilization (or non-utilization) of IP by women entrepreneurs. Secondly, these assumptions provide a guide that may ensure a multi-level analysis of the intersecting factors, processes and structures impacting the issue of IP; and engender questions regarding how IP issues are framed and understood. Handl et al similarly identify the need to engage with intersectionality as an analytic tool in business and human rights (BHR) scholarship and argue that an intersectional approach to BHR issues can help to illuminate structures of oppression “by challenging simplistic

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<sup>260</sup> *Ibid.*

representations about gender, race and other issues....”<sup>261</sup> In this analysis, I similarly challenge simplistic representations about gender in women’s entrepreneurship and the IP regime by examining the intersections of gender and religion, gender and culture, gender and geographical location, gender and educational background, and finally, gender and politics.

### 2.2.2 Third World Approaches to International Law (TWAIL)

Extending Cynthia Enloe’s enquiry— “does gender matter?”<sup>262</sup> —I ask, does race matter? That is, do the politics of race matter for the ways in which people (women) experience IP and the way that people with power try to control IP? I ask, further, Does the geographical location of women entrepreneurs affect / control the way they experience IP? TWAIL is a historically located intellectual and political movement.<sup>263</sup> Even though it is not bounded by geography, its thinkers have been from the Third World. TWAIL was birthed<sup>264</sup> to create a coalition of Third World states that would articulate political and economic issues specific to them and force these issues onto the international agenda.

TWAIL is driven by the need “to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.”<sup>265</sup> Mohammed Bedjaoui, a renown Third World writer, describes the failure of international law to carry along

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<sup>261</sup> Handl, Seck & Simons, *supra* note 243 at 4.

<sup>262</sup> Enloe, *supra* note 142.

<sup>263</sup> Makau Mutua, “What Is TWAIL?” (2000) 94 Proceedings of the ASIL Annual Meeting 31–38.

<sup>264</sup> This took place at the Bandung Conference which took place in Bandung, Indonesia, in 1955. It brought together the first independent African and Asian states and launched a political movement that continues to influence global politics. *Ibid* at 31.

<sup>265</sup> *Ibid*.

the development needs of the Third World as a “poverty of the international order,”<sup>266</sup> an “international law of indifference”<sup>267</sup> that has historically upheld a “predatory economic order”<sup>268</sup> based on the exploitation of the weak in the interests of the powerful. Following this, TWAIL seeks to construct and present an alternative normative legal edifice for international governance<sup>269</sup> by introducing “a new way of thinking about law, a new kind of law and most important of all, a new way of making law.”<sup>270</sup> Lastly, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.<sup>271</sup>

This can be achieved by questioning “the very foundations of the legal system that upholds the existing economic order.”<sup>272</sup> At the heart of the Third World critique is the recognition of the need to reframe the questions we ask because the “framing of questions in traditional ways reproduces prevailing paradigms like racism, patriarchy, the civilizing mission.”<sup>273</sup> With the historical experience of universal importation of white supremacist ideologies through Christianity and colonization, TWAIL frowns on attempts to confer universality on norms and practices that are European in origin, thought, and experience.<sup>274</sup>

This is particularly so when such norms are codified into international law thus becoming a requirement for non-European societies in the post-colonial era. “TWAIL scholars focus on how European expansion and exploitation of non-European peoples constructed an imperial

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<sup>266</sup> Mohammed Bedajoui, *Towards a New International Economic Order* (New York: Holmes & Meier Pub, 1979) at 1.

<sup>267</sup> *Ibid* at 23–51.

<sup>268</sup> *Ibid* at 50.

<sup>269</sup> Mutua, *supra* note 264.

<sup>270</sup> Mickelson, “Rhetoric and Rage”, *supra* note 17 at 372.

<sup>271</sup> Mutua, *supra* note 264 at 31.F

<sup>272</sup> Mickelson, “Rhetoric and Rage”, *supra* note 17 at 371.

<sup>273</sup> Jeanne Woods, “Introduction: Theoretical Insights from the Cutting Edge” (2010) 104 Proceedings of the Annual Meeting (American Society of International Law) 389.

<sup>274</sup> Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42:1 Harv Int'l LJ 201.

international law.”<sup>275</sup> As Anghie argues, the “extension and universalization of the European experience, which is achieved by transmuting it into the major theoretical problem of the discipline [international law], has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied.”<sup>276</sup> According to Mutua, “International law itself was founded on the preeminence of four specific European biases: geographic Europe as the center, and Christianity, mercantile economics, and political imperialism as superior paradigms.”<sup>277</sup>

The protection of intellectual property through the treaty on Trade Related Aspects of Intellectual Property Rights (TRIPs) is arguably another attempt by the First World to impose their economic values globally without consideration of the development needs of the Third World. TWAIL scholarship does not support the idea that free-market, private property, or trade values are superior to, or automatically trump, other human values.<sup>278</sup> While universalism is sometimes inevitable, how that process is conducted is particularly important. There is need to transform the nature of globalization by “reconceptualizing and restructuring international [IP] law.”<sup>279</sup> TWAIL resists the tendency of the First World to turn their unique contexts into international imperatives (by codifying them as international law) and attempting to impose them globally, such as through a global IP regime. As a result, arguments have been made by TWAIL scholars exposing the

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<sup>275</sup> James Gathii, “Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other” (2020) 67 UCLA Law Review, online: <<https://papers.ssrn.com/abstract=3620343>> at 2.

<sup>276</sup> Antony Anghie, ed, “Finding the Peripheries: Colonialism in Nineteenth-Century International Law” in *Imperialism, Sovereignty and the Making of International Law* Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2005) 32 at 7.

<sup>277</sup> Mutua, “Savages, victims, and saviors”, *supra* note 267 at 214.

<sup>278</sup> Mutua, *supra* note 267.

<sup>279</sup> Makau Mutua, “Critical Race Theory and International Law: The View of an Insider-Outsider Mutua, Makau, Critical Race Theory and International Law: The View of an Insider-Outsider (2000) 45 Villanova Law Review 841, online: <<https://papers.ssrn.com/abstract=1525526>> at 851.

prioritization of developed world's interest by imposing a global IP regime on those of the less-developed world.

This thesis intersects with three of the four strands of TWAIL scholarship expounded by James Gathii in “The Agenda of Third World Approaches to International Law (TWAIL).”<sup>280</sup> The first strand of TWAIL scholarship “traces how international law produces and shapes international legal rules, doctrines and practices that have profound implications for the global distribution of wealth and power, particularly along North / South; European / Non-European axis.”<sup>281</sup> This thesis examines how the IP regime is projected as a universal ideal but is currently constituted in ways detrimental to Third World countries. The second strand traces international law's close connection with capitalism. This thesis similarly joins other TWAILers<sup>282</sup> by investigating the role of IP laws “in legitimizing and sustaining the unequal structures and processes that manifest themselves in the growing north–south divide”<sup>283</sup> and argues that the IP legal regime appears to aid the structuring of “global markets so that they continue to serve as sources of raw materials for European capitals.”<sup>284</sup> The fourth<sup>285</sup> strand of TWAIL scholarship traces the role of international law as a “‘material practice’ in the everyday operation and application of its rules, doctrines and

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<sup>280</sup> James Gathii, “The Agenda of Third World Approaches to International Law (TWAIL)” Forthcoming in *Jeffrey Dunoff and Mark Pollack (eds) International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022).

<sup>281</sup> *Ibid* at 13.

<sup>282</sup> See for example, B S Chimni, “Capitalism, Imperialism, and International Law in the Twenty-First Century” (2012) 14:1 *Oregon Review of International Law* 017–045.

<sup>283</sup> Gathii, *supra* note 281 at 14.

<sup>284</sup> *Ibid*.

<sup>285</sup> The third strand of TWAIL scholarship highlighted by Gathii, traces the origins of the state as a product of European colonialism and imperialism and examines the consequences of its adoption in the non-European world but does not intersect with this thesis.

practices”<sup>286</sup> and emphasizes how international law practices operate to construct a particular meaning of the universal.

This thesis, through an analysis of the IP regime, examines “the administrative procedures, municipal norms, private bureaucracies, and innocuous technical or commercial things which are the material sites in which international law works and gains its power,”<sup>287</sup> with a focus on how IP laws constitute and reconstitute “routines, spaces and objects.”<sup>288</sup> Drawing on TWAIL and feminist scholarship, this thesis argues that international law is not merely organized and distributed on a First World / Third World axis but organizes and distributes power by privileging males over females. It asserts that gender roles are key to understanding how “international law shapes the unjust and oppressive outcomes for women.”<sup>289</sup> It further extends TWAIL scholarship by engaging gender and intersectionality in its analysis. This research applies what I frame as an “Intersectional Feminist TWAIL” (IFTWAIL) approach to draw attention to some inclusions and omissions in the IP legal framework that exacerbate the challenges of women’s entrepreneurship in Third World countries. It questions the claimed neutrality of IP laws and joins other feminist TWAIL scholars<sup>290</sup> in arguing “that legal analysis cannot be separated from the political, economic, historical and cultural context in which people live.”<sup>291</sup> Indeed, TWAIL requires the inclusion of feminist narratives because feminism offers an important vehicle for challenging the acceptable narrative of international law. This research takes a stand in the debate about the role of IP in development

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<sup>286</sup> Gathii, *supra* note 281 at 17.

<sup>287</sup> *Ibid* at 19.

<sup>288</sup> *Ibid*.

<sup>289</sup> *Ibid* at 22.

<sup>290</sup> Mosope Fagbongbe, “The Future of Women’s Rights from a TWAIL Perspective” (2008) 10:4 International community law review 401–409; Vasuki Nesiah, “Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence” (2018) 112 Am J Int’l L 313.

<sup>291</sup> Hilary Charlesworth, Christine Chinkin & Shelley Wright, “Feminist Approaches to International Law” (1991) 85:4 Am J Int’l L 613 at 613.

and questions the gender neutrality of the IP regime and its effect on women's development in Third World countries, with the objective that this questioning will generate "a new ground, with a new set of fault lines, from which to situate and shape future political engagement"<sup>292</sup> with the IP regime.

In examining the role of IP for Nigerian (Third World) women entrepreneurs innovating mostly behind the scenes in forgotten parts of the Third World, I use "race as a broad intersectional and transnational category of analysis that leaves space for discussions of the Third World with respect to distributive justice, access to knowledge, and even neo-coloniality."<sup>293</sup> This approach is imperative for the decolonization of the IP regime because the study of race in the context of intellectual properties must be an intersectional enterprise in order to achieve what Bedjaoui describes as "an international law of participation, genuinely all-embracing and founded on solidarity and co-operation, which must give great prominence to the principle of equity (which corrects injustices) rather than the principle of equality."<sup>294</sup> This thesis therefore employs an IFTWAIL approach in order to not only draw attention to the need for the Third World to adapt and innovate IP within their own realities instead of importing IP laws and policies wholesale,<sup>295</sup> but to locate and include Third World women entrepreneurs and the unique conditions of their entrepreneurship in such IP framework.

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<sup>292</sup> Vasuki Nesiiah, "The ground beneath her feet: 'Third world' feminisms" (2003) 4 *Journal of International Women's Studies* at 37.

<sup>293</sup> Anjali Vats & Deidre A Keller, "Critical Race IP" (2017), online: <<https://papers.ssrn.com/abstract=3050898>> at 761.

<sup>294</sup> Bedajoui, *supra* note 267 at 127.

<sup>295</sup> Usha Natarajan et al, "Introduction: TWAIL - on praxis and the intellectual" (2016) 37:11 *Third World Quarterly* 1946.

## 2.3 Methodology

This thesis engages in a legal doctrinal analysis of the potential role of intellectual property rights (IPRs) as a development tool for women entrepreneurs producing cosmetics, who are innovating in the informal economy of a Third World country—Nigeria. However, over time, the study of law has expanded the traditional doctrinal approach and made room for a more contextual and interdisciplinary approach.<sup>296</sup> This thesis therefore adopts feminist methods which emanate from the position that gender must be considered as a crucial factor in research.<sup>297</sup>

Overall, the thesis engages in legal doctrinal research that employs the feminist method of asking the woman question. While traditional legal methods place a high premium on the predictability, certainty, and fixity of rules, feminist legal methods have emerged from the critique that existing rules over represent existing power structures, value rule-flexibility, and the ability to identify missing points of view.<sup>298</sup> As Doucet and Mauthner explain, “questions about who produces knowledge?,”<sup>299</sup> “who can be a knower?,”<sup>300</sup> “whose knowledge?,”<sup>301</sup> and “who speaks

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<sup>296</sup> Fiona Cownie, *Legal Academics: Culture and Identities*, 1st edition ed (Oxford; Portland, Or: Hart Publishing, 2004) at 197.

<sup>297</sup> See, “Gender Mainstreaming, An Overview” *UN Women* (2002), online: <<https://www.un.org/womenwatch/osagi/gendermainstreaming.htm>>; See also, Global Affairs Canada, “Gender Analysis”, (14 June 2017), online: *GAC* <[https://www.international.gc.ca/world-monde/funding-financement/gender\\_analysis-analyse\\_comparative.aspx?lang=eng](https://www.international.gc.ca/world-monde/funding-financement/gender_analysis-analyse_comparative.aspx?lang=eng)> Last Modified: 2019-04-23 “An understanding of socio-economic relations, and with it gender relations, is an integral part of policy analysis, and is essential in creating and implementing effective development co-operation initiatives. Analysis of the different situations of men and women can provide an understanding of the different impacts that legislation, cultural practices, policies, and programs can have on women and men.”

<sup>298</sup> Katharine Bartlett, “Feminist Legal Methods” (1989) 103 *Harvard Law Review* 829 at 831.

<sup>299</sup> Doucet & Mauthner, *supra* note 216 at 31.

<sup>300</sup> Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (Ithaca, NY: Cornell University Press, 1991).

<sup>301</sup> Sandra Harding, *The Science Question in Feminism*, reprint edition ed (Ithaca: Cornell University Press, 1986).

for whom?”<sup>302</sup> have become critical in contemporary feminist, postmodern, and postcolonial climates.”<sup>303</sup>

To engage fully with the different aspects of the study, the thesis employs an interdisciplinary approach from a feminist standpoint<sup>304</sup> to examine the research questions.<sup>305</sup> For its legal aspect (the discipline of law), the thesis uses established feminist methods of inquiries to analyze and interrogate the intellectual property system, focussing on the trademarks regime, as well as semi-formal and informal forms of IP appropriation. The thesis will analyze relevant provisions from appropriate international treaties, Nigerian IP laws, as well as the policies of appropriate international, regional, and national institutions.

The approach of this analysis is best described as an IFTWAIL approach because it draws on intersectionality, feminism and TWAIL approaches, where appropriate, to call attention to dominant First World assumptions regarding IP and the Third World. The analysis focuses in part on the complexities of the lives of Third World women entrepreneurs that have been (are being) shaped by historical, economic, social, cultural, religious, and other experiences. This is achieved through an intersectional lens that acknowledges the tensions regarding universalism and cultural

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<sup>302</sup> Lorraine Code, “How Do We Know?: Questions of Method in Feminist Practice.” in *Changing Methods: Feminists Transforming Practice* (Peterborough, Ontario, Canada: University of Toronto Press, 1995) 13; Lourdes Torres, Chandra Talpade Mohanty & Ann Russo, eds, *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991).

<sup>303</sup> Doucet & Mauthner, *supra* note 216 at 40.

<sup>304</sup> “A feminist standpoint perspective assumes that women have unique experiences as women, and thus the preferential right of interpretation regarding knowledge about women and their conditions.” See Colette Henry, Lene Foss & Helene Ahl, “Gender and entrepreneurship research: A review of methodological approaches” (2016) 34:3 *International Small Business Journal* 217–241 at 8; A standpoint analysis is designed to produce knowledge that is for women, instead of for the effective management of dominant institutions. For a fuller discussion on Standpoint theory, see Sandra Harding, “Introduction: Standpoint Theory as a Site of Political, Philosophic, and Scientific Debate” in Sandra G Harding, ed, *The Feminist Standpoint Theory Reader: Intellectual and Political Controversies* (Routledge, 2004) 1.

<sup>305</sup> B Courtney Doagoo et al, eds, *Intellectual Property for the 21st Century: Interdisciplinary Approaches* (Toronto; Holmes Beach: Irwin Law, 2014).

relativism in IP discourse and emphasizes the need to locate rights in their proper context, by recognizing and writing gender as well as other social and economic factors into analyses of international legal concepts like IP. This is even more important to this research because women's human rights are considered one of the culturally most sensitive rights and are most affected by local traditions and practices.<sup>306</sup>

In addition, because this research focuses on women entrepreneurs, and I was an entrepreneur for over ten years, I carry out a form of self study.<sup>307</sup> Having sought and obtained clearance from the University of Ottawa Research and Ethics Board, I reflect on my experiences as an entrepreneur in the context of the role of IP in my entrepreneurship. Using narratives and reflections<sup>308</sup> of my experience and observations of how other women entrepreneurs carried on their business, I share insights gained during my entrepreneurship. Furthermore, in 2012 I initiated a Non-Governmental Organization (NGO) called Chadash Phoenix Woman Foundation.<sup>309</sup> One of the activities of the NGO was to organize capacity-building programs for women entrepreneurs in rural communities. Between 2012 and 2017, the NGO organized various programs and I interacted with countless women entrepreneurs over that period.

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<sup>306</sup> Istvan Lakatos, "Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights." (2018) *Pécs Journal of International and European Law*, online: <[http://ceere.eu/pjiel/wp-content/uploads/2018/08/8\\_pjielPJIEL1801.pdf](http://ceere.eu/pjiel/wp-content/uploads/2018/08/8_pjielPJIEL1801.pdf)> at 6.

<sup>307</sup> "Self-study typically involves a scholarly reflection on one's own experiences in a particular context. Self-study may involve narratives, reflections and/or analyses of experiences based on the researcher's observations of, interactions with, or information about other individuals or communities. In self-study, at least the researcher is a research participant" See, "Scope: Interagency Advisory Panel on Research Ethics", (5 February 2016), online: <[https://ethics.gc.ca/eng/policy-politique\\_interpretations\\_scope-portee.html](https://ethics.gc.ca/eng/policy-politique_interpretations_scope-portee.html)> at para 13 Last Modified: 2022-02-09.

<sup>308</sup> Prados Megías, Márquez García & Padua Arcos, "Life Stories as a Biographic-narrative Method. How to Listen to Silenced Voices" (2017) 237 *Procedia, Social and Behavioral Sciences* 962–967.

<sup>309</sup> "Chadash Phoenix WOMAN Foundation", online: <<https://www.facebook.com/Chadash-Phoenix-WOMAN-Foundation-908353882588213/>>.

This PhD research is largely inspired by my experiences as a founder of this NGO. I leverage my experience and share insights I gained as I organized conferences, capacity-building trainings, and workshops for rural women entrepreneurs. At the end of each program a report was produced which I have relied on in this research. This technique is in some ways like the biographical autoethnography,<sup>310</sup> where life stories are used as a means of connecting personal experience to systemic social interactions, particularly those situated in lived, systemic oppression.<sup>311</sup> It is a form of autoethnography that has been used effectively to bring in the voices of underrepresented scholars who have brought to the fore stories and analyses of lives previously ignored, and whose own stories may have otherwise been suppressed.<sup>312</sup>

I use this technique within the broad methodology of asking the woman question to effectively contextualise the analysis of the role of IP in women's entrepreneurship in the Third World. In my thesis, I include some anonymous comments recorded in the NGO's unpublished reports that buttress the analysis from the literature review I have carried out. The names of participants who made contributions from the audience were never recorded during the programs as the participants were always assured anonymity and encouraged to speak freely. Contributions made at the events were however written in the minutes and formed parts of the report that was produced at the end of the conference. The reports though unpublished were publicly available at the time and shared with stakeholders, particularly sponsors of the conference. Furthermore, I rely on autobiographical writing, a data source in narrative inquiry and style of academically informed

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<sup>310</sup> F Michael Connelly & D Jean Clandinin, "Stories of Experience and Narrative Inquiry" (1990) 19:5 Educational Researcher 2.

<sup>311</sup> Kathryn Besio, "Autoethnography" in Audrey Kobayashi, ed, *International Encyclopedia of Human Geography (Second Edition)* (Oxford: Elsevier, 2020) 243.

<sup>312</sup> Kathryn Besio, "Autoethnography" in Rob Kitchin & Nigel Thrift, eds, *International Encyclopedia of Human Geography* (Oxford: Elsevier, 2009) 240.

autobiographical writing.<sup>313</sup> Here, I analyse my personal experience as illustrative of the social life of women entrepreneurs, doing so in a way that is both evocative and analytical.<sup>314</sup> In this way, I position myself within the analysis “without losing sight of empirical and political detail,”<sup>315</sup> because the role of IP in women’s entrepreneurship must be understood as a local practice and in a specific context. To properly contextualize this analysis therefore, I include my personal experiences as a Nigerian woman entrepreneur who produced cosmetics between 2002 and 2010 at a micro-enterprise level. I share my personal observations of how other producers carried on their businesses. My experiences and narratives are used in a “demonstrative mode,”<sup>316</sup> where the data do not speak for themselves but “instead are used in exemplary ways to illustrate”<sup>317</sup> my arguments and insights. In asking the woman question, I apply the technique of self study principally to provide context to the analysis of IP treaties, laws, and policies, but not to set any standard.

The woman question is a method of “identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups (asking the ‘woman question’).”<sup>318</sup> According to Bartlett,

The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only non neutral in a general

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<sup>313</sup> Connelly & Clandinin, *supra* note 312; Megías, García & Arcos, *supra* note 310.

<sup>314</sup> Besio, *supra* note 313.

<sup>315</sup> Kathryn Besio, “Autoethnography” in Audrey Kobayashi, ed., *International Encyclopedia of Human Geography (Second Edition)* (Oxford: Elsevier, 2020) 243 at 245.

<sup>316</sup> Connelly & Clandinin, *supra* note 312 at 11.

<sup>317</sup> *Ibid.*

<sup>318</sup> Bartlett, *supra* note 101 at 832.

sense, but also “male” in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.<sup>319</sup>

To do this efficiently, this thesis will utilize different techniques such as searching for silences<sup>320</sup>, deconstruction<sup>321</sup>, feminist practical reasoning<sup>322</sup> and consciousness-raising.<sup>323</sup> These are examples of techniques generally deployed in feminist research, and particularly, in intersectional analysis. In asking the woman question, the thesis applies the technique of searching for silences in the IP legal framework to draw attention to the ways that the laws factor out the realities of women’s lives.<sup>324</sup> Here, the thesis examines the international and national IP framework to show how the knowledge and creations of women are incorporated into them. Particularly, the thesis analyses the national IP frameworks to show how they sustain and reinforce the gendered hierarchies in international IP regimes in national contexts<sup>325</sup> and the dilemmas and constraints they represent<sup>326</sup> for women entrepreneurs in Nigeria. The thesis explores how stereotypes are

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<sup>319</sup> *Ibid.*

<sup>320</sup> Hilary Charlesworth, “What are ‘Women’s International Human Rights’?” (2011) *Human Rights of Women: National and International Perspectives* 58–84. Charlesworth describes the technique of paying attention to the way that various dichotomies are used in the structure of international law, as means to identify and decode the silences in the law.

<sup>321</sup> The notion of deconstruction was developed by French poststructuralist philosopher Jacques Derrida during the 1970s in a series of books that explore how we understand written text. Deconstruction proceeds from the premise that language has no fixed meaning. As a result of this, we should not assume we know what words mean, either to ourselves or anyone else. See “Deconstruction” in *The SAGE Dictionary of Qualitative Management Research* (1 Oliver’s Yard, 55 City Road, London EC1Y 1SP United Kingdom: SAGE Publications Ltd, 2008)..

<sup>322</sup> “Feminist practical reasoning challenges the legitimacy of the norms of those who claim to speak, through rules, for the community...”Bartlett, *supra* note 201 at 855.

<sup>323</sup> “Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events...”Bartlett, *supra* note 201 at 864.

<sup>324</sup> Hilary Charlesworth, “Feminist Methods in International Law” (1999) 93:2 *Am J Int’l L* 379.

<sup>325</sup> Hilary Charlesworth, “Feminists Critiques of International Law and Their Critics” *THIRD WORLD LEGAL STUDIES* 17.

<sup>326</sup> Róisín Ryan-Flood & Rosalind Gill, *Secrecy and Silence in the Research Process: Feminist Reflections* (Routledge, 2010).

reinforced in the IP legal regime and how that could affect the appropriation of IP rights by women entrepreneurs.

Similarly, a deconstructive approach to texts implies that context is central to meaning. Therefore, if the context of a word is changed, then its meaning is also changed; and those deconstructive readings will inevitably expose what a text excludes as much as what it includes.<sup>327</sup> The value attached to detail and context in deconstruction is important as a technique in asking the woman question. Like deconstruction, “feminism is intent on detail—on the closely contextualized construction of gender identity, particularly in terms of the sociological categories of class, ethnicity, sexuality and so on.”<sup>328</sup>

Feminist practical reasoning on the other hand involves reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas, such as the lived experiences of women producing cosmetics in Nigeria’s informal economy, rather than “static choices between opposing, often mismatched perspectives,”<sup>329</sup> while consciousness-raising involves seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative. In this study, I adopt the method of asking the woman question, through these various techniques, to identify and challenge aspects of the IP framework that leave out or hinder women entrepreneurs producing cosmetics in Nigeria.

This method (asking the woman question) is sometimes criticized for its bias, for being a political ruse rather than a method. Against the traditional backdrop<sup>330</sup> that method and substance

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<sup>327</sup> Connelly & Clandinin, *supra* note 312.

<sup>328</sup> Kate Nash, “The Feminist Production of Knowledge: Is Deconstruction a Practice for Women?” (1994) 47 *Feminist Review* 65–77 at 68.

<sup>329</sup> Bartlett, *supra* note 101 at 831.

<sup>330</sup> The traditional range of methods of legal reasoning include deduction, induction, analogy, and use of hypotheticals, policy, and other general principles, see *Ibid* at 832.

have different functions, and that “method cannot serve its purpose unless it remains separate from, and independent of, substantive ‘bias,’”<sup>331</sup> it is easy to see the traction of this feminist method and the various techniques. However, all legal methods shape substance because they allow for reaching different substantive results.<sup>332</sup> Legal methods shape substance through the hidden biases they contain. For instance, “the method of distinguishing law from considerations of policy reinforces existing power structures and masks exclusions or perspectives ignored by that law.”<sup>333</sup> Similarly, “academic debates over originalism, interpretivism, and other theories of constitutional interpretation demonstrate that methodological principles convey substantive views of law and make a difference to legal results.”<sup>334</sup> Indeed, all methods have substantive consequences but that does not make them pointless. Feminist methods, such as asking the woman question, makes it possible to understand how gender activities and commitments influence the development of women.

To investigate the role of IPRs as a development tool for women entrepreneurs producing cosmetics in Nigeria, I apply the feminist method of asking the woman question through the techniques of searching for silences, deconstruction, feminist practical reasoning, consciousness raising and self study. It is imperative to reconceptualize IP from a feminist perspective because it “allows fresh perspectives on some of the most difficult and anxiety-producing dilemmas of our era,”<sup>335</sup> and “provides new ways of seeing the world to enlarge the horizons of our explanations, understandings, and yearnings for a better life.”<sup>336</sup>

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<sup>331</sup> *Ibid* at 843.

<sup>332</sup> Bartlett, *supra* note 101.

<sup>333</sup> *Ibid* at 845.

<sup>334</sup> *Ibid* at 843.

<sup>335</sup> Harding, *supra* note 305 at 2.

<sup>336</sup> *Ibid* at 4.

### 2.3.1 Covid-19 and Its Impact on this Thesis

This thesis was envisioned a qualitative study which would examine women's participation in the cosmetics sector to document women's innovative activities and lived experiences. This was to be carried out specifically in the context of innovating in an informal sector of a Third World country, to document experiences that may be different first from men, and second, between women entrepreneurs at different intersections. The thesis was to include field work where I would conduct in-person interviews to gather relevant data. The fundamental objective of this part of the thesis was to document women's innovative practices in cosmetics production and the gender constraints of IP, if any. It was not expected that the interviews would yield data for statistical analysis; rather they sought to capture the lived interaction between IP and women entrepreneurs producing cosmetics in Nigeria. It would have required travelling from Canada to Nigeria where the thesis was to be undertaken in three cities in Nigeria: namely, Lagos, Onitsha, and Aba. The cities were selected based on the presence of a significant number of small businesses producing natural cosmetics and their strategic status as Nigerian commercial and economic hotspots.

In the second year of my PhD program however, the COVID-19 pandemic struck dismantling life as we knew it, and bringing with it fear for survival, lockdowns, travel restrictions, and uncertainties. As the pandemic continued unabated without definite news about a vaccine, and with projections for a second wave at the end of 2020, it became clear that the field research aspect of this thesis could not continue as planned without an uncertain / indefinite extension of my PhD program. This was especially so as the thesis could not take advantage of the technology of Zoom and other new forms of communication / interaction because of the high likelihood that most of the expected participants in the rural areas may not have the resources to do so. Worse so, it was

not clear that when vaccines would arrive, if they would get to Nigeria or, in particular, to the rural areas the research was to take place.

Being a wife and mother of three who has put everything (financial and otherwise) on the line to pursue this program and considering that the interviews were not expected to yield data for statistical analysis, it was impossible for me risk any delay to the completion of my program by waiting indefinitely for travel restrictions to be lifted and for life to return to “normal.” It therefore became necessary to jettison the field research aspect of the thesis. This however turned into an opportunity to rethink the research methodology. I sought and received ethics clearance from the University of Ottawa Research and Ethics Board to include my personal experiences as an entrepreneur and producer of cosmetics in this analysis, thereby enabling me to contextualize the analysis in this research. Importantly, drawing on my personal experience as a woman entrepreneur enabled me write in Nigerian women entrepreneurs who are absent from the literature.

### 2.3.2 Data Collection

Data for this thesis has been collected through a desktop review. I have applied the above discussed feminist methods to identify and examine relevant primary and secondary sources, including peer-reviewed literature, national laws, and international instruments on the protection of intellectual property. WIPO’s Policy on Gender Equality,<sup>337</sup> adopted in 2014, was reviewed to determine its usefulness in the seven years after the adoption. In addition, the Joint Declaration on Trade and Women’s Economic Empowerment<sup>338</sup> has been reviewed to assess developments since its adoption in 2015. Nigeria’s national IP laws, case laws, and policies have been similarly analyzed to assess their suitability in the context of women’s innovations in the informal sector.

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<sup>337</sup> note 93.

<sup>338</sup> note 1.

The United Nations Evaluation Group's handbook on integrating human rights and gender equality in evaluation<sup>339</sup> provided a guide for this analysis. Ultimately, the desk review sought to find out the gender sensitivity of these documents and what they may offer to women entrepreneurs (producing cosmetics) in Third World economies.

Importantly, secondary data on the role of women in the cosmetics sector in Nigeria was collected. These included information on the Nigerian trademark office website, National Agency for Food and Drug Administration and Control (NAFDAC) website, World Intellectual Property Organization (WIPO) website, cosmetics companies' websites, online news reports, reports of the Chadash Phoenix Woman Foundation, autobiographical notes, and cosmetics product labels.

### 2.3.3 The Analytical Component

In the analytical part of the thesis, the suitability of the existing IP frameworks was examined to see how the current mechanism is designed and developed in a way that corresponds with the research questions. Thematic analysis of all the literature was undertaken to elucidate the ideas.<sup>340</sup> One objective of this thesis is to illuminate the attitudes and experiences of women entrepreneurs in the IP system. In my analysis, therefore, I sought explanations to address the questions that triggered the research in the first place, or to account for issues which arise from the research itself. I variously deployed the feminist techniques of searching for silences, deconstruction, feminist practical reasoning, consciousness raising, and self study, in asking the woman question, as discussed above, to find these explanations.

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<sup>339</sup> *Integrating Human Rights and Gender Equality in Evaluation - Towards UNEG Guidance* (United Nations Evaluation Group, 2011).

<sup>340</sup> David Silverman & Jaber Gubrium, "Competing Strategies for Analyzing the Contexts of Social Interaction" (1994) 64:2 *Sociological Inquiry* 179.

Ultimately, this thesis sought and found new ways of creating systems of intellectual property law which fully account for the knowledge created by women entrepreneurs. The ways in which male-constructed and male-enforced<sup>341</sup> laws disadvantage women have not been sufficiently discussed in intellectual property legal scholarship.<sup>342</sup> This thesis aligns with the idea that gender issues should be part of the primary IP discourse because there is disconnect between the general desire to promote gender equity and the specific inclusion of it as a goal within the world of intellectual property.<sup>343</sup> The thesis recommends policy reforms that are shaped by the application of the theoretical framework to the social realities examined through the research.

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<sup>341</sup> Bartow, “Fair Use and the Fairer Sex”, *supra* note 32.

<sup>342</sup> *Ibid.*

<sup>343</sup> Gearhart-Sema, “Women’s Work, Women’s Knowing”, *supra* note 25.

## Chapter Three: A Critical Analysis of the International and National Legal Framework for Trademarks in Nigeria

### 3.1 Preliminary Considerations

#### 3.1.1 Introduction

Women producing natural cosmetics in Nigeria apply their traditional knowledge to produce cosmetics. There have been robust arguments around the protection of traditional knowledge. This research, rather than lend voice to those arguments, will focus on other regimes in the IP system, which research has shown to be more readily utilized in the informal sector. One of them is trade secrets, which are very useful in the manufacturing stage of production. Trade secrets do not however have statutory protection in Nigeria even though they may be protected by contract, law of tort, and other basic legal principles, not the least of those is confidential information. Consequently, the legal framework for trade secrets will not be examined here, although a discussion will be carried out later in the thesis to see how women entrepreneurs in Nigeria use trade secrets protection. To translate the result of creative efforts into utilities available to the consuming public,<sup>344</sup> these producers, like most innovators in the informal sector, may rely on trademarks.

This chapter therefore examines the international and national legal framework for trademarks. As explained earlier, I choose to consider trademarks as an IPR for consideration of the effect of IPRs on women entrepreneurs producing cosmetics in Nigeria because the registration of

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<sup>344</sup> Chidi Oguamanam & Adebambo Adewopo, “The Nigerian Trade Mark Regime and Challenges of Economic Development” (1999) 30:6 *International Review of Industrial Property and Copyright Law* 632 at 633.

trademark is a precondition for the registration of a cosmetic NAFDAC.<sup>345</sup> Trademarks are also more widely recognized than other formal IP protection mechanisms among entrepreneurs operating in the informal sector.<sup>346</sup> The thesis therefore considers trademarks as a formal IPR that could be most relevant to women entrepreneurs producing cosmetics, who may often not have the relevant financial nor legal exposure to pursue other IPRs such as patents.

The focus of this research is on how IP policies potentially affect women entrepreneurs innovating in the cosmetics production sector of Nigeria. National IP policies play a very significant role in this regard. Firstly, because IP laws are guided by the principle of territoriality, the protection of IPRs are generally limited to the territory of the country where they have been granted. Secondly, these nations consequently, are responsible—in theory, at least—for shaping their IP laws according to their societal and development needs per time.<sup>347</sup> Holistically, therefore, this research is concerned with how Nigeria’s IP laws can be fashioned to benefit women entrepreneurs producing cosmetics in Nigeria’s informal sector.

However, as argued in this thesis, Nigerian IP laws not only emanate from the international framework but, for the most part, are a replica of the international regime. More so, as Chimni<sup>348</sup> explains, “property rights in the era of globalization are not merely protected by national laws and institutions but increasingly by international laws and institutions.”<sup>349</sup> It is therefore important to begin an analysis of the IP framework for trademarks with the international trademark regime.

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<sup>345</sup> note 72.

<sup>346</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>347</sup> Emmanuel Oke, “Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset” (2018) 15:2 SCRIPTed 313.

<sup>348</sup> B S Chimni, “Capitalism, Imperialism, and International Law in the Twenty-First Century” (2012) *Capitalism, Imperialism, and International Law in the Twenty-First Century* 30 pages Accepted: 2013-01-19T21:00:14Z.

<sup>349</sup> *Ibid* at 29.

This will aid in the ultimate understanding of national policies and buttress the assertion that current national IP laws in Nigeria are not context driven. Further, the international framework exists because of increased cross-border trade and provides the framework within which protection can be extended beyond national borders.<sup>350</sup> This is relevant for women entrepreneurs producing cosmetics whose products are ultimately exported from Nigeria. With the growth of the internet, products or services travel rapidly in today's commercial marketplace and can reach foreign markets even before the producers actively engage in export business.<sup>351</sup>

This chapter, therefore, examines the international and national legal framework for trademarks. It adopts the theoretical approach of *TWAIL* and feminist theory in its analyses. It deploys the feminist method of asking the woman question to scrutinize the language of the legal provisions. The language is particularly important because, "it is through language that a particular meaning is fixed and naturalized within a regime."<sup>352</sup> Applying the feminist technique of deconstruction, this chapter analyzes the international and national IP frameworks for trademarks to critically assess the extent to which the existing regime for trademarks accommodate the protection of the innovations of women entrepreneurs in the field of cosmetics production. The objective of this chapter is to examine how the current framework for trademarks is framed in a way that corresponds with one of the thesis questions: Does the current regulatory framework of intellectual property (IP) law in Nigeria have the potential to support women entrepreneurs producing cosmetics to optimize their potential in the marketplace? A deconstructive analysis

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<sup>350</sup> Marisella Ouma, *Why and How to Protect Traditional Knowledge at the International Level* (Geneva, Switzerland: WIPO, 2016).

<sup>351</sup> Marshall Leaffer, "The New World of International Trademark Law" (1998) 2:1 *Marquette Intellectual Property Law Review* 1 at 4.

<sup>352</sup> Valbona Muzaka, "A Dialogic Approach to Understanding Regime Conflicts: The Case of the Development Agenda" (2017) 38:1 *Third World quarterly* 61.

allows for a more interpretative or cognitive approach<sup>353</sup> that will elucidate the role of ideas, knowledge, and discourse in examining the nature of IP regimes.<sup>354</sup>

The chapter is divided into two sections. The first section deals with preliminary issues germane to the discussion. It includes this introduction, which will be followed by a brief historical background of IP protection and an overview of the trademark regime. The second section is an analysis of the legal framework for trademarks. It begins with a general overview of the World Intellectual Property Organization (WIPO), which coordinates international treaties regarding intellectual property rights, the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Agreement), the Madrid System for the International Registration of Marks (Madrid System), and the African Regional Intellectual Property Organization (ARIPO). Although Nigeria is not a party to the Nice Agreement, the Madrid System or ARIPO, this section provides an overview of these three Agreements because of the pivotal role they play in the international IP regime. Thereafter, the section carries out an analysis of the international framework for trademarks relevant to Nigeria,<sup>355</sup> namely the Paris Convention<sup>356</sup> and the Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPS).<sup>357</sup> This is followed by an analysis of the national legal framework for the protection of trademarks in Nigeria. Here, the thesis carries out a critique of the Nigerian Trademark Act.<sup>358</sup>

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<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid.*

<sup>355</sup> Trademark-related treaties administered by WIPO are the Paris Convention, Madrid Agreement (Marks) Madrid Protocol, Nice Agreement, Vienna Agreement, Singapore Treaty, Trademark Law Treaty and Nairobi Treaty. This chapter will only consider treaties that Nigeria has ratified.

<sup>356</sup> *Paris Convention for the Protection of Industrial Property* (World Intellectual Property Organization (WIPO)).

<sup>357</sup> World Trade Organization (WTO), *supra* note 8.

<sup>358</sup> Trade Marks Act Chapter 436 Laws of the Federation of Nigeria (LFN) 1990

### 3.1.2 The Evolution of Trademarks as Intellectual Property Protection.

It is necessary to understand the evolution of trademarks as an IP right to comprehend the conflicting viewpoints of IP.<sup>359</sup> This is because history helps us to gain a deeper understanding of current events and attitudes. Such understanding may also help stakeholders “to comprehend its [IP’s] ability to fulfil the needs of different parties within the context of trademarks.”<sup>360</sup> Importantly, TWAIL scholarship is committed to history as a means of understanding “the untold truths and social functions of international law.”<sup>361</sup> The monopolistic control over the commercial benefits of one’s creation for a given period has been one of the foremost aims of intellectual property. However, in the beginning, monopoly itself was generally frowned at, ostensibly because it tends to stifle the growth of innovation. The British Statute of Monopolies of 1623 affirmed that monopolies were contrary to common law:

All monopolies, and all commissions, grants, licenses, charters, and letters patents, heretofore made or granted, or grants, etc.... thereof, or hereafter to be made or granted, to any person whatsoever, of or for the sole buying, selling, making, working, or using, of anything... shall be utterly void and of none effect, and in no wise to be put in use or execution.<sup>362</sup>

Trademark use is one of the earliest recorded human practices.<sup>363</sup> The book of Genesis makes an early reference to use of a mark for identification where “the Lord set a mark on Cain lest

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<sup>359</sup> Jimmy Pak, “Re-imagining the Wheel: Seeking a Feasible International Regime to Protect Indigenous Cultural Expressions Through Trademark Law” (2011) 24:1:5 *Global Business and Development Law Journal* 31.

<sup>360</sup> Mohammed Naser, “Reexamining the Functions of Trademark Law” (2008) 8:1:4 *Chi-Kent J Intell Prop* 99 at 100.

<sup>361</sup> Gathii, *supra* note 281 at 22.

<sup>362</sup> It did, however, make exceptions for patentable inventions for a given period. See, “Statute of Monopolies | England [1623]”, online: *Encyclopedia Britannica* <<https://www.britannica.com/topic/Statute-of-Monopolies>>.

<sup>363</sup> Patricia Fletcher, “Joint Registration of Trademarks and the Economic Value of a Trademark System” (1982) 36:2 *University of Miami Law Review* 297.

anyone, finding him should kill him.”<sup>364</sup> The earliest use of trademarks in entrepreneurship involved the branding of cattle with colours or signs to distinguish the ownership of one cattle from another. and interestingly, dates to Africa–Egypt where “wall paintings of ancient Egypt show cattle being branded by field workers.”<sup>365</sup> Also in ancient Egypt, it was required that each brick carry marks traceable to the brickyard and the slave who manufactured it so that any defective brick could be traced to the manufacturer. The original use of marks was therefore as a means of determining the physical origin or source of the brick.<sup>366</sup> Similarly, in ancient Egypt, Greece, and Rome distinctive signs were made on pottery as a means of determining the source.

Indeed, long before the IP legal regime as it is known today was in place, there was a form of protection for creators which served to place a value on their innovations and may have promoted innovation in the same sense that IP claims to do today. As trade-based economies emerged in medieval Europe, associations of merchants and artisans (called guilds) became stronger and gained recognition from the governments to promote the orderly conduct of commerce. Each guild group was required by statutory regulation to affix a certain mark to all examples of each product. At that time, the mark was not only to identify the source and origin of the goods but to enable the detection and punishment of anyone responsible for any defect in the good, as well as ensure that in case of shipwreck or piracy, the goods might be reclaimed by the owner.<sup>367</sup>

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<sup>364</sup> *The open bible: New king James Version, ed* (Nashville: Nashville: Thomas Nelson Publishers, 2012) at Genesis 4:15b.

<sup>365</sup> Sidney Diamond, “The Historical Development of Trademarks” (1983) 73:222–223 Trademark Report, online: World Documents<<https://fdocuments.net/document/the-historical-development-of-trademarks.html>> at 444.

<sup>366</sup> Fletcher, *supra* note 365.

<sup>367</sup> *Ibid.*

“The name guild derives from the Saxon word *gilden*, meaning to pay or yield, as members of the guild were expected to contribute to its collective finances.”<sup>368</sup> The two major types of guilds were “merchant guilds for those who controlled trade in a particular item and craft guilds for skilled artisans such as weavers, shoemakers and bakers.”<sup>369</sup> These guilds of merchants and craft workers were formed to enable their members to set and maintain production standards, reduce competition, and act collectively to achieve political influence. This is very similar to current cooperative associations so common among women entrepreneurs particularly in rural areas. Through participation in cooperative activities, these women can set standards for their products and generally participate in economic programs that improve their status quo.<sup>370</sup>

However, “entry requirements to guilds became stricter over time as those who controlled the guilds became part of a richer middle class and set a higher membership fee for outsiders. This new bourgeoisie successfully sought to maintain their position above workers without the means or skills needed to run their own small businesses.”<sup>371</sup> At that time, the power to introduce new innovations in the creation of goods and services rested solely with the guilds. Indeed, the guilds, which had started as small associations of skilled artisans, experienced and confirmed experts in their field of handicraft developed into larger, formal associations accepted by the governments of their countries.<sup>372</sup> “They had strict membership requirements, setting standards of quality and pricing, and maintaining a structured training system of apprenticeship that enabled young

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<sup>368</sup> “Medieval Guilds”, online: *World History Encyclopedia* <[https://www.worldhistory.org/Medieval\\_Guilds/](https://www.worldhistory.org/Medieval_Guilds/)>.

<sup>369</sup> *Ibid.*

<sup>370</sup> Augonus Uhegbu, Amanze Unagha & Nkechi Amaechi, “Participation of Women in Cooperative Activities in Imo State, Nigeria: The Information Factor.” (2017) 13:2 *International Journal of Library and Information Science Studies*.

<sup>371</sup> note 370.

<sup>372</sup> Mathew McIntosh, “A History of Guilds from the Medieval Era”, (27 January 2020), online: Brewminate <<https://brewminate.com/a-history-of-guilds-from-the-medieval-era/>>.

craftsmen to inherit the skills of the older masters.”<sup>373</sup> This is, to some extent, comparable to the Igbo Apprenticeship System(IAS) of Nigeria discussed later in this thesis (See chapter four).

As the guilds grew stronger, their privileges were accompanied by a negative right to exclude non-guild members and allow the guilds to “appropriate without compensation any inventive technologies introduced by an outsider artisan.”<sup>374</sup> It is easy to connect these early traits with the current exclusionary model of IP laws today, and their potential to stifle new technologies, particularly in growing economies like those of the Third World. Indeed, these early practices, driven by the consolidation of power and political agendas, provided the frameworks for the development of national laws of some countries of the First World.<sup>375</sup> It is important to note the impact of this on international law which Third World countries contend is a body of the national laws of First World countries.<sup>376</sup> These countries, having adapted IP laws to suit the needs of that time, sought to extend those laws to other climes irrespective of the peculiar needs of those climes. According to Chimni, “international law that has emerged in the last three decades, in particular since the end of the Cold War, has been shaped by an emerging transnational capitalist class to realize its interests.”<sup>377</sup>

In common law jurisdictions, like Nigeria, trademark law is derived from the tort of “passing off” which prevented a merchant from putting another merchant’s mark on their

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<sup>373</sup> *Ibid* at 1.

<sup>374</sup> Ted Sichelman & Sean O’Connor, “Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic” (2012) 49 San Diego Law Review 1267 at 1269.

<sup>375</sup> Sichelman & O’Connor, “Patents as Promoters of Competition”, *supra* note 376.

<sup>376</sup> See Makau Mutua, “Critical Race Theory and International Law: The View of an Insider-Outsider” (2000), online: <<https://papers.ssrn.com/abstract=1525526>>; Antony Anghie, ed, “Finding the Peripheries: Colonialism in Nineteenth-Century International Law” in *Imperialism, Sovereignty and the Making of International Law* Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2005) 32.

<sup>377</sup> B S Chimni, “A Just World under Law: A View from She south” (2007) 22:2 Am U Int’l L Rev 199- at 201.

product.<sup>378</sup> As a British colony, Nigeria's earliest interaction with the IP system was the Trademarks Promulgation of 1900 which was passed by the High Commissioner of the Protectorate of Southern Nigeria. As will be argued in this analysis, one century after, Nigeria's trademark law has not developed much farther from the received English law in content and its response to the changing needs of Nigeria's economy. It is interesting to note that even though one of the earliest forms of IP protection was found in Africa—ancient Egypt—where distinctive signs were made on cattle and pottery to indicate their source, the Third World (Africa) is still on the receiving end of an IP regime developed by and for the First World. The next section provides an overview of marks and considers the relevance of the protection of trademarks in the innovations of women entrepreneurs producing cosmetics in Nigeria.

### 3.1.3 Overview of Marks

#### A. *Trademarks*

WIPO defines a trademark as “a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.”<sup>379</sup> When a mark is used to indicate a service, it is called a service mark. “Both in trade and service marks, trademarks represent distinctive signs (words, graphics, sounds or colors) associated with a good or service”<sup>380</sup> Such an indicator could be a name, a sign, a color, or symbol which indicates to the public (consumer) that a product originates from a particular producer. A trademark could be owned by a natural person or a

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<sup>378</sup> Daniel Gervais, “A Look at the Trademark Provisions in TRIPS,” in Irene Calboli & Jane C Ginsburg, *The Cambridge handbook of international and comparative trademark law* (Cambridge: University Press, 2020) 27 at 30.

<sup>379</sup> “Trademarks”, online: WIPO <<https://www.wipo.int/trademarks/en/index.html>>.

<sup>380</sup> Stephen Kehinde Medase & Shoaib Abdul Basit, “Trademark and product innovation: the interactive role of quality certification and firm-level attributes” (2021) 0:0 Innovation and Development 1 at 5.

corporate body. The owner of a trademark is entitled to deal with their trademark in any manner of their choice, including the right to license, assign or mortgage the same for their individual benefit.

In the medieval era, the consumer of a good and manufacturer were in small units, and the consumer was familiar with the identity and reputation of the local manufacturers from which she bought goods. Trademarks effectively identified the source of the purchased goods. However, the “technological advances of the industrial revolution, particularly in communication and transportation,”<sup>381</sup> blurred the interpersonal connection between the consumer and the manufacturer leading to a heavier reliance on trademark to bridge the gap between the manufacturer and consumer,<sup>382</sup> thus the need for international trademark laws. Today, trademarks enjoy legal protection primarily because they lower the cost of consumers searching for products and “encourage producers to invest in a certain level of quality for their goods.”<sup>383</sup>

As a result of trademark’s roots in principles of unfair competition, its protection was readily absorbed into the domestic legal systems of most Third World countries,<sup>384</sup> unfair competition being discouraged in most societies’ values. In Nigeria, for instance, trademark law was the first intellectual property law to be extended to Nigeria.<sup>385</sup> In addition, because trademark regulation is primarily administrative in nature, it is considerably easier for Third World countries to carry out trademark administration than the other categories of intellectual property. Significant for this

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<sup>381</sup> Fletcher, *supra* note 365 at 302.

<sup>382</sup> Fletcher, *supra* note 365.

<sup>383</sup> Ruth Okediji, “Africa and the Global Intellectual Property System: Beyond the Agency Model” (2004) 12 African Yearbook of International Law, online: <<https://experts.umn.edu/en/publications/africa-and-the-global-intellectual-property-system-beyond-the-age>> at 244.

<sup>384</sup> Okediji, “Africa and the Global Intellectual Property System”, *supra* note 105.

<sup>385</sup> Umar Abubakar Dubagari & Kabiru Garba Muhammad, “Legal Regime of Intellectual Property Rights Protection in Nigeria: An Appraisal.” (2015) 1:1 JPSSLIR 14 at 16.

research, over the last century, trademarks have moved from the position of having no role in innovation (merely signalling a distinct commercial source in the marketplace),<sup>386</sup> to possibly being “an engine of innovation.”<sup>387</sup> Even more relevant for women entrepreneurs is the ecosystem of the trademark system.<sup>388</sup> Trademark is originally composed of different marks such as individual trademarks, collective marks, certification marks and other “pseudo-marks,”<sup>389</sup> which could be appropriated by women entrepreneurs in the informal economy. However, its use has been expanding over the years and the system appears fluid enough to accommodate different aspects of cosmetics production. Businesses in the service industry, such as hair salons and spas, generally use less formal IP protection; but when they do use IP, trademarks are particularly important.<sup>390</sup>

Even more importantly, in Nigeria, the Guidelines for Registration of Cosmetics made in Nigeria provides that “no Cosmetic shall be manufactured, imported, exported, advertised, sold, distributed or used in Nigeria unless it has been registered in accordance with the provisions of NAFDAC Act CAP N1 (LFN) 2004, other related Legislation and the accompanying Guidelines.”<sup>391</sup> A NAFDAC issued number after registration is included on the label of cosmetic products and is prima facie evidence of the genuineness of the product. To get this number, however, producers of cosmetics must show evidence of registration of a brand name with the

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<sup>386</sup> Dev Gangee, “Trade marks and innovation?” in Graeme B Dinwoodie & Mark Janis, *Research handbook on trademark law reform*, Research handbooks in intellectual property series (Northampton: Edward Elgar Publishing, 2021) at 192.

<sup>387</sup> *Ibid.* Here, the author investigates claims that trademark law supports innovative activity and ponders whether since the innovation incentivization rationale provides normative support for patent law, it might do so for trade marks as well.

<sup>388</sup> Mogyoros, *supra* note 207.

<sup>389</sup> *Ibid* at 2.

<sup>390</sup> Jeremy de Beer, Kun Fu and Sacha Wunsch-Vincent, “Innovation in the Informal Economy,” *supra* note 6 at 238

<sup>391</sup> *Guidelines for Registration of Cosmetics made In Nigeria*. (National Agency for Food and Drug Administration & Control (NAFDAC), 2018).at 1.2

Trademark Registry.<sup>392</sup> One reason for this requirement from NAFDAC is to prevent counterfeiting in Nigeria. The Nigerian market is said to be “a huge target for second generation goods, with a major focus on pharmaceutical drugs.”<sup>393</sup> It is claimed that counterfeiting inhibits competitiveness<sup>394</sup> and that “the huge influx of counterfeit products into the Nigerian market is driving down the country’s ranking in global indices for Foreign Direct Investment (FDI).”<sup>395</sup> Indeed, Nigeria ranked 125 in a pool of 137 economies that had its national competitiveness measured.<sup>396</sup> As explained, such “indicators suggest that Nigeria is not a fertile destination for FDI, a major driver of rapid economic growth.”<sup>397</sup>

With claims that “IP protection plays a major role in the fight against counterfeiting and in helping to diminish the negative impact of counterfeiting on the economy of a specific jurisdiction,”<sup>398</sup> regulatory bodies in Nigeria like the NAFDAC, Nigeria Copyright Commission (NCC) and the Standards Organisation of Nigeria (SON) have been collaborating with the Nigerian

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<sup>392</sup> *Ibid* at 3.1.4. One of the documents required for registration is evidence of Registration of Brand Name with Trademark Registry in the Ministry of Industry, Trade and Investment. The section reads thus:

3.1 The application letter and print-out of the registration form are to be accompanied with two (2) sets of the following documents are to be submitted at the Liaison Office of the Director (LOD), R & R Directorate, Ground Floor, NAFDAC Office Complex, Oshodi-Apapa Express Way, Isolo, Lagos State or any NAFDAC Office (outside Lagos):

3.1.1. Evidence of Business Incorporation. In-case of Micro, Small and Medium Enterprises (MSMEs); evidence of Business name.

3.1.2. Evidence of payment to the Agency.

3.1.3. Contract Manufacturing Agreement (where applicable).

3.1.4. Evidence of Registration of Brand Name with Trademark Registry in the Ministry of Industry, Trade and Investment. This should be done in the name of the owner of the Trademark/Brand name as the case may be.

<sup>393</sup> Ugonna Awa, “Building respect for IP: Nigeria Customs Service on the frontline” *WIPO Magazine* (September 2018), online: <[https://www.wipo.int/wipo\\_magazine/en/2018/si/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2018/si/article_0002.html)>.

<sup>394</sup> For a robust discussion on the role of counterfeiting, see Daniel Chow CK, “Trademark enforcement in developing countries: counterfeiting as an externality imposed by multinational companies” in *Trademark Protection and Territoriality Challenges in a Global Economy* Calboli, I, & Lee, E (Eds) (Cheltenham, UK: Edward Elgar Publishing, 2014).

<sup>395</sup> Awa, *supra* note 395.

<sup>396</sup> Klaus Schwab, ed, *The Global Competitiveness Report 2017–2018* (World Economic Forum, 2017).

<sup>397</sup> Inés Tavares, “Fighting Counterfeiting in Nigeria: where we stand on this issue”, (31 May 2019), online: *Inventa* <[https://inventa.com/en/pt/news/article/401/fighting-counterfeiting-in-nigeria-where-we-stand-on-this-issue?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=LinkedIn-integration](https://inventa.com/en/pt/news/article/401/fighting-counterfeiting-in-nigeria-where-we-stand-on-this-issue?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration)>.

<sup>398</sup> *Ibid*.

Customs in the fight against counterfeiting in Nigeria. The mission of NAFDAC is to “protect and promote the public health by instituting an effective and efficient regulatory system that ensures only the right quality Food, Drugs and other regulated products are manufactured, exported, imported, advertised, distributed, sold, and used”<sup>399</sup> in Nigeria. For NAFDAC, one way of ensuring this, against the backdrop of a high rate of counterfeited goods in the Nigerian market and its alleged consequences, is to require that regulated products like cosmetics (as well drugs and food) register their brands with the trademark registry as precondition to getting certified to market their goods. In essence, while the “role of NAFDAC is not focused primarily on the protection and enforcement of trademark rights BUT on safeguarding public health, ...NAFDAC has proven to be a fulcrum in strengthening and enforcing trademark rights in Nigeria.”<sup>400</sup>

This makes trademarks even more relevant for women producing cosmetics in Nigeria. More so, partly, because of the human need for re-assurance, labeling, and ease of identity,<sup>401</sup> consumers of natural cosmetics specifically look to brand names to guide their purchasing decisions. The brand names of natural cosmetics are particularly important because consumers look to them to assure them of the natural contents. Consumers of natural cosmetics insist on 100% “naturalness” of the product, indeed, that may be the only reason they are buying the product. So, once they have identified a particular brand as being 100% natural, the search ends there, and they are even willing to pay extra for a brand they trust.<sup>402</sup> But, as will be explained in chapter four of

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<sup>399</sup> “NAFDAC Vision and Mission – NAFDAC”, online: <<https://www.nafdac.gov.ng/about-nafdac/nafdac-vision-and-mission/>>.

<sup>400</sup> Abdulai Taiwo, Bunmi Binitie & Temitope Coker, “Nigeria: The (Unwitting) Role of the NAFDAC in the Protection of Trade Marks Rights”, (25 March 2019), online: *Lexology* <<https://www.lexology.com/library/detail.aspx?g=8a5e6a9f-9dff-4509-a9ac-500066484ccf>>.

<sup>401</sup> Stephen Coomber, *Branding*, Express Exec marketing 04 (Oxford, U.K: Capstone Pub, 2002) at 14.

<sup>402</sup> Nicole Urbanowicz, “Survey: 54% of Women Want Skin Care to Be All Natural”, online: *Skin Inc* <<https://www.skininc.com/skinscience/ingredients/Survey-54-Percent-of-Women-Want-All-Natural-Products-321263321.html>>.

this thesis, few cosmetics are a 100% natural and NAFDAC only requires that a cosmetic product is termed organic if it contains 70% agricultural ingredients. Again, this research has exposed that not all cosmetics sold as natural or organic products are registered with NAFDAC or have certification marks to that effect.

The case study for this research—women producing cosmetics—are most involved at the manufacturing stage where they apply their traditional knowledge to produce their goods. Trademarks are a tool for companies to signal new products in the market<sup>403</sup> and are often an outcome of manufacturing and service innovation. This is “unlike patents, which are typically used to protect a concept for the restoration of technical difficulties, or ‘copyrights, which protect the concrete realization of a concept from exact replication, trademarks stand to protect labels used for marketing.”<sup>404</sup> Moreover, “trademark protection does not need particular technological elements or novelty. A trademark application system is wholly related to the new product introduction or services within the market terrain.”<sup>405</sup> Equally significant for women entrepreneurs innovating in the informal sector is that a mark does not have to be registered to be used. Unregistered marks are afforded protection against the tort of passing off by use of confusingly similar trademarks. As a result of lack of finance, entrepreneurs in the informal sector could readily use marks without registering them, relying on the measure of protection that unregistered trademarks give them. However, the requirement of NAFDAC for trademark registration still poses a major challenge as will be discussed in chapter five.

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<sup>403</sup> Medase & Abdul Basit, “Trademark and product innovation”, *supra* note 382.

<sup>404</sup> *Ibid* at 6.

<sup>405</sup> *Ibid* at 6.

Furthermore, even though entrepreneurs can carry on business with unregistered trademarks, enforcing unregistered trademark rights is often a complicated exercise, as gathering the required supporting documentation can involve significant time and effort, and evidence gathered may still be insufficient to support a successful claim for passing off. An unregistered trademark does not prevent a competitor from filing an application of registration for trademark as they are not entitled to the exclusive use of their trademarks.<sup>406</sup> A registered trademark is a trademark with a government seal which is prima facie evidence of ownership. Women producers of natural cosmetics may find it more beneficial to register a trademark for their name or logo to protect their brand and reputation for their natural cosmetics. Trademark registration provides them with a legal means of distinguishing their product from other similar ones and stop a competitor from using the same mark. Very importantly, it will save them the hardship of proving passing off in court, which is their only option with an unregistered trademark.<sup>407</sup>

Oguamanam and Adewopo's description of trademarks as an economic instrument fashioned by law to translate the result of creative efforts into utilities available to the consuming public,<sup>408</sup> provides insight to the possible benefits that trademarks could have for women entrepreneurs in a few ways. One possibility is that trademarks could help in translating the creative efforts of women producing natural cosmetics by providing a defendable right over marks that they choose to signify the authenticity of their products. The second possibility is that the

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<sup>406</sup> Aderonke Alex-Adedipe & Feyijuwa Akinyanmi, "Protection and Enforcement of Trademark Rights in Nigeria" *Mondaq* (12 October 2021), online: Mondaq <<https://www.mondaq.com/nigeria/trademark/1120020/protection-and-enforcement-of-trademark-rights-in-nigeria>>.

<sup>407</sup> S3 of the Nigerian Trade Mark Act provides that "No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

<sup>408</sup> Oguamanam & Adewopo, *supra* note 346.

reliance of the consuming public on such marks could motivate women entrepreneurs to keep ensuring that they maintain the standard expected of their product and motivate others, such as individuals or financial institutions, to invest in their business. In addition, for those who have the knowledge and exposure, this is another asset to their business—an IP asset—that they can sell, assign, or license.

On the other hand, trademark is viewed by some Third World countries as exploiting local consumers “by entrenched brand names acting as insidious vehicles for persuasive advertising”<sup>409</sup> and “that they encourage irrational preferences among the vulnerable and largely illiterate, members of the population. Some even see trademarks as an obstacle to achieving economic self-sufficiency.”<sup>410</sup> It is easy to understand this when viewed from the perspective of informal economies populated by small and micro-scale enterprises who do not engage much with formal IP mechanisms. Understandably, multinational companies (such as Lush<sup>411</sup> and The Body Shop<sup>412</sup>) have so much more to gain from a strong trademark system, as they have the resources to market their products all over the world, and the resources to introduce new versions of their product regularly. In addition, the cost of registering trademarks and the fact that trademarked products are found to be more expensive<sup>413</sup> is a potential problem for women entrepreneurs. Inevitably trademarked goods are more expensive because producers of the products must spend more money on promotional activities, like advertisements and giving out of samples. To recoup expenses,

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<sup>409</sup> Leaffer, *supra* note 353 at 6.

<sup>410</sup> *Ibid.*

<sup>411</sup> “Lush v Amazon: High Court Judgment on Trade Mark Infringement Online”, (12 February 2014), online: <<https://www.scl.org/news/3021-lush-v-amazon-high-court-judgment-on-trade-mark-infringement-online>>.

<sup>412</sup> “Beauty, Bath, Body & Skin Care Products | The Body Shop®”, online: <<https://www.thebodyshop.com/en-ca/>>.

<sup>413</sup> John Spitals, “The UNCTAD Report on the Role of Trademarks in Third World countries: An Analysis” (1981) 2:3 NYLS Journal of International and Comparative Law 2.

producers shift the costs to consumers but end up having to deal with low demand for their goods because of the increased price.

This puts a pall on the perceived advantage of trademarks. Prices of goods must be competitive to ensure high demand. A decrease in demand will cause prices to drop, which in turn leads to low production and its attendant consequences on the business. Indeed decades ago, “the United Nations Conference on Trade and Development (UNCTAD) secretariat came to the conclusion that the costs of trademark systems in developing [Third World] countries far outweighed their benefits”<sup>414</sup> and proposed the abolishment of the use of trademarks in some sectors.<sup>415</sup> Another common problem in countries like Nigeria is that as soon as an entrepreneur invests money in these promotional activities and some brand recognition is established, their trademarks would typically be applied surreptitiously to an inferior product in the same product category, thereby damaging the original entrepreneurs’ reputation.<sup>416</sup> In the end, while trademarks may be attractive to women entrepreneurs at first glance, these issues must be taken into consideration when deciding to choose trademarks. As argued, “the legal regime that protects trademark rights has become divorced from the realities of commercial exchange and from the interests of consumers that once occupied its core.”<sup>417</sup> To this extent, this thesis examines whether a stronger protection of trademarks would be beneficial for women entrepreneurs producing cosmetics mostly in the informal sector of a Third World country like Nigeria.

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<sup>414</sup> *Ibid* at 174.

<sup>415</sup> Spitals, “The UNCTAD Report on the Role of Trademarks in Third World countries”, *supra* note 60.

<sup>416</sup> *Ibid*

<sup>417</sup> Bita Amani & Carys Craig, “The ‘Jus’ of Use: Trademarks in Transition” (2018) 30:2 Intellectual Property Journal 217–270 at 235.

*B. Collective Marks.*

A collective mark is a form of trademark or service mark owned by a collective, whose members use the collective mark to identify their goods and services. Through such a mark, they distinguish their goods and services, thereby indicating membership in the group and differentiation from non-members. The signs are used to distinguish the geographical origin, material, mode of manufacture and other common characteristics of goods or services of different enterprises using the collective mark.<sup>418</sup>

There are two types of collective marks: collective mark—this is like a trademark but is used by members of a collective; and collective membership mark—used to indicate membership in the collective.<sup>419</sup> The collective itself typically does not sell goods under the mark, but instead advertises or promotes the goods of its members under the mark. In some instances, the collective may also use the mark as a trademark to identify goods or services. These marks are an exception to the underlying principle of trademarks in the sense that while most trademarks serve as “badges of origin,” that is, they indicate the individual source of the goods or services, a collective trademark indicates a group source. A collective mark is used by a variety of traders, rather than just one individual concern, provided that the trader belongs to the association.<sup>420</sup> A popular example of a collective mark is INTER-FLORA, which is used worldwide by a flower ordering service.<sup>421</sup>

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<sup>418</sup> “The Value of Collective and Certification Marks for Small Players” *WIPO* (September 2002), online: <[https://www.wipo.int/edocs/pubdocs/en/general/121/2002/wipo\\_pub\\_121\\_2002\\_07-08-09.pdf](https://www.wipo.int/edocs/pubdocs/en/general/121/2002/wipo_pub_121_2002_07-08-09.pdf)>.

<sup>419</sup> “Collective Marks and Certification Marks An Introduction and Global Overview.”, online: *vdocuments.mx* <<https://vdocuments.mx/collective-marks-and-certification-marks-an-introduction-and-global-overview.html>>.

<sup>420</sup> *Ibid.*

<sup>421</sup> “Flower Delivery | Send Flowers Online with INTERFLORA”, online: INTERFLORA <<https://www.interflora.co.uk/>>.

Collective marks also differ from certification marks. The main difference is that collective trademarks may only be used by members of the organization that own them, while certification marks may be used by anybody who complies with the standards defined by the owner of the certification mark. Certification marks are usually given for compliance with defined standards but are not confined to any membership. They may be used by anyone who can certify that the products involved meet certain established standards.<sup>422</sup>

The function of a collective mark is to inform the public about features of the product for which the collective mark is used. They are often used to promote products that are characteristic of a given region and used by the collective itself to promote the interests of the members. Where it is used, the creation of a collective mark has not only helped to market such products domestically and, occasionally, internationally but has also provided a framework for cooperation between local producers. The creation of the collective mark, usually go hand-in-hand with the development of common standards, criteria, and strategy. Collective marks are therefore powerful tools for local development.<sup>423</sup>

### C. *Certification Marks*

Certification marks are registrable in Nigeria. The Nigerian Trademark Act provides that “a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, method of manufacture, quality, accuracy or other

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<sup>422</sup> “Collective Marks and Certification Marks”, (25 October 2013), online: *Bohan Mathers* <<https://www.bohanmathers.com/collective-marks-and-certification-marks/>>.

<sup>423</sup> A good example of this is the Potato Park in Peru. See Alejandro Argumedo, *Collective trademarks and biocultural heritage. Towards new indications of distinction for indigenous peoples in the Potato Park, Peru* (International Institute for Environment and Development (UK), 2013).

characteristic, from goods not so certified shall be registrable as a certification trade mark...,”<sup>424</sup> as long as the mark is not in the name of persons who trade in goods of the kind certified. Examples of certifying bodies in Nigeria include International Organization for Standardization (ISO),<sup>425</sup> an independent body that develops standards for ensuring the quality, safety, and efficiency of products or services; as well as Certvalue.<sup>426</sup> Certification marks are usually given for compliance with defined standards set by the certified organisation but are not confined to any membership. They may be used by anyone or entity whose products are certified to meet certain established standards.<sup>427</sup> The certification represented by a certification mark does not necessarily indicate technical standards like those required by NAFDAC’s Good Manufacturing Practice (GMP) Guidelines,<sup>428</sup> but rather that some quality of material or manufacture, a method of manufacture or a mode of service, the geographic origin of the product or that the provider or manufacturer meets the standards of or sanctioned by the certifying organization.<sup>429</sup> Once that mark is received from a proprietor, the proprietor may register the mark at the trademark registry. Certification marks would have relevance for women producing cosmetics in Nigeria but as seen in the analysis in chapter four of this thesis, women producing natural cosmetics in Nigeria’s informal sector do not often use these marks to market their products because of the challenges they face in trying to acquire them and for some, lack of awareness.

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<sup>424</sup> S43(1) Trade Marks Act Cap T 13, Laws of the Federation of Nigeria 2004

<sup>425</sup> “ISO Certification in Nigeria | Apply online ISO Certification | SIScert”, online: *SIS Certifications* <<https://siscertifications.com/iso-certification-in-nigeria/>>.

<sup>426</sup> “Certvalue Global | Consulting, Advisory, Trainings, Audit & Certification Services”, online: *Certvalue* <<https://www.certvalue.com/>>.

<sup>427</sup> note 424.

<sup>428</sup> *NAFDAC Good Manufacturing Practice Guidelines for Cosmetics Products 2021* (National Agency for Food & Drug Administration & Control (NAFDAC) Drug Evaluation & Research (DER) Directorate, 2021).

<sup>429</sup> note 424.

D. *Geographical Indications (GI)*

WIPO defines GI as a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin.<sup>430</sup> GI gives right to the people who produce products in a particular region to stop others from using the geographical name in marketing similar products that do not originate from the defined areas. Examples of such products are Champagne, Basmati rice and Ethiopian coffee. Although agricultural products are typically identified by GI, other non-agricultural products that possess “unique qualities, due to the materials and labor associated with the place where they are manufactured, have also characterized products, such as “Swiss” watches, “Belgian” chocolate.”<sup>431</sup> According to Calboli,<sup>432</sup> however, “non-agricultural GI are nonetheless less common, and their protection is even more controversial than the more traditional agricultural GI.”<sup>433</sup> The functions of GI like trademarks are fundamentally as source identifiers by informing consumers about the origin of the goods to which they are affixed. “Today, GIs facilitate the worldwide trade of coffees, teas, rice, spices, textiles and a variety of handicrafts both in the brick-and-mortar words and in cyberspace.”<sup>434</sup>

While the protection of GI may hold some potential for women producing cosmetics in Nigeria who primarily use agricultural products as raw materials to produce cosmetics, “GI standards and certification criteria however use more resources than many Third World countries like Nigeria can afford.”<sup>435</sup> Calboli argues that “the major problem of GI is the precise boundaries

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<sup>430</sup> “Geographical Indications: What do they specify?”, online: <[https://www.wipo.int/geo\\_indications/en/](https://www.wipo.int/geo_indications/en/)>.

<sup>431</sup> Calboli, “Expanding the Protection of Geographical Indications of Origin Under Trips”, *supra* note 211 at 185.

<sup>432</sup> Calboli, “Expanding the Protection of Geographical Indications of Origin Under Trips”, *supra* note 211.

<sup>433</sup> *Ibid* at 185.

<sup>434</sup> Irene Calboli, “Geographical Indications: New Perspectives and Recent Developments” (2021) 16:4–5 *Journal of intellectual property law & practice* 289–290 at 290.

<sup>435</sup> Esther Ekong, *Gender Implications of Geographical Indications for Ghanaian Shea Butter* (South African Institute of International Affairs (SAIIA), 2019).

of the rationale and scope of their protection and the defenses applicable to their unauthorized uses;<sup>436</sup> and warns that “GIs represent a unique type of IPRs, such that overprotection and abuse could be very detrimental to the international community.”<sup>437</sup> More importantly, “GIs may not be helpful to women entrepreneurs in the informal sector that often favor direct sales or short distribution channels and lack the advanced supply structure that is required for the success of efficiently marketing GI<sup>438</sup> in Third World countries.

#### D. *Service Marks*

A service mark is a word, name, symbol, or design used, or intended to be used, by a person for the purposes of distinguishing their services from the services of others.<sup>439</sup> Unlike a trademark which relates to a product, a service mark is used in the sale or advertising of services to identify and distinguish the services of one company from those of others.<sup>440</sup> The function of a service mark is however similar to that of a trademark, because it identifies the provider of certain services and distinguishes such services from the services provided by others in the industry. Manufacturers, sellers, and distributors of products use trademarks while providers of services use service marks. As will be discussed later, service marks are not provided for in the current trademark law in Nigeria.

#### E. *Non-traditional Marks*

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<sup>436</sup> Calboli, “Expanding the Protection of Geographical Indications of Origin Under Trips”, *supra* note 211 at 202.

<sup>437</sup> *Ibid.*

<sup>438</sup> Ekong, *supra* note 437 at 6.

<sup>439</sup> Service Marks: online, INTA<<http://www.inta.org/TrademarkBasics/FactSheets/Pages/ServiceMarksFactSheet.aspx>>

<sup>440</sup> Omolara Kayode, “The Growing Necessity for The Protection for Service Marks in Nigeria”, (5 August 2016), online: *Legal Services Nigeria - Commercial & Advocacy Lagos Law Firm - SA Shitta-Bey & Co* <<http://jabitachambers.com/growing-necessity-for-the-protection-for-service-marks-in-nigeria/>>.

These are marks which are beyond the domain of traditional trademarks. They include shapes, sounds, scents, tastes, and textures. Trademarks have indeed come a very long way from the days when signs were branded on cattle and bricks. Today, the wide definition of trademarks given in TRIPS has led to the expansion of the scope of trademark protection. Consequently, any sign including “single colors, shapes, sounds, smells, video clips, holograms and even gestures,”<sup>441</sup> can be registered as a trademark. These categories of marks are now referred to as non-traditional trademarks. According to Calboli,<sup>442</sup> “the current definition of trademarks has led to a slippery slope situation where anything that is capable of distinguishing, because it is either original or interesting to the eye (and well-advertised), can be registered as a mark.”<sup>443</sup> The author warns that “trademark examiners should require a higher degree of secondary meaning before registering these marks.”<sup>444</sup> As argued later in this chapter, TRIPS qualifies the definition of trademark in a way that seems to remove the certainty of what can be trademarked. With non-traditional marks, it has been argued “that there is the difficult question of what constitutes an adequate representation of a non-traditional sign.”<sup>445</sup>

This problem “goes beyond applications for registration of “non-visual” marks, such as sounds, scents, and tastes, and extends to applications for shape and / or color marks, where vague representations can give rise to uncertainties over what the mark actually is and the scope of what

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<sup>441</sup> Irene Calboli, “Chocolate, Fashion, Toys and Cabs: The Misunderstood Distinctiveness of Non-Traditional Trademarks” (2018) 49:1 IIC - International Review of Intellectual Property and Competition Law 1–4 at 1.

<sup>442</sup> Calboli, “Chocolate, Fashion, Toys and Cabs”, *supra* note 443.

<sup>443</sup> *Ibid* at 3.

<sup>444</sup> *Ibid* at 3.

<sup>445</sup> Michael Handler, “What Should Constitute Infringement of a Non-Traditional Mark?: The Role of ‘Trademark Use’” in *The protection of non-traditional trademarks: critical perspectives*, 1st ed ed (Oxford: Oxford University Press, 2019) 165 at 165.

is being claimed.”<sup>446</sup> Despite its inherent challenges, the inclusion of non traditional marks has become a worldwide phenomenon.<sup>447</sup> Nigerian trademark law however does not provide for non-traditional marks and the implications (or lack thereof) for women entrepreneurs producing cosmetics is discussed later in this chapter.

#### E. Trade Names

A trade name is the “name or designation identifying the enterprise of a natural or legal person.”<sup>448</sup> Most entrepreneurs in the informal sector in Nigeria carry on their businesses under a trade name, by which their business and trading objects are distinguished from all other businesses. This is principally because of the ease and simplicity of registering a business name (same as trade name) compared to a limited or unlimited company. The Nigerian Company and Allied Matters Act (CAMA)<sup>449</sup> established the Nigerian Corporate Affairs Commission (the Commission) and empowers the Commission to regulate and supervise the registration of business names.<sup>450</sup> Trade names are legally different from trademarks specifically because while a trade name is an official name under which an entrepreneur carries on business, a trademark offers companies legal protection for a particular brand, which may be associated with a trade name. However, trade names offer a measure of protection to business owners because once their trade name is registered with the Commission, no other business can legally operate under the same or similar name. If

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<sup>446</sup> Michael Handler, “What Should Constitute Infringement of a Non-Traditional Mark?: The Role of ‘Trademark Use’” in *The protection of non-traditional trademarks: critical perspectives*, 1st ed (Oxford: Oxford University Press, 2019) 165 at 165.

<sup>447</sup> Irene Calboli, *The Protection of Non-Traditional Trademarks: Critical Perspectives*, first edition. ed, Oxford scholarship online (Oxford: University Press, 2019) at 1.

<sup>448</sup> Bureaux for the Protection of Intellectual Property (BIRPI), Model Law for Developing Countries on Marks, Trade Names, and Acts Of Unfair Competition (WIPO, 1967) at S1(d).

<sup>449</sup> *Companies and Allied Matters Act, 2020 Act No. 3* (Federal Republic of Nigeria Official Gazette, 2020).

<sup>450</sup> S8(1)*Ibid.*

another company attempts to do so, whether deliberately or inadvertently, the Commission could direct the company concerned to change its name within six weeks from the date of the direction or such longer period as the Commission may allow.<sup>451</sup>

The regulation of trade names is very significant for women producing cosmetics in several ways. First, it protects the creative investments made by entrepreneurs by distinguishing their enterprise. Second, it helps to preserve the good will and reputation that may be associated with their trade name, thereby increasing competition. Third, the law helps to promote clarity in the marketplace by encouraging consumers to rely on the entrepreneur's trade name when assessing the quality of the product; and finally, "the use of a trade name is unavoidable: every natural or legal person who (or which) pursues a trade does so under a name, be it his (or its) own name or another name, designation, or description"<sup>452</sup> The Nigerian Trademark law recognizes trade names by providing that "in any action or proceeding relating to a trade mark or trade name, the tribunal shall admit evidence of the usages of the trade concerned and of any relevant trade mark or trade name or get-up legitimately used by other persons."<sup>453</sup> To enjoy this benefit such a trade name must be registered with the commission as a business name.

### 3.2 Analysis of the Legal Framework for Trademarks

In the second section of this chapter, I carry out a critical analysis of the current legal regime for the protection of trademarks in Nigeria. To provide a clearer picture of the international trademark regime, it begins with a general overview of the WIPO, the Nice Agreement, the Madrid

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<sup>451</sup> S30(1) Ibid

<sup>452</sup> Bureaux for the Protection of Intellectual Property (BIRPI), *Model Law for Developing Countries on Marks, Trade Names, and Acts Of Unfair Competition* (WIPO, 1967) at 77.

<sup>453</sup> S52 Trade Marks Act Chapter 436 Laws of the Federation of Nigeria (LFN) 1990

System, and ARIPO. Thereafter, the section carries out an analysis of the international framework for trademarks relevant to Nigeria,<sup>454</sup> namely the Paris Convention for the Protection of Industrial Property (1883),<sup>455</sup> and the Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPS).<sup>456</sup> The analysis of the international framework is followed by a critical examination of the national framework for trademarks in Nigeria, namely, the Trade Marks Act.<sup>457</sup> The aim of this section is to highlight the extent to which the trademark regime supports the innovation of women producing natural cosmetics in Nigeria.

### 3.2.1 General overview of the WIPO, the Nice Agreement, the Madrid System, and ARIPO.

#### A. *The World Intellectual Property Organization (WIPO)*

WIPO was established by the *Convention Establishing the World Intellectual Property Organization* (The WIPO Convention)<sup>458</sup> in 1967. WIPO is the global forum for intellectual property (IP) services, policy, information and cooperation, and coordinates international treaties regarding IPRs, such as the Paris Convention and Madrid Systems, amongst others. There are presently 193 member states in WIPO, including Nigeria which joined WIPO in 1995.<sup>459</sup> Although WIPO was originally established primarily to promote the protection of IP, its objective was redefined as a public-interest or humanitarian goal when it became one of the specialized agencies

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<sup>454</sup> Trademark-related treaties administered by WIPO are the Paris Convention, Madrid Agreement (Marks) Madrid Protocol, Nice Agreement, Vienna Agreement, Singapore Treaty, Trademark Law Treaty and Nairobi Treaty. This chapter will only consider treaties that Nigeria has ratified.

<sup>455</sup> note 358.

<sup>456</sup> World Trade Organization (WTO), *supra* note 8.

<sup>457</sup> Trade Marks Act Chapter 436 Laws of the Federation of Nigeria (LFN) 1990

<sup>458</sup> “Convention Establishing the World Intellectual Property Organization”, online: WIPO<<https://www.wipo.int/treaties/en/convention/index.html>>.

<sup>459</sup> “Information by Country: Nigeria”, online: WIPO<[https://www.wipo.int/members/en/details.jsp?country\\_id=128](https://www.wipo.int/members/en/details.jsp?country_id=128)>.

of the United Nations (UN) system in 1974.<sup>460</sup> All member states of the UN are entitled, though not obliged, to become members of the specialized agencies.<sup>461</sup>

In January 2020, the WIPO Nigeria Office (WNO) was established in Abuja, Nigeria, to promote awareness raising, training, and capacity building in the field of IP, and across WIPO's global services in Nigeria. The aim is to provide a responsive institutional sub-Saharan presence for WIPO in Nigeria. WIPO aims to expand the knowledge, accessibility, awareness, and strategic use of IP for economic, social, and cultural development in Nigeria through close engagement with the Nigerian Government and IP stakeholders in Nigeria.<sup>462</sup>

WIPO leads the development of an international IP system that aims to enable innovation and creativity for the benefit of everyone. One way it aims to achieve this is to create awareness about IP across the world, thus, in 1998 the WIPO Academy was established. The Academy's objective is to provide general and specialized courses on IP. WIPO has indeed played a central role in international IP training and education programs by offering technical assistance to countries. However, as argued by de Beer and Oguamanam,<sup>463</sup> "if these objectives can be aligned with the principles underpinning WIPO's recently adopted Development Agenda, developing [Third World] countries could benefit from a richer understanding of the nuanced ways in which IP systems can be creatively designed and exploited to facilitate human development."<sup>464</sup>

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<sup>460</sup> Robin Gross, *World Intellectual Property Organization (WIPO)* / (Global Information Society Watch). Article 1 of the key agreement establishing WIPO's relationship to the UN restates WIPO's purpose as: "for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the Third World countries in order to accelerate economic, social and cultural development..." (WIPO, 1974).

<sup>461</sup> "WIPO — A Brief History", online: WIPO <<https://www.wipo.int/about-wipo/en/history.html>>.

<sup>462</sup> "WIPO Nigeria Office", online: WIPO <<https://www.wipo.int/about-wipo/en/offices/nigeria/index.html>>.

<sup>463</sup> Jeremy de Beer & Chidi Oguamanam, "Open Minds: Lessons from Nigeria on Intellectual Property, Innovation, and Development" in *Open Development* (The MIT Press, 2014).

<sup>464</sup> *Ibid* at 252.

Indeed, dissatisfaction with the “disadvantageous or inappropriate way of governing IPRs”<sup>465</sup> led to the adoption of the Development Agenda by Third World countries “in an effort to replace WIPO’s mission of automatically maximizing intellectual property rights without examination of the impact of policies.”<sup>466</sup> The proposal for a Development Agenda at WIPO asserted “that greater protection for intellectual property rights alone, without any focus on improving developmental structures within these countries would be detrimental in the long run.”<sup>467</sup> Consequently the development agenda addressed this issue by recommending that the technical assistance from WIPO should be:

- To assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote fair balance between intellectual property protection and the public interest. This technical assistance should also be extended to sub-regional and regional organizations dealing with intellectual property.<sup>468</sup>
- To assist Member States to strengthen national capacity for protection of domestic creations, innovations and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO’s mandate.<sup>469</sup>
- To further mainstream development considerations into WIPO’s substantive and technical assistance activities and debates, in accordance with its mandate<sup>470</sup>

and that:

WIPO’s legislative assistance shall be, inter alia, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.<sup>471</sup>

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<sup>465</sup> Muzaka, “A dialogic approach to understanding regime conflicts”, *supra* note 96 at 70.

<sup>466</sup> Robin Gross, “Development Agenda”, online: *IP Justice* <<https://www.ipjustice.org/campaigns/wipo/wipo-development-agenda/>> at 1.

<sup>467</sup> *Ibid.*

<sup>468</sup> Recommendation 10, “The 45 Adopted Recommendations under the WIPO Development Agenda”, online: <<https://www.wipo.int/ip-development/en/agenda/recommendations.html>>.

<sup>469</sup> *Ibid* Recommendation 11

<sup>470</sup> *Ibid*, Recommendation 12

<sup>471</sup> *Ibid*, Recommendation 13

In 2007, after several years of discussion, WIPO officially adopted the Development Agenda. However, the extent to which WIPO plays its public-interest or humanitarian goal in the Third World is an ongoing debate.<sup>472</sup>

*B. Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*

The Nice Agreement was concluded at Nice in 1957 and was amended in 1979 to establish a classification of goods and services for the purposes of registering trademarks and service marks (known as the Nice Classification). The trademark offices of Contracting States indicate, in official documents and publications in connection with each registration, the numbers of the classes of the Classification to which the goods or services for which the mark is registered belong. The competent offices of the Contracting States must indicate in official documents and in any publication they issue in respect of the registration of marks, the numbers of the classes of the Classification to which the goods or services for which the mark is registered belong. Although Nigeria is also not a Contracting State to the Agreement, the Agreement is open to states party to the Paris Convention<sup>473</sup> and so open to Nigeria. Use of the Nice Classification is mandatory not only for the national registration of marks in countries party to the Nice Agreement, but also for

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<sup>472</sup> Peter Drahos, “Third World countries and International Intellectual Property Standard-Setting” (2005) 5:5 The Journal of World Intellectual Property 765–789; Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, 1st ed (Routledge, 2002); Jean-Frédéric Morin & Edward Richard Gold, “An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Third World countries” (2014) 58:4 International studies quarterly 781–792; Pratyush Upreti, “A TWAIL Critique of Intellectual Property and Related Disputes in Investor-State Dispute Settlement”(2022) The Journal of World Intellectual Property, online: Wiley Online Library<<http://onlinelibrary.wiley.com/doi/abs/10.1111/jwip.12217>>.

<sup>473</sup> “Summary of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of the Marks (1957)”, online:WIPO<[https://www.wipo.int/treaties/en/classification/nice/summary\\_nice.html](https://www.wipo.int/treaties/en/classification/nice/summary_nice.html)>.

the international registration of marks effected by the African Intellectual Property Organization (OAPI), the African Regional Intellectual Property Organization (ARIPO), the International Bureau of WIPO, amongst others. The Nice Classification is also applied in countries, like Nigeria, not party to the Nice Agreement. Trademarks are registered in Nigeria in accordance with the Nice Classification of goods and services under the internationally recognized class headings even though Nigeria is not a contracting party to the Nice Agreement.<sup>474</sup>

### C. *The Madrid System for the International Registration of Marks (Madrid System)*

The Madrid System is a “convenient and cost-effective solution for registering and managing trademarks worldwide.”<sup>475</sup> It is governed by the Madrid Agreement,<sup>476</sup> concluded in 1891, and the Protocol<sup>477</sup> relating to that Agreement, which concluded in 1989. The system makes it possible to protect a mark in different and any number of countries simultaneously by obtaining an international registration that has effect in each of the designated Contracting Parties.<sup>478</sup> Through the Madrid System, the international registration and protection of trademarks is simplified and standardized across borders. The Agreement provides that:

nationals of any of the contracting countries may, in all the other countries party to this Agreement, secure protection for their marks applicable to goods or services,

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<sup>474</sup> Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks [https://www.wipo.int/treaties/en/text.jsp?file\\_id=287532](https://www.wipo.int/treaties/en/text.jsp?file_id=287532).

On 19 April 2007, the Honourable Minister for Commerce and Industry exercised his powers under sections 42 and 45 of the Nigerian Trade Marks Act by issuing a regulation (the “Regulation”) expanding the classification under the Fourth Schedule of the Trade Marks Regulations covering 34 classes of goods to include service marks “according to the manner and structure” of the Nice Classification. See Mark Mordi, “Towards Trademark Law Reform in Nigeria: A Practitioner’s Note” in NIALS Journal of Intellectual Property (Nigeria: Maiden Edition, 2011) 193 at 204

<sup>475</sup> “WIPO | Madrid – The International Trademark System”, online: WIPO <<https://www.wipo.int/madrid/en/index.html>>.

<sup>476</sup> *Madrid Agreement Concerning the International Registration of Marks* (World Intellectual Property Organization, 1979).

<sup>477</sup> *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (World Intellectual Property Organization, 2007).

<sup>478</sup> note 477.

registered in the country of origin, by filing the said marks at the International Bureau of Intellectual Property (hereinafter designated as ‘the International Bureau’) referred to in the Convention establishing the World Intellectual Property Organization (hereinafter designated as ‘the Organization’), through the intermediary of the Office of the said country of origin.<sup>479</sup>

The Madrid System can be used by anyone who has a personal or business connection to one of the System’s members. In effect, one must be either domiciled, have a business establishment in, or be a citizen of one of the 125 countries covered by the Madrid System’s 109 members. Nigeria, having not acceded to either the Madrid Agreement or the Protocol, is not one of those countries. However, Nigerians can still have access to and benefit from the Madrid System because members of countries that are party to the Paris Convention can do so if they are within the territories of the Special Union.<sup>480</sup> Each application for international registration must be presented on the form prescribed by the Regulations, the Office of the country of origin of the mark shall certify that the particulars appearing in such application correspond to the particulars in the national register<sup>481</sup> and the applicant must indicate the goods or services in respect of which protection of the mark is claimed, and also, if possible, the corresponding class or classes according to the classification established by the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks<sup>482</sup> (Nigeria does have the classifications but even if Nigeria did not, the International Bureau would classify the goods or services in the appropriate classes of the said classification).<sup>483</sup>

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<sup>479</sup> Article 1(2) note 478.

<sup>480</sup> Article 1 *ibid* The countries to which this Agreement applies constitute a Special Union for the International registration of marks.

<sup>481</sup> Article 3 (1) *ibid*.

<sup>482</sup> Article 3 (2) *ibid*.

<sup>483</sup> article 3(2) *ibid*.

From the date an international registration is in effect, the protection of the mark in each of the contracting countries concerned shall be the same as if the mark had been registered directly there<sup>484</sup> and the mark shall enjoy the right of priority provided by the Paris Convention<sup>485</sup> without requiring further compliance with the formalities prescribed by the convention.<sup>486</sup> The Madrid System has indeed simplified the process of international trademarks registration and enforcement for women entrepreneurs who have the capacity to carry on international business. Unfortunately, very few women producing cosmetics in Nigeria grow past micro-enterprises to international trading due to various factors which will be addressed in this thesis.

D. The African Regional Intellectual Property Organization (ARIPO)<sup>487</sup>

ARIPO is an inter-governmental organization (IGO) that facilitates cooperation among member states in IP matters. Its objective is to pool financial and human resources, and seek technological advancement for economic, social, technological, scientific, and industrial development.<sup>488</sup> ARIPO is mandated to register marks and the administration of such registered marks on behalf of the Banjul Protocol Contracting States in accordance with the provision of the Banjul Protocol on Marks. The Banjul Protocol on Marks was adopted on November 19, 1993, at Banjul, The Gambia. It establishes a trademark application system where an applicant may file a single application either at one of the Banjul Protocol Contracting States or directly with the

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<sup>484</sup> Article 4 (1) *ibid.*

<sup>485</sup> See Article 4 World Intellectual Property Organization, “Paris Convention for the Protection of Industrial Property”, online: WIPO <<https://wipo.int/en/text/287556>>.

<sup>486</sup> Article 4 (2) note 478.

<sup>487</sup> “Trademarks – The African Regional Intellectual Property Organization (ARIPO)”, online: ARIPO <<https://www.aripo.org/ip-services/trademarks/>>.

<sup>488</sup> “The African Regional Intellectual Property Organization (ARIPO)”, online: ARIPO <<https://www.aripo.org/>>.

ARIPO Office. The ARIPO Office has introduced online services to allow applicants, attorneys, and other users to conduct their ARIPO business electronically in a secure environment.<sup>489</sup>

Regional organizations like this are very important for Third World countries because they “are able to represent the interests and welfare of the constituent Member countries more easily than the larger multilateral frameworks where greater tension converges.”<sup>490</sup> However, ARIPO like other regional agreements, has been revised to make it compatible with TRIPS, which suggests the problems inherent in TRIPS (as discussed in the next section), may ultimately be reflected in the regional agreement. Further, Nigeria has yet to join the organization but enjoys an observer status.

### 3.2.1 Analysis of the International Framework for Trademarks Relevant to Nigeria

### 3.2.2 *The Paris Convention for the Protection of Industrial Property (Paris Convention) 1883*<sup>491</sup>

The Paris Convention, as explained above, sought to harmonize national IP laws to protect foreign inventors. The Convention provides basically for national treatment,<sup>492</sup> priority right<sup>493</sup> and common rules for Patents, Marks, Industrial Designs, Trade names, Indication of Source and

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<sup>489</sup> note 489.

<sup>490</sup> Adebambo Adewopo, “Trademark Systems in Africa: A Proposal for the Harmonization of The ARIPO and OAPI Agreements on Marks” (2003) 6:3 *The Journal of world intellectual property* 473 at 474.

<sup>491</sup> note 358.

<sup>492</sup> “The Convention provides that, as regards the protection of industrial property, each Contracting State must grant the same protection to nationals of other Contracting States that it grants to its own nationals.” See, “Summary of the Paris Convention for the Protection of Industrial Property (1883)”, online: <[https://www.wipo.int/treaties/en/ip/paris/summary\\_paris.html](https://www.wipo.int/treaties/en/ip/paris/summary_paris.html)>.

<sup>493</sup> *Ibid.*

This right means that, on the basis of a regular first application filed in one of the Contracting States, the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), apply for protection in any of the other Contracting States. These subsequent applications will be regarded as if they had been filed on the same day as the first application. In other words, they will have priority (hence the expression "right of priority") over applications filed by others during the said period of time for the same invention, utility model, mark or industrial design.

Unfair Competition which all Contracting States must follow.<sup>494</sup> As rapid changes in technology began to facilitate greater quantities of trade as well as speed in transboundary exchanges, local economies sought an international control mechanism to protect themselves outside their borders.<sup>495</sup> This led to what Chimni calls the “‘internationalization of property rights’ by which is meant their specification, articulation and enforcement through international laws and institutions.”<sup>496</sup>

Essentially, therefore, developed economies in their determination to prevent other economies from “benefiting” from trade advantages caused by the absence of trade barriers between countries through the sale of counterfeit products put together the Paris Convention. While the international regime for IP is not, by itself, a problem, the institution of the laws in ways that benefit the First World against the interests of the Third World continues to pose a problem for the latter. As Chimni explains, “global imperialism is characterized by the adoption of laws for the creation and protection of *international* property rights.”<sup>497</sup>

Article 1(3) defines the term “industrial” very widely to include everything that could be created by anyone, as understood at that time. It provides that:

Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.<sup>498</sup>

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<sup>494</sup> *Ibid*

<sup>495</sup> Bawa, *supra* note 110.

<sup>496</sup> Chimni, *supra* note 350 at 29.

<sup>497</sup> *Ibid*.

<sup>498</sup> Murtala Muhammad, “Trademarks in Nigeria: An Overview.” (2016) 4:4 International Journal of Innovative Legal & Political Studies, online: <<http://seahipaj.org/journals-ci/dec-2016/IJILPS/full/IJILPS-D-2-2016.pdf>>.

Cosmetic products come under both the general industry as well as agricultural industry because natural cosmetics are made from agricultural products. The names and logos of cosmetic products can be registered as trademarks. Popular cosmetics trademarks include Dudu-Osun, Mary Kay, Bath & Body Works, Avon, amongst many others that can be found globally. Article 6 of the Paris Convention goes on to provide for the protection and registration of trademarks. It provides that the conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation but adds that even if a trademark has not been filed in the country of origin, an application for the registration of a mark filed by a national of a country of the Union in any country of the Union<sup>499</sup> may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin. Accordingly, a mark duly registered in a country of the Union shall be regarded as independent of marks registered (or unregistered) in the other countries of the Union, including the country of origin.

The Paris Convention also provides for service marks. It provides that “the countries of the Union undertake to protect service marks. They shall not be required to provide for the registration of such marks.”<sup>500</sup> This is relevant for women entrepreneurs engaged in salon services for instance, where they administer natural cosmetics in the form of massage oils, shampoos, etc. It is significant for women entrepreneurs that registration is not required for this protection because of the high cost associated with IP registration. Even more relevant for women entrepreneurs producing cosmetics is article 7 which provides for Collective

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<sup>499</sup> This refers to countries that have acceded to the Paris Convention. Nigeria became a country of the union when Nigeria acceded to this treaty on July 17, 1963

<sup>500</sup> Article 6sexies, note 358.

Marks because they mostly work in groups and form cooperatives that enable them to join their resources together to produce larger quantities of products that may be exported.

The Paris Convention provides that “the countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.” It goes on to delegate the judgment of the conditions under which a collective mark shall be protected to the member country and that they may refuse protection if the mark is contrary to the public interest.<sup>501</sup>

Again, the provision that the protection of these marks shall not be refused to any association simply because the association is not established in the country where protection is sought or is not constituted according to the law of the latter country, makes appropriating collective marks administratively easier. Article 8 provides for the protection of trade names in all the countries of the Union without the obligation of filing or registration, whether or not the trade name forms part of a trademark. This is welcoming for women entrepreneurs who mostly do their businesses under trade names because they often cannot afford the financial and legal rigors of other forms of IP protection.<sup>502</sup>

The Paris Convention guarantees national treatment to member states.<sup>503</sup> It requires that each member state should grant the same protection to eligible foreign trademark holders that it grants to its own nationals. Ideally, the national treatment undertaking assures foreign

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<sup>501</sup> Article 8(2) *Ibid*

<sup>502</sup> S52 of the Nigerian Trade Marks Act provides that, “in any action or proceeding relating to a trade mark or trade name, the tribunal shall admit evidence of the usages of the trade concerned and of any relevant trade mark or trade name or get-up legitimately used by other persons.”

<sup>503</sup> Articles 2 & 3 note 358.

businesses that their marks will be protected in the foreign nation as the nationals' marks are, and that foreign mark holders will not be disadvantaged by doing business in that foreign country. There is however an exception to this rule. The national treatment is subject to the host country's laws relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property.<sup>504</sup> Examples of such laws include the requirement for "foreign trademark holders to designate or appoint an agent for service or to post a bond for litigation, in conjunction with making application for trademark protection."<sup>505</sup> This is a laudable provision of the Convention as it attempts to ensure that foreign trademark holders are not discriminated against and provides some level of harmonization of national laws.<sup>506</sup>

The problem for women entrepreneurs, however, is that even though the Paris Convention provides that the conditions for filing and registration of trademarks are "to be determined in each country of the Union by its domestic legislation,"<sup>507</sup> one must recall that IP laws were mostly extended to countries like Nigeria during colonization. Being spawned by the same international institutions and treaties that had facilitated their colonization earlier on, the national laws were such a repetition of the treaties (as will be shown later), that the provision "to be determined by domestic legislation" is tautological at best, since the

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<sup>504</sup> Article 2(3)*Ibid.*

<sup>505</sup> Atwesigye Damson, "Paris Convention for the Protection of Industrial Property, 1883" Analysis of the Paris Convention, [online: <https://www.academia.edu/39353899/PARIS\\_CONVENTION\\_FOR\\_THE\\_PROTECTION\\_OF\\_INDUSTRIAL\\_PROPERTY\\_1883>](https://www.academia.edu/39353899/PARIS_CONVENTION_FOR_THE_PROTECTION_OF_INDUSTRIAL_PROPERTY_1883) at 5.

<sup>506</sup> Ulrich Loewenheim, "The Principle of National Treatment in the International Conventions Protecting Intellectual Property" in Wolrad Prinz zu Waldeck und Pyrmont et al, eds, *Patents and Technological Progress in a Globalized World: Liber Amicorum Joseph Straus* MPI Studies on Intellectual Property, Competition and Tax Law (Berlin, Heidelberg: Springer, 2009) 593.

<sup>507</sup> Article 6, note 14

domestic legislation is filled with similar provisions as the treaty. Indeed, as TWAIL scholars argue, even though colonialism today no longer involves territorial conquests of the formal colonial era, “the establishment of informal empires such as those of free trade that intervening states use to serve the interests of their profit-seeking corporations”<sup>508</sup> is one of the ways that the First World continues to assert control over the Third World. Unfortunately, IP laws were not immediately recognized as vestiges of colonialism, therefore, even after the colonies got their independence, the laws were not changed to accommodate the local realities of the nations. While some Third World countries, such as India, have made radical changes to their IP laws,<sup>509</sup> most have not. Nigeria, as will be seen later in the analysis, has made no change in the content of its trademark laws since it attained independence.

Charles Lawrence’s<sup>510</sup> metaphor of racism as a disease aptly describes the failure of stakeholders in Third World countries like Nigeria to leverage national discretions provided in the treaty and unawareness of the cancerous effect of adopting copious provisions of the Paris Convention without recourse to the unique needs of a Third World economy, long after colonization. According to Charles Lawrence,

One’s inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease. This failure is compounded by a reluctance to admit that the illness of racism infects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.<sup>511</sup>

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<sup>508</sup> Gathii, *supra* note 281 at 2.

<sup>509</sup> “India’s IP Regime: Renewed Reform Efforts and Ongoing Challenges”, online: *The National Bureau of Asian Research (NBR)* <<https://www.nbr.org/publication/indias-ip-regime-renewed-reform-efforts-and-ongoing-challenges/>>.

<sup>510</sup> Charles Lawrence, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism” (1987) 39:2 *Stanford Law Review* 317.

<sup>511</sup> *Ibid* at 321.

Some decided cases in Nigeria<sup>512</sup> show how easy it is for multinational companies to stifle smaller competitors using the instrument of unwitting (“diseased”) national courts and international treaties. To ensure a very wide breath of compliance, Article 24 of the Paris Convention requires any country to declare in its instrument of ratification or accession that this convention’s provisions shall be applicable to all or part of its designated territories, for the external relations of which it is responsible.<sup>513</sup> In other words, all the provisions set out in the Paris convention regarding every imaginable product produced could be binding on every nation that accedes to the treaty, subject to their national laws.

The following aspects of the treaty pose peculiar challenges for women entrepreneurs in Third World countries like Nigeria:

1. The problem of determining well-known marks.

A well-known mark is a trademark that has acquired widespread reputation or recognition. Such a trademark may enjoy broader protection than other marks. Although Article 6b of the Paris Convention provides for the protection of well-known marks, it neither provides the criteria to determine whether a mark is well known nor whether use in the country where protection is sought is required as a basis for protection.<sup>514</sup> While it is impossible to enumerate every foreseeable instance that could determine or define what a well-known mark is (or could be), this provision

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<sup>512</sup> See for example, *Iyke Merchandize v Pfizer Inc and Anor* (2001) LCN /2982(SC) where Pfizer a multinational pharmaceutical company successfully brought an action against a local company for supplying an infringing product which closely resembled a trademark used by Pfizer.

<sup>513</sup> Caroline Nwabueze, “Challenges of Transnational Trademark Law Practice: The Case of Nigerian Companies Brands in OAPI States” (2015) 45:1 *Revue générale de droit* 321-347.

<sup>514</sup> Marshall Leaffer, “Protection of Well-known Marks: A Transnational Perspective” in Irene Calboli & Edward Lee, eds. *Trademark Protection and Territoriality Challenges in a Global Economy* (Cheltenham, UK: Edward Elgar Publishing, 2014).

gives wide powers to a country to refuse or admit a registration of a “well known mark.” Recognizing the difficulty around the determination of well-known marks, the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (Joint Recommendation)<sup>515</sup> provided factors for a competent authority to consider when determining whether a mark is a well-known mark in a member state.<sup>516</sup>

The Joint Recommendation, however, admits that the factors, which are guidelines to assist the competent authority to determine whether the mark is a well-known mark, are not pre-conditions for reaching that determination, and that each case will depend on the circumstances of that case. In fact, in some cases none of the factors may be relevant and a decision may be reached on other factors neither provided nor listed.<sup>517</sup> With a long history of First World economies’ attempts to ensure that Third World economies remain consumers (not producers) of products of the West, this provision could place undue hardship on women entrepreneurs trying to break the glass ceiling through the exportation of their goods. The test of similarity to a well-known mark could be subject to the whim of bigger companies.

Third World countries are not only necessarily bound to the treaty on accession but by the proactive and verbatim adoption of most of the provisions in Paris Convention into their national laws, thus making it easy for First World countries to continue to ride roughshod over trade matters through the instrument of national courts. According to Bartow, “expansive constructions of trademark rights discourage third parties from using trademarks of their own that are even mildly similar to pre-existing marks, impede legitimate competition, and dissuade and chill legally

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<sup>515</sup> *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* (World Intellectual Property Organization (WIPO), 2000).

<sup>516</sup> *Ibid* at Article 2.

<sup>517</sup> *Ibid* at Article 2(1)C.

permissible free speech uses of trademarks.”<sup>518</sup> This is a fight for the strong as this provision gives powerful members the right to reject trademarks from Third World countries. Indeed, countries like the United States are also known to deny protection for a foreign well-known mark as it fits them at the instance “in direct conflict with its international treaty commitments.”<sup>519</sup>

## 2. The cost of upholding rights

The Paris Convention made no allowance for small business holders who cannot afford the cost of upholding their right in the international arena. Many owners of well-known marks must spend excessive amount of financial and human resources to defend their trademarks internationally, especially on disputes “even in countries where they do minimal business, and even then, their marks may remain at risk even after these unproductive policing expenditures.”<sup>520</sup> A capitalist could remark that such small business holders have no place in the international arena in the first place. Yet, if inclusiveness is considered as important, there ought to be reforms in the treaty to make allowance for small business holders to waive some cost. But this is not so. Rather, “Third World countries have, over the last forty years, persistently argued for international rules that facilitate the transfer of technology and give them some control over the conduct of multinationals,”<sup>521</sup> to no avail.

Trademark holders must bear the cost of upholding rights which could include getting lawful representation, managerial and / or court costs. These costs, including time, need to be taken into

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<sup>518</sup> Ann Bartow, “Likelihood of Confusion” (2004) 41 *Diego Law Review*, online: SSRN<<https://papers.ssrn.com/abstract=544923>>at 1.

<sup>519</sup> Leaffer, “Protection of Well-known Marks”, *supra* note 505 at 36.

<sup>520</sup> *Ibid* at 17.

<sup>521</sup> Peter Drahos, “Third World countries and International Intellectual Property Standard-Setting” (2005) 5:5 *The Journal of World Intellectual Property* 765–789 at 779.

consideration when advancing the benefits of upholding the rights.<sup>522</sup> Extensive powers are given to countries in Article 9 of the Paris Convention to seize imported goods and “if the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.”<sup>523</sup>

Provisions like this do not bode well for most women producers who run small-scale businesses and cannot afford to register their products either inside or outside Nigeria. Yet many of their products have attained popularity because of the rising demand for natural products. Most of the producers of natural cosmetics are operating at the level of input to production where they extract essential oils from agricultural products but do not make economic gains as their products move up the value chain. The Paris Convention did not make allowance for those innovating at that primary level. The battle between Amazon and Lush<sup>524</sup> where “UK-based Lush was successful in convincing the court that Amazon had infringed its trademark by returning results for the term ‘Lush’ in its search function despite not selling any Lush products,”<sup>525</sup> is one example of how grueling and capital intensive it can be to defend one’s trademark in the international arena. Indeed, women entrepreneurs producing cosmetics in Nigeria’s informal economy have little chance of exporting their products “themselves” under the Paris Convention. Rather, multinational cosmetics companies purchase traditionally processed products like shea butter from them for pittance. They export these products to their countries to refine, valorize and market them all over the world

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<sup>522</sup> Damson, *supra* note 507.

<sup>523</sup> Article 9(6) Paris Convention, *note* 11

<sup>524</sup> *note* 413.

<sup>525</sup> “Lush defeats Amazon at UK High Court in row over search results” *World IP Review* (10 February 2014), online: <<https://www.worldipreview.com/news/lush-defeats-amazon-in-trademark-battle>>.

because they have the financial means and exposure to do so.<sup>526</sup> These companies do this easily because most women entrepreneurs producing these raw materials do not have the means to comply with complex regulations that come with international IP protection.<sup>527</sup> TRIPS purportedly set out to resolve some of these and other issues arising from the Paris Convention as well as other treaties related to industrial property.

### 3.2.3. *The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) 1995*<sup>528</sup>

The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) covers all main areas of intellectual property (IP).<sup>529</sup> TRIPS sets out the minimum standards of protection to be provided by each Member country of the Agreement. Each of the main elements of IP protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.<sup>530</sup> The main substantive provisions of the Paris Convention (and the Berne Convention) are incorporated by reference and thus become obligations under TRIPS between TRIPS-member countries. TRIPS purportedly set out to resolve some of the issues arising from the Paris Convention as well as other treaties related to industrial property, as TRIPS adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate.<sup>531</sup> In the next section, I briefly examine to what extent TRIPS accommodates the needs of developing countries

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<sup>526</sup> “The shea butter economy: big money and exploitation”, (6 July 2011), online: *AGOA.info* <<https://agoa.info/news/article/4800-the-shea-butter-economy-big-money-and-exploitation.html>>.

<sup>527</sup> Fabio Parasecoli, *The Gender of Geographical Indications* supra note 1 at 468

<sup>528</sup> World Trade Organization (WTO), *supra* note 8.

<sup>529</sup> The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data, see “Overview: The TRIPS Agreement”, online: *World Trade Organization* <[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)>.

<sup>530</sup> *Ibid.*

<sup>531</sup> *Ibid.*

like Nigeria and how that accommodation (or lack of it) may affect women entrepreneurs producing cosmetics in Nigeria.

None of the provisions of TRIPS may be said to expressly discriminate against women, as they apply equally to both women and men. I, however, argue that the existing marginalization of women in the development process and the undeniable gender inequalities that persist particularly in local contexts could make the impacts of TRIPS to more negatively affect women's entrepreneurship than men.<sup>532</sup> Furthermore, even though trademark law may not appear on a cursory look "as having particularly compelling gender-related dimensions"<sup>533</sup> compared to other areas of law, such as family law and employment law, we must not presume its gender neutrality.<sup>534</sup> The next section therefore analyses some aspects of TRIPS relating to the protection of Marks in the light of the covert effect they may have on women entrepreneurs producing cosmetics in Nigeria.

To bridge the gaps found in the treaties relating to IP like the Paris Convention, and to facilitate the flow of knowledge-rich goods and services across borders, the WTO incorporated IP into the trade regime through TRIPS. This was an enthusiastic attempt to correct all the perceived wrongs that the international trade system had been plagued with over the years.

The preamble to TRIPS begins thus:

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property

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<sup>532</sup> Padmashree Sampath, *Gender and the Agreement on Trade-related Aspects of Intellectual Property Rights: Exploring some interlinkages* (Institute for Agriculture & Trade Policy, 2004).

<sup>533</sup> Bartow, *supra* note 520.

<sup>534</sup> *Ibid.*

rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade...<sup>535</sup>

The analysis begins with a close examination of this desire, to see to what extent the provisions of TRIPS encapsulate the intention to achieve the expressed desire and how women in Third World countries like Nigeria may enjoy the benefits thereof.

**1. To reduce distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights.**

One of the aims of TRIPS was to create a level playing field (during international trading) for nations within the IP regime. To facilitate its implementation, TRIPS makes provisions<sup>536</sup> that developed country members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country (LDC) members. The nature of this cooperation include assistance in the preparation of IP laws, support for the establishment of relevant IP offices as well as the training of personnel. This “assistance” must, however, be viewed with some angst because of the historical tendency of First World countries to ship to Third World countries palliatives that only benefit First World countries in the long run.

While Nigeria now has several IP experts who possess both the specialized technical skills of legislative drafting and expertise in IP law, their number is not commensurate to the scope of its economy. Worse still, the effort of these local IP experts is negatively impacted

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<sup>535</sup> Preamble, World Trade Organization (WTO), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (World Intellectual Property Organization (WIPO)).

<sup>536</sup> Article 67, *Ibid.*

by non-contextual national IP laws that are vestiges of colonialism, and the lack of political will. At the end of the day, Nigeria is still pursuing an IP agenda within the interstices of an IP paradigm<sup>537</sup> dominated by First World countries by relying upon outside legal drafters who may be brought in on a consultancy basis from First World countries.<sup>538</sup>

The result is national policies that do not represent the unique circumstances of Third World countries, which disenfranchises women (and men) entrepreneurs through stringent requirements imported from international treaties. Like the Greek Trojan Horse gift, the provision of draft laws and legal advice to Third World countries may simply be yet another effort to control trade in Third World countries to their detriment. The technical assistance offered pursuant to TRIPS ought to be targeted at addressing concerns about the effects of trade policies on women's welfare, a key to development in Third World countries rather than transplanting<sup>539</sup> programs that have no bearing on the realities of the Third World. They should be targeted at helping women producers and exporters understand and equip themselves to cope and comply with international trading requirements.<sup>540</sup> These are the kind of technical assistance most relevant to women entrepreneurs.

Rather, Nigeria has benefited from Funds-In-Trust Japan Industrial Property Global (FIT / Japan IP Global)) which supports developing and least developed countries (LDCs) to improve their knowledge of IP systems and enhance their IP capabilities to facilitate

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<sup>537</sup> Jeremy de Beer, ed, *Implementing the World Intellectual Property Organization's Development Agenda* (Waterloo: Wilfrid Laurier University Press/Centre for International Governance Innovation/International Development Research Centre, 2009).

<sup>538</sup> Drahos, *supra* note 112.

<sup>539</sup> Morin & Gold, "An Integrated Model of Legal Transplantation", *supra* note 474.

<sup>540</sup> Sampath, *supra* note 534.

innovation and technology transfer worldwide.<sup>541</sup> The Fund contributes to the development of IP systems in Third World countries through a variety of initiatives over the years. These include high-level meetings with countries and regions to promote cooperation in the field of IP, dispatching experts to develop IP legal systems and operations, holding various workshops, and supporting the digitization of IP Offices.<sup>542</sup> In 2016 the Nigerian trademark registry benefited from the Training of Trainers' Workshop on the Effective Use of Technical and Scientific Information and Evaluation of the National TISC Project.<sup>543</sup> The International Trademark Association (INTA) president<sup>544</sup> led a delegation to Nigeria, where he represented INTA at an IP symposium titled "The Bane of Counterfeit Pharmaceuticals and Piracy: Building Respect for IPR as a Strategic Resource for Economic Growth."<sup>545</sup> At the event, INTA advocated for a revamping of the pro-IP landscape in the country and emphasized the importance of inter-agency collaboration and the establishment of an IP Rights (IPR) Center.<sup>546</sup>

INTA also hosted a two-day training for examiners at the Trademarks, Patents and Designs Registry Trademark Office in Abuja, Nigeria.<sup>547</sup> Participants were briefed on the Association's role and activities around the world and discussed several IP topics, including

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<sup>541</sup> "Funds-In-Trust Japan Industrial Property Global", online: WIPO<[https://www.wipo.int/cooperation/en/funds\\_in\\_trust/japan\\_fitip\\_global/index.html](https://www.wipo.int/cooperation/en/funds_in_trust/japan_fitip_global/index.html)>.

<sup>542</sup> "International Cooperation in association with the World Intellectual Property Organization (WIPO) and the Japan International Cooperation Agency (JICA) | Japan Patent Office", online: <[https://www.jpo.go.jp/e/news/kokusai/developing/experts\\_workshops\\_e.html](https://www.jpo.go.jp/e/news/kokusai/developing/experts_workshops_e.html)>.

<sup>543</sup> "Training of Trainers' Workshop on the Effective Use of Technical and Scientific Information and Evaluation of the National TISC Project", online: WIPO<[https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=39243](https://www.wipo.int/meetings/en/details.jsp?meeting_id=39243)>.

<sup>544</sup> David Lossignol (Novartis Pharma AG, Switzerland)

<sup>545</sup> "INTA Delegation Supports Intellectual Property Rights in Nigeria", (1 October 2019), online: *International Trademark Association* <<https://intaguidesdev.inta.org/inta-delegation-supports-intellectual-property-rights-in-nigeria/>>.

<sup>546</sup> *Ibid.*

<sup>547</sup> "INTA Hosts Training in Nigeria", (16 April 2019), online: *International Trademark Association* <<https://intaguidesdev.inta.org/inta-hosts-training-in-nigeria/>>.

international best practices in trademark oppositions and cancellations, operational procedures, treaties, and brand restrictions.<sup>548</sup> None of these trainings (technical assistance) had any bearing on women innovating in rural areas. The content was all geared toward expanding and strengthening IP without consideration for local appropriation mechanisms, which are more relevant to these women entrepreneurs. Indeed, the technical assistance offered is no more than capsules of US ideas administered to the Third World in the form of “foreign education and capacity building programs”<sup>549</sup> and their effect is that “minds have become more closed rather than more open to a range of different views about the relationship between IP, innovation, and development.”<sup>550</sup> Consequently, adequate consideration is not given to other (more) relevant mechanisms for appropriating IP such as the semi-formal and informal IP mechanisms examined in this thesis for instance.

Further, Article 7 of TRIPS states that “the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” This is a very important provision which stakeholders in Third World countries need to leverage. However, a major problem with focusing on technology as a means to development is “the conceptualization of technology that is wholly detached from the political, social, economic, and cultural context in which it is developed, used and transformed.”<sup>551</sup> While it may be argued that TRIPS favors Third World countries by

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<sup>548</sup> *Ibid.*

<sup>549</sup> Jean-Frederic Morin & E Richard Gold, “International Socialization at the State and Individual Levels: Mixed Evidence from Intellectual Property.” (2017) 29:4 Cambridge Review of International Affairs 1375 at 1375.

<sup>550</sup> de Beer & Oguamanam, *supra* note 465 at 251.

<sup>551</sup> Muzaka, “A dialogic approach to understanding regime conflicts”, *supra* note 96 at 73.

increasing the availability of advanced technologies to them through stronger system of international IP system,<sup>552</sup> the reality for Third World countries is that TRIPS could reduce the ability of the Third World countries to catch up through imitation and adaptation of advanced technologies through “informal” channels such as reverse engineering involving minor changes.<sup>553</sup> Especially in the informal sector where women entrepreneurs abound, “‘informal’ knowledge transfer may be more important than ‘formal’ transfer.”<sup>554</sup>

Attention must therefore be paid to the gender dimensions of the transfer of technology. It is necessary to assess levels and costs of obligations that trade agreements impose on women in Third World countries, the national capacity to meet them, and the adequacy of resources made available by the international community.<sup>555</sup> While technology, technical assistance and capacity building are crucial for addressing concerns about the effects of trade policies on women’s welfare, they must be structured to be specifically targeted according to the trade-related areas that they are dealing with, such as helping women producers and exporters understand and equip themselves to cope in the international marketplace.<sup>556</sup> A good number of capacity-building programs organized by WIPO are vertically directed at IP-related awareness raising and technological capacity building for women, justifying IP laws as a “necessary prerequisite for attracting technology transfer”<sup>557</sup> without much consideration for the adequacy of the system for the particular realities of women in Third

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<sup>552</sup> For instance, Article 66(2) of the TRIPS Agreement provides that developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

<sup>553</sup> Ha-Joon Chang, “Intellectual Property Rights and Economic Development: Historical lessons and emerging issues” (2001) 2:2 Journal of Human Development (Journal of Human Development and Capabilities) 287.

<sup>554</sup> *Ibid* at 301.

<sup>555</sup> Sampath, *supra* note 534 at 73.

<sup>556</sup> Sampath, *supra* note 534.

<sup>557</sup> Muzaka, “A dialogic approach to understanding regime conflicts”, *supra* note 96 at 74.

World countries. Rather, the programs focus on promoting the protection, utilization, and enforcement of IP by women while the gender gap persists.<sup>558</sup>

**2. To ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.**

Despite this objective of TRIPS, creating a balance between access and competition is still a major problem in national IP regimes, a problem that emanates from the international legal playground where the wide gap between the First World and Third World countries seem to stretch. According to Gana, “while antitrust rules and sophisticated regulatory institutions in developed [First World] countries make the balance a feasible, even if difficult, objective, it is not so with the international system.”<sup>559</sup> The costs of obligations that trade agreements like TRIPS impose on women in Third World countries because of the national capacity to meet them is not considered by TRIPS. Indeed, from the beginning, IP was basically considered in the context of the General Agreement on Tariffs and Trade (GATT) “as an ‘acceptable obstacle’ to free trade, at least until the Tokyo Round.”<sup>560</sup> TRIPS is “only Annex 1C of the Agreement Establishing the World Trade Organization, the successor organization to the General Agreement on Tariffs and Trade (GATT). As such, TRIPS was part of a broad package of trade rules.”<sup>561</sup> Gervais<sup>562</sup> gives an insightful examination of the bargaining aspect of TRIPS, which helps to understand its emergence as part of the WTO legal framework, and how it continues to affect Third World countries. Despite its

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<sup>558</sup> “IP Capacity Building Meeting Targets Women Entrepreneurs in Tanzania”, online: WIPO<[https://www.wipo.int/women-and-ip/en/news/2017/news\\_0006.html](https://www.wipo.int/women-and-ip/en/news/2017/news_0006.html)>.

<sup>559</sup> Ruth Gana, “Prospects for developing countries under TRIPS” (1996) 29 Vand J Transnat’l L 735.

<sup>560</sup> Daniel Gervais, *TRIPS: Drafting History and Analysis* (London: Sweet & Maxwell, 2012) at 1.

<sup>561</sup> Daniel Gervais, *TRIPS: Drafting History and Analysis* (London: Sweet & Maxwell, 2012) at 1.

<sup>562</sup> Daniel Gervais, *TRIPS: Drafting History and Analysis* (London: Sweet & Maxwell, 2012).

claims of removing barriers to legitimate trade, TRIPS has ignored a crucial consideration of public interest issues relevant to women entrepreneurs such as poverty eradication and provision of universal access to essential goods and services.<sup>563</sup> These issues invariably impact on how women entrepreneurs engage with the current trademark regime. A deeper discussion of this impact is carried out in the fifth chapter of this thesis.

Third World countries remain on the periphery of international economic relation and the implications of the potential incompatibility of TRIPS with other social institutions in Third World countries were not effectively addressed by TRIPS.<sup>564</sup> Rather, there have been the formation of what Gervais calls “‘IP country clubs,’ designed to negotiate higher protection and enforcement norms among like-minded partners in relative secrecy, including the Anti-Counterfeiting Trade Agreement (ACTA). The ACTA was the first major international, IP negotiation based not on geography but rather on like-mindedness.”<sup>565</sup> The feasibility of TRIPS for the benefit the of Third World countries has been widely questioned by several authors.<sup>566</sup> Indeed, it has been suggested that TRIPS is “skewed to benefit the economic interests of First World countries.”<sup>567</sup>

In addition, there has been evidence of double standards in issues of enforcement.<sup>568</sup> Nigerian women producing cosmetics stand no chance in the current arrangements of international IP

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<sup>563</sup> Sampath, *supra* note 534.

<sup>564</sup> Gana, *supra* note 561.

<sup>565</sup> Gervais, *supra* note 125 at 95.

<sup>566</sup> Chon, *supra* note 37; Okediji, “Africa and the Global Intellectual Property System”, *supra* note 105; Daniel Gervais, “IP Calibration” (2014), online: <[https://www.academia.edu/40245155/IP\\_Calibration](https://www.academia.edu/40245155/IP_Calibration)>.

<sup>567</sup> Gana, *supra* note 561 at 744.

<sup>568</sup> For instance, “for years the Western multinationals that controlled the packaging and distribution of food had made extensive use of the territorial insignia of Third World countries such as Darjeeling tea and Basmati rice without much regard for whether the products they were distributing actually originated from these regions. No one in the West considered this a problem.” See Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, 1st ed (Routledge, 2017) at 109

protection, even with TRIPS. No attention is paid to how “the redistribution of revenue, transfers of technology, and the participation in political decisions relating to agriculture and production are heavily influenced by gender relationships in any given community,”<sup>569</sup> even with the feminization of agriculture.<sup>570</sup> Women entrepreneurs producing natural cosmetics are deeply affected by trade rules governing agriculture because that is the primary source of raw materials for their production. Closer attention must be paid to how the provisions of TRIPS and other bilateral agreements that protect IPRs may impact on them. Somewhere in between the negotiations and setting of standards, women entrepreneurs got lost, and the well sounding provisions of TRIPS has not found them. Rather, research from some countries has shown that international competition has resulted in increasing the income gap between men and women.<sup>571</sup>

### 3.2.3.1 Trademarks and TRIPS

TRIPS goes on to provide for trademarks in section two. This section provides a strenuous definition for trademarks in its attempt to cover every field thus:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.<sup>572</sup>

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<sup>569</sup> Fabio Parasecoli, “The Gender of Geographical Indications: Women, Place, and the Marketing of Identities” (2010) 10:6 Cultural Studies ↔ Critical Methodologies 467–478 at 472.

<sup>570</sup> Olivier de Schutter, *The Agrarian Transition and the ‘Feminization’ of Agriculture* (Transnational Institute, 2013).

<sup>571</sup> Sampath, *supra* note 534.

<sup>572</sup> Article 5, World Trade Organization (WTO), *supra* note 8.

However, TRIPS proceeds to qualify this definition in a way that seems to remove the certainty of what material can be trademarked. In some ways, the qualification of this provision (discussed next) may serve to make the protection of trademarks in the international arena easier to achieve, but in other ways, these qualifications create uncertainty and rather wide discretionary powers to Members:

1. “Paragraph one shall not be understood to prevent a Member from denying registration of a trademark on other grounds if they do not derogate from the provisions of the Paris Convention.”<sup>573</sup> This implies that the grounds for denying registrations are inexhaustible if they meet this condition. Such wide discretion given to Members under Article 15(2), allowing them to deny registration on grounds other than those enumerated, raises some alarm for less powerful parties. As previously argued, women entrepreneurs who are doubly impacted by the prevalent challenges of carrying on business in a Third World country, as well as the gender discrimination they suffer locally as result of patriarchal norms and cultural values are likely to suffer more from such wide discretion.
2. “Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.”<sup>574</sup> This consideration could work in the favor of women entrepreneurs who sometimes must abandon their business for long periods either because of poor finances or to deal with family emergencies.

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<sup>573</sup> Article 15(2)

<sup>574</sup> Article 15(3)

3. “The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.”<sup>575</sup> This is again a consideration that could work positively for women entrepreneurs especially where they use traditional knowledge to produce cosmetics, which may not be commonly known outside their locality

The reality, however, is that women producing natural cosmetics are mostly knowledge producers, while TRIPS is more “concerned with protecting the rights of owners of intellectual property rather than with the producers of IP.”<sup>576</sup> To this extent, TRIPS is of little benefit to these women. Moreover, TRIPS’s acclaimed potential to promote international trade and investment is subject to “institutional prerequisites,”<sup>577</sup> which are sadly lacking in Third World countries. Worse still, TRIPS imposes no specific responsibility on the First World to provide the “resources that would enable the poor countries to construct the necessary social, legal, and administrative infrastructure that would enable them to meet their responsibilities under the agreement.”<sup>578</sup> Nor does it require First World countries to “provide assistance to those in the poor countries that would be severely displaced or burdened by the force of the TRIPS.”<sup>579</sup>

The Third World must not forget that pressure for TRIPS was mounted by countries of the First World and led by the United States in a relentless campaign to wipe out what they perceived as unauthorized appropriation of knowledge-based commodities and production processes by Third World countries like Nigeria, which they claim have failed to adequately provide or

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<sup>575</sup> Article 15(4)

<sup>576</sup> Donald Richards, “Trade-related Intellectual Property Rights” (2005) 12:3 Review of International Political Economy: RIPE 535 at 546.

<sup>577</sup> *Ibid* at 538.

<sup>578</sup> *Ibid*.

<sup>579</sup> *Ibid* at 539.

administer legal IP protection. TRIPS was their perceived solution to the “‘piracy’ of knowledge-based production”<sup>580</sup> by “establishing a system of harmonized IPRs that all trading nations would adhere to as well as a means of enforcing those minimum standards.”<sup>581</sup> From this perspective, it is easy to understand the lopsided plans for technical assistance and a tacit lack of regard for the development needs of the Third World evidenced in TRIPS.

Consequently, the post-TRIPS phase which Gervais calls “TRIPS 2.0,”<sup>582</sup> was marked by opposition<sup>583</sup> to TRIPS and has uncovered the “various perils of excessive IP uniformity”<sup>584</sup> in a world of diverse cultures, industries, development levels, and needs. According to Gervais, IP is now in a calibration phase (TRIPS 3.0),<sup>585</sup> where the belief in a uniform set of IP rules is undergoing rigorous debate. In this phase, countries should “tailor policy to their potential strengths in innovation while alleviating negative welfare costs”<sup>586</sup> and international norm setting should “reflect both the need for minimum common denominators and the need to tailor innovation-related rules and policies.”<sup>587</sup> Third World countries must generate “comparative research to identify ways in which those known intellectual property norms affect them differently, and whether a different implementation method is required.”<sup>588</sup>

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<sup>580</sup> *Ibid* at 536.

<sup>581</sup> *Ibid*.

<sup>582</sup> Gervais, *supra* note 568.

<sup>583</sup> Dalindyebbo Shabalala & Anselm Kamperman Sanders, “Intellectual Property Treaties and Development” in *Intellectual Property, Trade and Development* (Oxford: University Press, 2014). According to the authors,

The resistance of many Third World countries against TRIPS-plus arrangements may have permanently shifted the international discourse on intellectual property establishing the need to recognize linkages with other regimes such as human rights, biodiversity, and climate change. Rather than focusing solely on raising the standards of IP protection, it shows that harmonization of intellectual property rights need to be framed in a larger context of trade and development.

<sup>584</sup> Gervais, *supra* note 568 at 87.

<sup>585</sup> *Ibid*.

<sup>586</sup> *Ibid*.

<sup>587</sup> *Ibid*.

<sup>588</sup> Daniel Gervais, *TRIPS: Drafting History and Analysis* (London: Sweet & Maxwell, 2012) at 29.

The analysis in this subsection buttresses the point that even though trademarks, like all IPRs, “are regulated by each country independently, because goods travel beyond country borderlines and bear trademarks, trademark law has international implications.”<sup>589</sup> These implications affect First World and Third World countries in different ways. As Patricia Williams eloquently describes,

blacks and whites do differ in the degree to which rights-assertion is experienced as empowering or disempowering. The expression of these differing experiences creates a discourse boundary, reflecting complex and often contradictory societal understandings. It is time to recognize the importance of rights in a legal system in which rights are so often selectively invoked to draw boundaries, to isolate, and to limit.<sup>590</sup>

As argued by critical scholars, “international law is not simply a set of formal rules that guarantees sovereign equality, but rather also a system that entrenches formal inequality that produces international economic and political hierarchy and domination, of the rich industrialized economies over poorer ones.”<sup>591</sup> The social and historical context of IP treaties shows the attempt to perpetually exclude those that are regarded as not as “productive” as First World countries in the guise of positive law. According to Antony Anghie, “positivism was the new analytic apparatus used by the jurists of the time to account for the events that culminated in the universalization of international law and the formulation of a body of principles that was understood to apply globally.”<sup>592</sup>

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<sup>589</sup> Muhammad, *supra* note 500.

<sup>590</sup> Patricia Williams, “Alchemical Notes- Reconstructing Ideals from Deconstructed Rights.” (1987) 22 Harv CR-CL LRev 401 at 406.

<sup>591</sup> Gathii, *supra* note 281 at 12.

<sup>592</sup> Anghie, *supra* note 277 at 2.

It must be recalled that it was during this period of colonialism that IP laws that were in existence at the time, such as the Paris Convention, “were extended to the colonies but, importantly, this extension had nothing to do with the societies in these parts and everything to do with securing the colonizers’ economic interest against each other in the colonial territories.”<sup>593</sup> As a result, even though IP laws were completely antithetical to the socioeconomic realities of the colonized countries, the provisions of the Paris Convention, like other IP treaties, were transposed into national laws at the time and reflect the same overriding interest to exclude others. It is therefore necessary to examine the fundamental tenets of IP’s claim of ideological neutrality and “the fiction of state consent that informs legal positivism,”<sup>594</sup> because they reflect the dominant views of Third World countries.<sup>595</sup> Indeed, de Beer et al, in “The Intellectual Property Treaty Landscape in Africa, 1885 to 2015,”<sup>596</sup> carried out research which mapped the history of the IP treaty landscape governing the protection of, and access to, knowledge in Africa. Their concluding remarks provide words that succinctly sum this section’s analysis:

The 130-year history of IP treaty adoption across Africa tells a colonial and neo-colonial story of the creation of a globalized IP system. The developed world imposed IP policies that benefited Western rights holders while limiting African participation in negotiating new treaties. As a result, IP policies do not reflect the realities in many African countries, contributing to poor performance on global metrics of innovation.<sup>597</sup>

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<sup>593</sup> Muzaka, “A dialogic approach to understanding regime conflicts”, *supra* note 96 at 75.

<sup>594</sup> Jeanne Woods, “Introduction: Theoretical Insights from the Cutting Edge” (2010) 104 Proceedings of the Annual Meeting (American Society of International Law) 389 at 390.

<sup>595</sup> Woods, “Introduction”, *supra* note 274.

<sup>596</sup> Jeremy de Beer, Jeremiah Baarbe & Caroline Ncube, “The Intellectual Property Treaty Landscape in Africa, 1998 to 2015” (2017) SSRN Journal, online:SSRN <<https://www.ssrn.com/abstract=3008743>>.

<sup>597</sup> *Ibid* at 25.

### 3.2.4 Analysis of the Legal Framework for Trademarks in Nigeria

In the final part of this Chapter, I examine the national framework for the protection of trademarks in Nigeria. Again, the aim of this part is to tease out aspects of the current legal framework that could affect women's entrepreneurship. It begins with a brief discussion about the Nigerian constitution and its treaty obligations and highlights the requisite section of the constitution which empowers Nigerian courts to deal with IP matters. Thereafter, it proceeds to examine the Nigerian Trade Marks Act.<sup>598</sup>

#### A. *The Nigerian Constitution*<sup>599</sup>

The Nigerian constitution is the grund norm in Nigeria. The constitution provides validity to all institutions in Nigeria. Nigeria is a sovereign nation that was admitted as the 99th member of the United Nations on the 7th of October 1960. As a member of the international community, Nigeria became a member of the GATT on 18 November 1960 and joined the WTO on 1 January 1, 1995.

Nigeria takes a dualist approach to treaty obligations. For international treaty law to be domestically applicable it must be so declared in an Act of the National Assembly. Nigeria's obligation to treaties is subject to her constitution. The Nigerian Constitution states that "*No Treaty between the federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly.*"<sup>600</sup> In the case of *General*

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<sup>598</sup> Trade Marks Act Cap T 13, Laws of the Federation of Nigeria 2004

<sup>599</sup> *Constitution of the Federal Republic of Nigeria 1999* (Federal Ministry of Justice, Abuja, 1999).

<sup>600</sup> S12 CFRN *Ibid.*

*Sani Abacha & Ors v. Chief Gani Fawehinmi*,<sup>601</sup> the Supreme Court of Nigeria (SC) held that treaties had no “effect upon citizens’ rights and duties in common or statute law and that domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land.”<sup>602</sup> In this case, the SC agreed that “as against a state-party to a treaty in its relations to another state-party under international law the State cannot escape from its treaty obligations by pleading a contrary provision in its existing municipal law or by adopting a new legislation inconsistent with those obligations.”<sup>603</sup> The court restated that “the basis of the binding force of a treaty as a contract is agreement and the recognition given to agreements between states in international law as a law creating pact—*Pacta Sunt Servanda*.”<sup>604</sup> The court explained, however, that treaties “might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them would observe the terms of the treaty.”<sup>605</sup>

WIPO was created “to promote the protection of IP rights worldwide and extend the benefits of the international IP system to all member States.”<sup>606</sup> Nigeria joined WIPO in 1995. Therefore, in Nigeria’s trade dealings with other countries, Nigeria is bound by the provisions of the treaties it has ratified—in this case, the Paris Convention and TRIPS. At the national level however, it may consider the terms of the treaty as it deems fit in constructing its national IP laws. Indeed, the SC, citing *Macarthy’s Ltd. v. Smith*<sup>607</sup> reiterated that “a State is always at liberty if it deems *desirable*

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<sup>601</sup> *General Sani Abacha & Ors V Chief Gani Fawehinmi*, [2019] Law Care Nigeria.

<sup>602</sup> *Ibid.* as per Salihu Modibbo Alfa Belgore, J.S.C at 47

<sup>603</sup> *Ibid.*

<sup>604</sup> *Ibid*

<sup>605</sup> *Ibid*

<sup>606</sup> Tamara Nanayakkara, *The World Intellectual Property Organization and Its Program for SMEs* (WIPO, 2014) at 3.

<sup>607</sup> (1979) 3 All ER

*due to domestic circumstances* or international considerations to legislate a law inconsistent with its treaty obligations”<sup>608</sup>(emphasis added). Even though this amounts to a breach of international obligations since state parties who avoid the terms of the treaty in their own country because of non-domestication, enjoy the benefits of the agreement in other territories,<sup>609</sup> the responsibility of legislating laws that are conducive to domestic circumstances is sacrosanct. Indeed, because IP treaties are “based on protectionist ideology,”<sup>610</sup> attention has been drawn to the need to domesticate treaties with due regard being given to the local circumstances in Nigeria. Any attempt to lock up knowledge to promote the economic rights of rights owners<sup>611</sup> may not fit in well with the development needs of Nigeria.

The IP regime in Nigeria is validated by the Nigerian constitution as it vests the Federal High Court with jurisdiction to the exclusion of any other court in civil causes and matters, any Federal enactment relating to copyright, patent, designs, trademarks and passing-off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards.<sup>612</sup> The applicable national legislation for trademarks is the Trade Marks Act<sup>613</sup> (the Act). In the next part, this thesis critically examines the Act to find what potential it may hold for women producing cosmetics.

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<sup>608</sup> *General Sani Abacha & Ors V. Chief Gani Fawehinmi*, *supra* note 603. The court agreed that “such an exercise will be without prejudice to any remedies available against the State in international law at the instance of the other states who ratified the treaty,” but that the courts are bound to follow any such law once the country decides to do that

<sup>609</sup> Sandra Eke, “Non-domestication of Treaties in Nigeria as a Breach of International Obligations”, (4 December 2020), online: *Mondaq* <<https://www.mondaq.com/nigeria/international-trade-investment/1013006/non-domestication-of-treaties-in-nigeria-as-a-breach-of-international-obligations-sandra-eke>>.

<sup>610</sup> Desmond Oriakhogba, “As We Celebrate Nigeria’s Ratification of the WCT, WPPT, The Beijing Treaty and Marrakesh Treaty”, online: UCT IP Unit <<http://ip-unit.org/2017/as-we-celebrate-nigerias-ratification-of-the-wct-wppt-the-beijing-treaty-and-marrakesh-treaty/>>.

<sup>611</sup> *Ibid.*

<sup>612</sup> S251(1)f note 131.

<sup>613</sup> Trade Marks Act Cap T 13, Laws of the Federation of Nigeria 2004

A. *The Nigerian Trademarks Act.*

The trademark legislation in Nigeria is the Trade Marks Act.<sup>614</sup> The Act defines a mark as “any device, brand, heading, label, ticket, name, signature, word, letter, or any combination,”<sup>615</sup> and defines trademark thus:

“trade mark” means, except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of this Act.<sup>616</sup>

It also provides that only legal or natural persons may own a trademark in Nigeria.<sup>617</sup> Trademarks are registered in Nigeria in accordance with the Nice Classification of goods and services under the internationally recognized class headings, even though Nigeria is not a contracting party to the Nice Agreement.<sup>618</sup> This is done by the registrar in exercise of the powers granted by the Act.<sup>619</sup>

In Nigeria, trademark protection can be obtained through registration and through use. Although the law provides that “no person shall be entitled to institute any proceeding to prevent,

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<sup>614</sup> *Ibid*

<sup>615</sup> S67(1) supra note 147

<sup>616</sup> *Ibid*

<sup>617</sup> S 9(1)a supra note 147

<sup>618</sup> Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks [https://www.wipo.int/treaties/en/text.jsp?file\\_id=287532](https://www.wipo.int/treaties/en/text.jsp?file_id=287532).

On 19 April 2007, the Honourable Minister for Commerce and Industry exercised his powers under sections 42 and 45 of the Nigerian Trade Marks Act by issuing a regulation (the “Regulation”) expanding the classification under the Fourth Schedule of the Trade Marks Regulations covering 34 classes of goods to include service marks “according to the manner and structure” of the Nice Classification. See Mark Mordi, “Towards Trademark Law Reform in Nigeria: A Practitioner’s Note” in NIALS Journal of Intellectual Property (Nigeria: Maiden Edition, 2011) 193 at 204

<sup>619</sup> S42 (1) and S45 (1) Trade Marks Act, supra note 147

or to recover damages for, the infringement of an unregistered trademark,”<sup>620</sup> it does provide that this does not affect “rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.”<sup>621</sup> In essence, trademark right can be established without registration and the owner of the unregistered trademark can maintain a passing off action upon infringement of their trademark. However, the Supreme Court (SC) of Nigeria in the case of *Omnia Nigeria Ltd v. Dyketrade Ltd*,<sup>622</sup> held that the Federal High Court, which is constitutionally<sup>623</sup> vested with jurisdiction to hear intellectual property rights matters, had no jurisdiction to hear matters regarding passing off unregistered trademarks. According to the SC, “the jurisdiction of the Federal High Court to deal with actions on passing-off depends on the registration of trademarks.”<sup>624</sup>

The SC held further “that an allegation that application had been made for the registration of a trade mark did not mean that the trade mark had been registered”<sup>625</sup> and “that the right to protection does not accrue until registration of the trade mark.”<sup>626</sup> The court went further to say “...that ‘acceptance’ of the appellant’s application to the Trade Marks Registry cannot be seen to mean ‘registration’ of the trade mark.”<sup>627</sup> This decision caused uncertainty regarding the cause of action for an infringed unregistered trademark in Nigeria for several years. However, in *Ayman Enterprise Ltd v. Akuma Industries Ltd*<sup>628</sup> the issue was clarified when the court held that “where

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<sup>620</sup> S3 Trade Marks Act, supra note 148

<sup>621</sup> *Ibid*

<sup>622</sup> *DYKTRADE LIMITED v OMNIA NIGERIA LIMITED*, [2000] 591 All Nigerian Law Report.

<sup>623</sup> S251(1)f note 601.

<sup>624</sup> As provided by S3 of the Trade Marks Act and S251(1) (f) CFRN, per Kalgo, JSC at page 153.

<sup>625</sup> Per Belgore, JSC, at page 596

<sup>626</sup> *Ibid*

<sup>627</sup> (Per Ogundare, JSC, at page 599).

<sup>628</sup> *AYMAN ENTERPRISES LIMITED v AKUMA INDUSTRIES LIMITED AND 3 OTHERS*, [2003] Nigeria Legal Information Institute.

the trademark is unregistered, as it was in this case, then the cause of action for passing-off is in common law for tort and action can now be brought in a State High Court in view of the provisions of Section 272 subsection (1) of the 1999 Constitution.”<sup>629</sup>

But this raises the challenge of high cost of protecting one’s IPR. To succeed in such action, as laid out in *Reckitt & Colman Products Limited v Borden Inc.*,<sup>630</sup> the owner of the trademark must establish the goodwill or reputation attaching to the goods or services; a misrepresentation by the defendant who has caused or has the potential of causing the members of the public to believe that goods or services emanate from the claimant; and the loss they suffered or really likely to suffer by the reason of the defendant’s misrepresentation to the source of defendant’s goods or services, which seems to suggest that they emanate from the claimant. The legal cost of protecting one’s IPR is one of the problems that IP regimes pose for entrepreneurs generally. Pursuing an action, whether for registered or unregistered trademarks, is often led up to the Supreme Court, which is costly, time-consuming, and often difficult to prove. They will be harder still for women entrepreneurs in the informal sector who often have few resources to pay lawyers for protracted litigation.

Another major challenge for women entrepreneurs in the Act is that it excludes other categories of marks and services from the scope of well-known marks. Only trademarks and certification marks are registrable under the Act. It does not provide protection for service marks,

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<sup>629</sup> Per Uwais, CJN at page 166. S272. (1) provides that:

Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person. *Supra*, note 146

<sup>630</sup> “*Reckitt and Colman Products Ltd. v. Borden Inc. et al.*, (1990) 107 N.R. 161 (HL)”, online: *vLex* <<https://ca.vlex.com/vid/reckitt-v-borden-inc-680985005>>. See also *Niger Chemist v Nigeria Chemist & D.K*

collective marks, distinctive shape of goods, or sensory marks (marks indicative of sound, smell, taste, etc.).<sup>631</sup> Over the years, efforts have been made to promote the awareness of IP rights in Nigeria and to sensitize the public on the various mechanisms available to protect creative and innovative works. However, despite the increase in IP awareness in the country, these efforts have been hindered by inadequate and outdated laws currently in place, many of which have not been amended or updated since they were enacted into law many years ago.<sup>632</sup> On the flipside, Nigeria's attitude to multilateral agreements has prevented the country, to some extent, from changing its laws according to the dictates of the First World.

For instance, Canada has had to carry out far reaching reforms<sup>633</sup> in its IP laws, making particularly fundamental changes to its trademark law because of its obligation under the Comprehensive Economic and Trade Agreement (CETA).<sup>634</sup> As a result, the previous use of a trademark, whether in Canada or any other country is no longer a requirement for registration of a mark thereby aligning Canada with the European Union (EU) where trade-mark rights are based on registration alone. This has been criticized because "the law's entrenchment of use into the legal life and constitution(ality) of a trademark, whether in the common law or by statute, served more than a legal function; it recognized a social reality."<sup>635</sup> It (use) functioned "to capture the essential spirit"<sup>636</sup> of trademark protection within the framework of unfair competition. Today, because of the amendments, anyone can "register a trade-mark whether or not they have a legitimate

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<sup>631</sup> S 9(1) Trade Marks Act *supra*, note 130

<sup>632</sup> John Onyido, Yetunde Okojie & Oluwasolape Owoyemi, *The Industrial Property Commission Bill (IPCOM) and the New Trade Marks Bill: Highlights, Issues and Recommendations* (SPA Ajibade & Co, 2018).

<sup>633</sup> Julius Melnitzer, "Canada-EU Trade Agreement Presages IP reform", *Financial Post* (1 November 2013), online: <<https://financialpost.com/legal-post/canada-eu-trade-agreement-presages-ip-reform>>.

<sup>634</sup> *Canada-European Union Comprehensive Economic and Trade Agreement*, (21 September 2017) see generally Article 20 which deals with intellectual property.

<sup>635</sup> Amani & Craig, "The 'Jus' of Use", *supra* note 419 at 235.

<sup>636</sup> *Ibid.*

commercial application in mind for the mark, and they may do so without the necessity of showing prior use.”<sup>637</sup> It has been argued that this is likely to “disadvantage weaker commercial actors.”<sup>638</sup> Indeed, the politics and complexities of the IP regime is unending and women entrepreneurs producing cosmetics are lost in the furor.

In 2016 the Industrial Property Commission (IPCOM) Bill<sup>639</sup> was presented to the National Assembly with the aim of harmonizing all current IP laws and governing bodies by providing for the establishment of the Industrial Property Commission of Nigeria, repealing of the Trade Marks Act,<sup>640</sup> and the Patents and Designs Act,<sup>641</sup> making comprehensive provisions for the regulation of trademarks, patents and designs, plant varieties, animal breeders and farmers rights and for other related matters. The bill also made provisions for the registration collective marks and service marks. It has since passed the second reading at the House of Representatives and is awaiting further legislative action. There is also a separate Trademark Bill,<sup>642</sup> which seeks to repeal the Act. This bill has also passed through the first and second readings, as well as the committee hearing which held in March 2018. The Trademark Bill like the IPCOM bill, seeks to harmonize Nigerian law in tandem with international best practices. It extends IP protection to services and collective marks.<sup>643</sup>

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<sup>637</sup> Julius Melnitzer, “Canada’s IP Reforms”, *LEXPERT Business of Law* (20 November 2015), online: <<https://www.lexpert.ca/archive/canadas-ip-reforms/350048>>.

<sup>638</sup> Amani & Craig, “The ‘Jus’ of Use”, *supra* note 419 at 217.

<sup>639</sup> *The Industrial Property Bill (No. .... of 2016)*.

<sup>640</sup> Cap. T13, LFN 2004

<sup>641</sup> Cap 344, LFN 2004

<sup>642</sup> Bill for an Act to repeal the Trade Marks Act CAP T13 LFN 2004 and provide for a comprehensive law on Trademarks and Related Matters (SB. 357) online, Lexology<<https://www.lexology.com/library/detail.aspx?g=66609b80-09f6-4989-a489-3add6fba6c48>>

<sup>643</sup> S 146 of the Draft bill

At the time of writing (2022), there is more than one bill presently before the National Assembly—one sponsored by a Nigerian senator and another sponsored by the Intellectual Property Law Association of Nigeria (IPLAN). These are private member bills, and both have passed first and second reading. However, the bill from the Ministry of Trade is still pending, as the President has directed for its harmonization between the draft submitted by the Ministry of Trade and another version by Ministry of Science and Technology. When the harmonization is completed, the draft bill will be returned to the Federal Executive Council for approval and then forwarded to the National Assembly for passage into law. Once the draft bill reaches the National Assembly (NASS) it will take precedence over the private member bills before the NASS. It is hoped that this bill will soon be passed into law.

Until then, however, service marks and collective marks are not registrable in the Nigerian trademark law, nor are non-traditional marks such as sounds and smells. While including provisions for non-traditional marks must be approached with careful consideration because of its inherent complications,<sup>644</sup> the continued absence of provisions for service marks and collective marks draws attention to the insensitivity of the current trademark framework to gender implications. Research<sup>645</sup> shows that women in Nigeria are more likely to start their businesses in the service sector due to the low capital requirement and a lack of contact with financial network. IP protection is believed to be one way of promoting innovation and attracting funding. This was

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<sup>644</sup> See for instance, Dev Gangjee & Robert Burrell, “Because You’re Worth It: L’Oréal and the Prohibition on Free Riding” (2010) 73:2 *The Modern Law Review* 282–295.. Here the authors examine the controversy in *L’Oréal v Bellure* where the European Court of Justice (ECJ) decided that taking advantage of the reputation enjoyed by an earlier mark is actionable, per se. In reaching this conclusion, the ECJ significantly expanded trade mark protection but provided little justification for doing so.

<sup>645</sup> Martha Chen, Renana Jhabvala & Frances Lund, “Supporting Workers in the Informal Economy: A Policy Framework” (2002) 58; *Prospects and Challenges of Women Entrepreneurs in Nigeria*, SSRN Scholarly Paper, by Adebimpe Adesua Lincoln, papers.ssrn.com, SSRN Scholarly Paper ID 2181943 (Rochester, NY: Social Science Research Network, 2012); PwC, *Impact of women on Nigeria’s economy* (2020).

reiterated by President Gurib-Fakim at the African Leaders' High-Level Conference on IP,<sup>646</sup> where she noted that protection of IP rights should be accompanied by adequate measures of incentives and support, and called for the setting up of a fund for African innovators to access the necessary capital to support start-ups.<sup>647</sup> The protection of service marks could therefore be one avenue through which more women entrepreneurs producing cosmetics in Nigeria could get IPRs over their services.

To cover the gap in the law resulting from the non-inclusion of services as the subject matter of trademarks, in 2007 the Minister of Commerce, in the exercise of the powers vested in him by Section 42 of the Act,<sup>648</sup> incorporated service marks into the classification of goods for purposes of registration of service marks in Nigeria. Consequently, applicants could apply for registration of service marks in Nigeria in Classes 35 to 41 but the applications were accepted with the condition that they would not be advertised until the relevant law is enacted.<sup>649</sup> The classification of services under the regulation range from advertising and business,<sup>650</sup> material treatment,<sup>651</sup> education, providing of training entertainment, sporting and cultural activities,<sup>652</sup> services for providing food and drinks, temporary accommodation,<sup>653</sup> medical services, veterinary services, hygienic and *beauty care for human beings* or animals, agriculture, horticulture and

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<sup>646</sup> "African Leaders Launch High-Level Conference on Intellectual Property for an Emerging Continent", online:WIPO <[https://www.wipo.int/pressroom/en/articles/2015/article\\_0014.html](https://www.wipo.int/pressroom/en/articles/2015/article_0014.html)>.

<sup>647</sup> *Ibid.*

<sup>648</sup> Section 42 (1) provides that "the minister may make such regulations and prescribe such forms as he thinks expedient, for empowering the Registrar to amend the register, whether by making or striking or varying entries therein, so far as may be requisite for the purpose of adapting the designation therein of the goods or classes of goods in respect of which traded marks are registered to any amended or substituted classification that may be prescribed. See also S45 the Trade Marks Act, and Regulation 5 of the Trade Marks Regulations

<sup>649</sup> Mark Mordi, "Towards Trademark Law Reform in Nigeria: A Practitioner's Note" (2011) 1:1 NIALS Journal of Intellectual Property 193–216.

<sup>650</sup> Class 35, "Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks", online: <<https://wipolex.wipo.int/en/text/287437>>.

<sup>651</sup> Class 39, *Ibid*

<sup>652</sup> Class 41, *Ibid*

<sup>653</sup> Class 43, *Ibid*

forestry services,<sup>654</sup> and personal and social services rendered by others to meet the needs of individuals.<sup>655</sup> This extension however continues to be opposed in legal arguments on the ground that only the National Assembly in Nigeria, as opposed to the Minister of Commerce, has the legal authority to include service marks in the definition of trademark in Nigeria to allow for their registration validly under Nigerian law.<sup>656</sup>

An IP framework that includes these services will be a welcome development because, as seen in the results of research conducted by Lincoln,<sup>657</sup> most women entrepreneurs operate in the business of the above-listed services. The result of the study<sup>658</sup> showed that although women entrepreneurs operated in a wide range of industries, the highest concentration could be seen in the service sector. This finding is supported by Chen et al,<sup>659</sup> who noted that 80 percent of new jobs in Africa are concentrated in the informal sector. Many of the women entrepreneurs were seen to provide services such as hairdressing, photography and others in the restaurant and communication sector. Indeed, research has continuously affirmed the dominance of women entrepreneurs in the service sector.<sup>660</sup> Service marks are relevant for women entrepreneurs producing cosmetics as they often offer salon and spa services in the application of natural cosmetics.

A redefinition of trademarks in Nigerian trademark law could easily cure this defect just as it was done in Canada in the Combating Counterfeit Products Act (CCPA). The United States (US)

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<sup>654</sup> Class 44, *Ibid*

<sup>655</sup> Class 45, *Ibid*

<sup>656</sup> Awoyemi Femi, "Trade Names and Trade Marks Protection in Nigeria ", (May 2010), online: *proshare* <<https://prosharetest.com/articles/2093>>.

<sup>657</sup> Adesua Lincoln, *supra* note 647.

<sup>658</sup> The aim of the study was to provide a micro-level perspective of gender related challenges faced by women entrepreneurs in the Nigerian socio-economic context and their prospects.

<sup>659</sup> Chen, Jhabvala & Lund, *supra* note 647.

<sup>660</sup> Organization for Economic Co-operation and Development, ed, *Enterprising women: local initiatives for job creation* (Paris, France: Washington, D.C: Organization for Economic Co-operation and Development; OECD Publications and Information Centre [distributor], 1990).

trademark law,<sup>661</sup> similarly, does not have IP protection for sensory marks written in it but the “language and intent of the Act permits sounds, shapes, colors, and scents to function as trademarks”<sup>662</sup> as the statute’s wording suggests that “no trademark by which the goods of an applicant may be distinguished from the goods of others shall be refused registration.”<sup>663</sup> The Nigerian trademark law could similarly be reworded, given the relevance of collective marks and service marks for women entrepreneurs. Equally important for women producing cosmetics is the way a product smells, looks, and feels is a major marketing tool in the industry. Sensory marks are now believed to be an innovative strategy for companies to expand their brand and to stand out in a competitive marketplace.<sup>664</sup> This is more so in the cosmetics industry where fragrance and texture is an integral part of the product. Despite the complications associated with protecting non-traditional marks, it is necessary to examine and consider if and how the Nigerian trademark law could provide for them because of their relevance in the cosmetics sector. It would necessitate that attention be paid to trademark use in determining the registrability of such non-traditional marks as they could “exacerbate the risk of registering functional product features as trademarks when they do not operate as such in the minds of consumers.”<sup>665</sup> This could result not only in “the unwarranted registration of non-marks, but also the monopolization of functional features with potentially anticompetitive consequences.”<sup>666</sup> Nigeria must therefore take all these into consideration and apply due diligence in how it updates the Nigerian trademark law to reflect new trends in marketing.

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<sup>661</sup> *Trade-marks Act* (R.S.C. 1985, c. T-13)

<sup>662</sup> Charlene Elliott, “Sensorium®: The Splash of Sensory Trademarks” (2019) 34:2 *Canadian Journal of Law and Society / La Revue Canadienne Droit et Société* 243 at 247.

<sup>663</sup> *Ibid.*

<sup>664</sup> *Ibid.*

<sup>665</sup> Amani & Craig, “The ‘Jus’ of Use”, *supra* note 419 at 235.

<sup>666</sup> *Ibid.*

The territoriality of IP laws makes it very important for national legislation to reflect provisions of the treaties that are relevant to their unique development needs. It is bewildering to find that while the provisions of the Act are mostly a replica of the international regime, key provisions like the protection of service marks and collective marks, ostensibly relevant to a growing economy with almost fifty percent of its citizens— women engaged in innovative services and innovating in groups — are left out. The absence of a clear provision for the protection of service marks and collective marks in the Nigerian trademark law further underscores the argument of this thesis that women entrepreneurs producing knowledge (natural cosmetics) in the informal sector of Nigeria are missing from the protective quilt of IP. In addition, the failure to mention sensory marks in the Nigerian trademark law (to whatever reasonable extent), further shows a disregard for the gender dimensions of IP laws. Attention must, of course, be given to the practical reality of the protection of sensory marks given the “commercial sophistication and illiteracy level”<sup>667</sup> of women entrepreneurs and the confusion that comes with protecting non-traditional marks, as discussed above. Again, this buttresses the need for a more context-driven knowledge appropriation paradigm. Indeed, the protection of trademarks today is far removed from its beginnings and is now riddled with so much tension, technicality, and confusion that women entrepreneurs need a more transformative and gender-sensitive framework for their knowledge appropriation. Amani and Craig succinctly sum this:

The economic value of the trademark, however, has gradually eclipsed its social significance and cultural context, as transnational flows of goods and capital engender national protection of marks even in the absence of local use. Increasingly, trademark owners assert rights in regions where they have never conducted business; infringers are commanded to cease the use of confusing marks in fields devoid of actual

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<sup>667</sup> Oguamanam & Adewopo, *supra* note 346 at 640.

consumers to confuse; and trademarks are protected by law in markets where they have never functioned as marks in trade.<sup>668</sup>

### 3.3 Conclusion

This chapter set out to examine the international and national legal framework for trademarks in Nigeria to assess their lacunae regarding the accommodation of women entrepreneurs producing cosmetics. The chapter began with a brief historical background of IP protection. The foray into history supports one of the narratives that IP may have originated in Africa, as one of the earliest forms of IP protection was found in Africa—ancient Egypt—where distinctive signs were made on pottery to indicate their source. It also potently underscored the fact that although innovation is not new to Africa, the early treaties did not take into consideration what forms of IP protection works best for African innovation and innovators as the provisions of the treaties originated from national legislation of now-developed economies. This historical background was followed by a conceptual exploration of trademarks as an IPR and the various marks—collective marks, service marks, amongst others—that make up the trademark regime. The exploration elucidated the subject matter of trademarks to draw out its potential benefit for women entrepreneurs.

Thereafter, the chapter examined how the current legal mechanism for trademark is designed and / or being developed in a way that corresponds with the thesis question: Does the current regulatory framework of intellectual property (IP) law in Nigeria have the potential to support women entrepreneurs producing cosmetics to optimize their potential in the marketplace?

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<sup>668</sup> Amani & Craig, “The ‘Jus’ of Use”, *supra* note 419 at 236.

Swathed in the theoretical framework of TWAIL and utilizing the feminist methods of deconstruction and asking the woman question, the analysis of the existing IP regime on trademarks in Nigeria exposed several gaps that may hinder its appropriation by women entrepreneurs producing cosmetics.

In the first place, the analysis reveals the high cost of pursuing litigation, the problem of determining well-known marks in the international arena, and how these issues affect women entrepreneurs innovating in the informal sector of a developing country like Nigeria, uniquely. It also revealed that even though TRIPS purportedly set out to bridge these gaps, it has not done so, and TRIPS itself is fraught with unresolved ambiguities and lopsided plans for technical assistance. Upon a closer look, TRIPS does not take into consideration the development needs of Third World countries, nor does it specifically target strengthening the capacity of women to leverage trademark as an economic tool to support their role in that development. This further supports the argument of TWAIL scholars “that international law arose in large part to facilitate the acquisition of non-European territories and to guarantee regimes of international economic law to protect the commerce and commercial routes that brought raw materials from the non-European world to the European world.”<sup>669</sup>

In the second place, the analysis showed that the Act, a vestige of colonial legal transplant, is not in sync with the current realities of entrepreneurship in Nigeria and that the effect of this is exacerbated for women entrepreneurs who face additional limitations caused by cultural norms and societal values as discussed in the chapter five. The analysis of the Nigerian trademark law revealed that the Act is insensitive to the specific needs of the country. This is because it does not

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<sup>669</sup> Gathii, *supra* note 281 at 22.

provide for collective and service marks which may have accommodated the typical creative innovations of women in the informal sector of Nigeria.

This chapter has underscored the need for the Third World to adapt and innovate IP protection, including trademarks, within their own realities instead of importing IP laws and policies wholesale.<sup>670</sup> More importantly, the analysis has highlighted how women entrepreneurs experience the legislative framework of IP differently and underscored the need for radical reform of the extant trademark law in Nigeria. Given this background, it is incumbent to investigate and critically examine other forms of IP protection that could be appropriated by women entrepreneurs—with a view to discovering what gender-responsive and gender-transformative reforms are necessary for women's development.<sup>671</sup> In the next chapter, the thesis examines other ways of appropriating knowledge through semi-formal and informal IP protection. The Third World must continue groping as they reframe policies that are germane to their development needs.

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<sup>670</sup> Natarajan et al, "Introduction", *supra* note 296.

<sup>671</sup> note 4.

## Chapter Four: Semi-Formal and Informal forms of Intellectual Property Appropriation.

### 4.1 Introduction

This chapter provides an analysis of semi-formal and informal IP mechanisms. As described in the first chapter of this thesis, I chose to analyse the legal framework for trademarks as an example of a formal intellectual property right (IPR), as well as semi-formal and informal means of appropriating IP to provide context. In the third chapter of this thesis, I examined the international and national legal framework for trademarks in Nigeria as a formal IP protection mechanism particularly relevant for women producing cosmetics in Nigeria. The analysis revealed lapses in the trademarks regime, specifically, its inadequacy in empowering Nigerian women innovating mostly in the informal sector. It found several gaps in the framework that could lead to the exclusion of women producing cosmetics in Nigeria's informal sector.

The gaps revealed in the IP legal regime and their potential impact on women entrepreneurship have been a recurring discussion for so long that one WIPO Development Agenda Recommendation<sup>672</sup> is to study “constraints to intellectual property (IP) protection in the informal economy, including the tangible costs and benefits of IP protection in particular in relation to generation of employment.”<sup>673</sup> The literature reviewed thus far, however, shows there

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<sup>672</sup> note 470. See Recommendation No. 34

<sup>673</sup> *Ibid* at Recommendation No 34.

has been no tangible reform in the IP system to deal with the problem of appropriating IP in the informal sector. One key defect in current IP laws remains that policies are “one size fits all” that do not take enough consideration of the developmental levels of countries, despite what TRIPS purports to do. Rather, powerful stakeholders in the international arena continue to push for more rigorously policed international standards of IP,<sup>674</sup> ignoring the lived reality for innovators in the informal sector (and the formal sector) of the Third World.

The lived reality for innovators in the informal (and formal) sector of the Third World is that the acclaimed gains of IPRs do not have much relevance for Third World countries, especially considering the development needs of the country as argued in the previous chapter. This was my reality as an entrepreneur in Nigeria and my empirics draw directly on my experience. The relevance of the current framework for IPRs remains a “complex empirical question”<sup>675</sup> that does not take into cognisance the economic, cultural, and social contexts of innovation. According to Drahos and Braithwaite for instance,

Copying and imitation are central to our process of learning and the acquisition of skills. As children we copy the artwork of others and imitate our sporting heroes. Copying and imitation never leave us, and without it a lot of socially valuable information would never be transmitted or learnt. The creator of innovation is also always the borrower of ideas and information from others. Intellectual property rights put a price on information, thereby raising the cost of borrowing. Raising the costs of borrowing through the imposition of very high standards of intellectual property will progressively choke innovation, not increase it.<sup>676</sup>

The need for transformation in the economic and legal structures of Third World countries to encourage economic growth has become more vital than ever. However, such changes must be

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<sup>674</sup> Drahos & Braithwaite, *supra* note 474.

<sup>675</sup> Peter Drahos, *A Philosophy of Intellectual Property* (ANU Press) at 139.

<sup>676</sup> Drahos & Braithwaite, *supra* note 474 at 3.

relevant to the social and cultural framework of Third World countries.<sup>677</sup> In considering how the current IP regime impacts Third World countries, one must bear in mind the diverse and complex nature of each country and not fall again into the trap of monolithic assessments. Different countries in the Third World have varying economic competences, which respond to different levels of actual or emerging forms of IPR. While Ghana's kente cloth industry, for instance, may need a stronger IPR protection mechanism, the "agbo" producers and traditional healers in Nigeria may just need informal forms of appropriation mechanisms that reflect the cultural terrain they innovate in. Ultimately, different IPRs resonate in different countries and sectors even within each country.<sup>678</sup> (The analysis in chapter five, for instance, reveals how differently women producing cosmetics approach the issue of IP protection, with some totally unaware of IP protection mechanisms while others call for stronger IP rights.)

At the center of these questions must always be added, the woman question:<sup>679</sup> Do the classic IP categories accommodate and support the innovation or creative processes of women innovators? Women entrepreneurs are vulnerable to insidious but facially neutral IP laws that do not take into consideration the vulnerabilities caused by patriarchal structures such as historical misogyny and the general difficulties associated with innovating in the Third World. As Drahos and Braithwaite explain about information feudalism,

The danger to basic rights posed by intellectual property regulation is not an obviously visible danger. Rather it is a danger based on the quiet accretion of restrictions—an accretion hardly visible because it is hidden behind technical rule-making, mystifying legal doctrine and complex bureaucracies, all papered over by seemingly plausible appeals to the rights of inventors and authors and the need to encourage innovation. We experience these restrictions not as a mass of individuals living in a totalitarian society, but as members of smaller communities who find strands of intellectual

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<sup>677</sup> Ruth Gana, "Prospects for Third World countries under the TRIPS Agreement" (1996) 29 Vand J Transnat'l L 735.

<sup>678</sup> Ikechi Mgbeoji, *A False Dawn? TRIPS and TRIPS-Plus Impacts in Africa* (Oxford University Press) at 182.

<sup>679</sup> Katherine Bartlett, "Feminist Legal Methods", 103 Harv. L. Rev. 829 1989 - 1990

property law settling on and changing the customary ways in which we have accessed and exchanged information. Farmers who follow ancient practices of saving, swapping, bartering or selling seeds to each other find that these practices have to take place in the shadow of patent claims over those seeds. Just what a farmer may or may not do with plants containing patented genes becomes a lawyers' game. Researchers from different institutions begin their conversations by swapping confidentiality agreements or not starting those conversations until the intellectual property lawyers have spoken.<sup>680</sup>

Women innovating in rural societies are even more effected by this (IP regulations) interruption to, and interference with traditional ways of doing their businesses. The UN, recognizing that rural women's (and men's) lives, their livelihoods, and responsibilities are multi-dimensional and dynamic; and therefore, differently impacted by policies, institutional mechanisms and rules suggest that policies and programmes must be informed by participatory processes involving them. Women are affected by gender relations institutionalized in households, communities, and beyond. Policies and programs should therefore take into account the diversity and complexity of factors that underpin the well-being and empowerment of women, men, girls and boys <sup>681</sup>By examining forms of semi-formal and informal IP that are being used (or could be readily used) in the informal sector in the face of the challenges of utilizing formal IP mechanisms in the sector, this chapter seeks to answer the research question: Would a context-driven IP regime help to bridge the economic gap between men and women entrepreneurs in Nigeria?

By putting women innovators in the cosmetics sector at the centre of this analysis, the need to find other ways of ensuring returns from their innovations becomes important—not just from a

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<sup>680</sup> Drahos & Braithwaite, *supra* note 474 at 4.

<sup>681</sup> Enabling rural women's economic empowerment: Institutions, opportunities, participation Expert Group Meeting: 20-23 September 2011, Accra, Ghana Recommendations

public policy perspective, but even more so from the perspective of the innovator.<sup>682</sup> This is because the ability of innovators to imitate (or protect themselves from imitation), or to appropriate an adequate proportion of innovation returns varies from innovator to innovator. As argued by Kamoche et al,<sup>683</sup> “there needs to be a better understanding of the scope and nature of appropriation by individuals besides negotiating financial rewards and intellectual property rights.”<sup>684</sup> Particularly, as explained in the next chapter, the diverse experiences of women innovators in the informal sector, and the way they construct their identity, has important implications for their creation, utilization, and appropriation of knowledge.<sup>685</sup> In addition, the “creations of the minds” these women entrepreneurs produce are often not accommodated in the current IP regime as they may not meet the current qualifying standards of “intellectual property.” This is further complicated by the cumbersome process of acquisition and enforcement of IPRs, and, of course, a lack of adequate knowledge of how to navigate the system as found. Yet, these women exert their minds to create, to innovate, and must be able to capture the value of their creations.

“Appropriation” refers to the act of capturing the value of one’s ideas and investments in developing and bringing them to market.<sup>686</sup> If an entrepreneur is unable to appropriate or capture the value of her IP, competitors may imitate her creations at minimal cost and cause the entrepreneur to lose her competitive edge. The main objective of IP management strategies is therefore, ultimately, appropriation.<sup>687</sup> For this analysis, I adopt the definition of “appropriation”

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<sup>682</sup> William Shughart & Diana Thomas, “Intellectual Property Rights, Public Choice, Networks, and the New Age of Informal IP Regimes” (2015) 23 Supreme Court Economic Review 169 at 3.

<sup>683</sup> Ken Kamoche, Rian Beise-Zee & Aminu Mamman, “Knowledge Appropriation and Identity: Toward a Multi-Discourse Analysis” (2014) 35 Organization Studies 1373.

<sup>684</sup> *Ibid* at 1374.

<sup>685</sup> *Ibid*.

<sup>686</sup> Jennifer Brant & Sebastian Lohse, *Enhancing Intellectual Property Management and Appropriation by Innovative SMEs* (International Chamber of Commerce (ICC), 2013).

<sup>687</sup> *Ibid*.

by de Beer, Kun & Wunsch-Vincent as “a way of realizing pecuniary or non-pecuniary benefits from an innovation, often but not always by excluding third parties from copying or by taking ownership of the original innovation via legal means.”<sup>688</sup> Appropriation may include formal and informal mechanisms by which individuals or firms can capture returns from an initial investment in innovation. The analysis in the next chapter (five) shows that while women producing cosmetics in Nigeria, like all innovators, aim to reap a return on their investment in the business by maintaining some form of exclusivity over their knowledge related to the innovative cosmetic production process or cosmetics products,<sup>689</sup> they do not, for the various reasons discussed in the chapter, widely appropriate knowledge using formal IP mechanisms.

As argued, women producing natural cosmetics in Nigeria, a Third World country, operate mostly in the informal sector. Research in Africa and other countries of the Third World, “indicate[s] that women constitute the principal labour force in the informal sector, particularly in such activities as food and beverages, retail trade, pottery, basket weaving and cross border trade”<sup>690</sup> Women producers of natural cosmetics innovate with agricultural products like shea nuts, carrots, coconut, lemon, palm kernels, among others, to produce high-demand natural cosmetics now used all over the world. As shown in the cosmetics value chain (see figure 1), they are particularly engaged at the levels of the inputs to production and manufacturing of cosmetics, where they (women in the informal sector), apply their traditional knowledge to extract raw materials for cosmetic production. Moving up the chain, they manufacture, distribute and retail cosmetics, as well as provide beauty services in the informal sector. How a context driven IP

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<sup>688</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73 at 233.

<sup>689</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>690</sup> Cathy-Austin Otekhile & Oluwatoyin Mathew, *An Explorative Study of the Contribution of the Informal Sector to Economic Activities in Lagos, Nigeria* (Brno, Czech Republic, 2017).

regime would impact women entrepreneurs applying traditional knowledge and using agricultural products to innovate, is significant.

This chapter therefore explores other forms of semi-formal and informal means of appropriating knowledge that could be utilized by women entrepreneurs in the informal sector. The objective of the chapter is to examine how other forms of appropriation mechanisms are designed or can be developed in a way that may address one of the thesis questions: Would a context-driven IP regime help to bridge the economic gap between men and women entrepreneurs in Nigeria? The task is achieved through a desk review of related literature on the subject albeit from different perspectives. The chapter deploys the feminist method of asking the woman question to examine other ways innovations of women producing cosmetics may be appropriated in Nigeria's informal sector. The chapter is divided into four parts. The introduction sets the stage for this inquiry and includes an outline of the philosophical justification for the informal appropriation of knowledge. The second part explores different semi-formal and informal IP appropriation mechanisms that have been found to exist among entrepreneurs in the informal sector. In the third part, the chapter provides two examples of traditional communities who successfully appropriate knowledge in their own setting and are renown for their innovations: the Igbo (Nigeria) Apprenticeship System, and the Informal Manufacturing of Home and Personal Care Products in South Africa. The fourth section is the conclusion. Here, the chapter concludes that attempting to impose the mainstream IP regime on the informal sector may not be successful because the values prized by entrepreneurs in the informal sector, such as trust and sharing, conflict with the individualism and exclusivism inherent in the IP regime. My conclusion recommends that Third World countries adopt and implement IP mechanisms that are proven to be responsive to these lived realities.

#### 4.1.1 A Philosophical Basis for Informal IP

The issue of IP protection remains contentious, causing deep scissions among stakeholders in all spheres of economic discourse. There are those pushing for stronger protections, those pushing for no protection at all and those pushing for other forms of protection. Somewhere in the middle of this division are women entrepreneurs, innovating mostly in the informal sector but contributing to economic growth, nonetheless. These women, most of whom have no idea whatsoever of IPRs nor its potential role in their business, need policy interventions to create a level playing field for them in entrepreneurship. With the growing importance of IP protection in today's world, it is necessary to examine what forms (or means) of appropriation of IP may be most relevant for women's economic growth. Despite the divisions in discussions around IP, all agree that it is an issue that must be confronted one way or the other, whether in acceptance or rejection or in finding a middle course by way of new reforms. Indeed, where policymakers in both rich and poor economies seem to agree is the need for an IP framework that is *conducive* to innovation and economic growth.<sup>691</sup>

The question of an IP framework *conducive* to innovation and economic growth is, however, fraught with tension. The analysis of the legal framework for IP (trademarks), carried out in the third chapter of this thesis, showed how national IP laws are largely a codification of international law. Yet international law, as argued by TWAIL scholars, is a “medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.”<sup>692</sup> International IP law has failed to carry along the

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<sup>691</sup> Kraemer-Mbula & Wunsch-Vincent, *supra* note 192.

<sup>692</sup> Mutua, *supra* note 264 at 31.

development needs of the Third World<sup>693</sup> and seems indifferent to the realities of innovation in the Third World. Indeed, it has been argued that international law is still used “as a cloak for pernicious commercial expansion.”<sup>694</sup> In “The Misery of International Law: Confrontations with Injustice and the Global Economy,”<sup>695</sup> the authors describe the role of international law in advancing a harmful economic order that enriches the few at the expense of everyone else, and “wrongs women with particular efficiency.”<sup>696</sup>

With the over representation of women in the informal sector of the economy (see chapter five), an international law that does not attempt to limit states’ excessive reliance on international trade in “increasing small-scale food production, particularly among women, and by pursuing economic policies that increase, rather than decrease employment and livelihoods”<sup>697</sup> cannot provide a reference point for an IP framework *conducive* to innovation and economic growth. Specifically, the international IP framework is not *conducive* to the development needs of the Third World because “its principal mechanisms and institutions fail to meet the reasonable expectations of those whose lives are regulated by the law.”<sup>698</sup> According to Linaelli et al,

the continued instrumental use of international law is dedicated to capitalist expansion and draws on the unproven claims that trade and investment promote economic development and is a panacea for the ills of poverty. As for the global financial architecture, it is an institutional order to govern the wealth of a community but does so in a way that imposes needless risk and makes the rich richer and the poor poorer. This use of international law provides for ‘accumulation by dispossession’, a movement of wealth from poor to rich, and from the public to the private, all the while leaving a host of ensuing immiserations in its wake.<sup>699</sup>

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<sup>693</sup> Bedajoui, *supra* note 267 at 1.

<sup>694</sup> John Linaelli, Margot Salomon & M Sornarajah, *The Misery of International Law: Confrontations with Injustice in The Global Economy*, 1st. ed (Oxford: University Press, 2018).

<sup>695</sup> *Ibid.*

<sup>696</sup> *Ibid* at 1.

<sup>697</sup> *Ibid* at footnote 45.

<sup>698</sup> *Ibid* at 1.

<sup>699</sup> *Ibid* at 2.

Such a setting makes no room for Sen's expanded definition for development, which include real human "freedoms" such as political freedoms, economic facilities, social opportunities, transparency guarantees, or protective security.<sup>700</sup> Further, the unproven claims that trade and investment promote economic development do not adequately factor in the fact that development is dependent on women's earning power, economic role outside the family, literacy, education and property rights.<sup>701</sup> An international IP framework that does not flow from an understanding that women's economic participation not only leads to an enhanced status of women but to long-term regional, political, and social change, cannot be very beneficial to women in the Third World.

Consequently, as found in this research, formal IPRs as conceptualized by international law can not promote women's development. By investigating the role of IP laws "in legitimizing and sustaining the unequal structures and processes that manifest themselves in the growing north-south divide"<sup>702</sup> this thesis has noted international law's close connections with capitalism and found that the IP legal regime appears to aid the structuring of "global markets so that they continue to serve as sources of raw materials for European capitals."<sup>703</sup> It has also drawn attention to some inclusions and omissions in the IP legal framework that exacerbate the challenges of women's entrepreneurship in Third World countries. The political, economic, historical, and cultural context in which women entrepreneurs live call for "a new ground, with a new set of fault lines, from which to situate and shape future political engagement"<sup>704</sup> with the IP regime. One such new ground is the promotion of semi-formal and informal IP mechanisms found to be useful particularly in the informal sector and should be harnessed to ensure a more "rounded" application

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<sup>700</sup> Sen, *supra* note 15.

<sup>701</sup> *Ibid.*

<sup>702</sup> Gathii, *supra* note 281 at 14.

<sup>703</sup> *Ibid.*

<sup>704</sup> Nesiiah, "The ground beneath her feet", *supra* note 293 at 37.

in the informal sector. The next section examines these mechanisms which may be exploited in the sector, in detail.

#### 4.2 Semi-formal and Informal mechanisms for appropriating IP

The argument of this chapter is not concerned with choosing between strong IP protection and offering no protections for IP. Rather, the chapter explores other forms of knowledge (IP) appropriation with a view to understand what reforms may be needed in the current IP regime to better accommodate innovations in informal economies generally, and more specifically, acknowledge and reward the innovations of women entrepreneurs like those producing cosmetics in Nigeria's informal sector. Indeed, despite ongoing arguments about the role of IP in economic development, there is a consensus that once there has been investment of time, effort, and money into an enterprise that leads to innovation, the innovator should enjoy returns on that investment. The lack of consensus is on *how to ensure* that the innovator does enjoy returns on their investment, because there is a potential risk that others can copy the underlying ideas that led to the innovation and use them in such a way that the original innovator (inventor) sees no return.

As a result, some argue that state intervention to grant and enforce the originators' property rights "for limited times" is essential for creators of new knowledge to be able to capture returns to their investment sufficient to make inventive activities worthwhile.<sup>705</sup> Others, however, argue that such information should be free for others to copy and adapt to their own use, and that when this is done, the world becomes wealthier no matter who is distributing and no matter who is

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<sup>705</sup> Shughart & Thomas, *supra* note 684.

receiving.<sup>706</sup> According to Thomas Peters, “information hoarding will be an impossible millstone around the neck of tomorrow’s organizations. Sharing is a must.”<sup>707</sup> Peters is, however, quick to add that “patent information, confidential personnel reports and information about would-be acquisitions are off limits for legal as well as common sense reasons.”<sup>708</sup> Indeed, those who invest in innovation naturally aim to reap a return on that investment and try to do so by maintaining some form of exclusivity over their knowledge related to innovative processes or products.<sup>709</sup> This thesis argues that a potential middle recourse between these divergent views is the promotion of semi-formal and informal means of appropriation that can be readily exploited by entrepreneurs irrespective of their circumstances (gender, education, finance, etc.).

Semi-formal means of appropriation are contractual or informal arrangements that exists among private parties. They include secrecy, publishing, non-competition clauses, non-disclosure agreements, contracts, among others. Informal means of appropriation, on the other hand, are design, production, or service delivery features that provide a competitive advantage.<sup>710</sup> Informal appropriation mechanisms cover different actions firms can undertake to protect their innovations and maximize their expected returns. They are mechanisms borne out of the fundamental human instinct of self (knowledge) preservation and vary from entrepreneur to entrepreneur. They are

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<sup>706</sup> Dorothy Denning, *Concerning Hackers Who Break into Computer Systems, Proceedings of the 13th National Computer Security Conference, Georgetown University*. (Georgetown University, 1990); The author here looked at knowledge sharing from the perspective of computer hackers, analysing the tension between an age-old tradition of controlling information as property and the Enlightenment tradition of sharing and disseminating information which was considered as one of the larger questions about values and practices in an information society. See also Chang, “Intellectual Property Rights and Economic Development”, *supra* note 36 where the author argues against stronger IPRs for developing countries.

<sup>707</sup> Thomas Peters, *Thriving on Chaos: Handbook for a Management Revolution*, 1st ed. ed, Borzoi book (New York: Knopf, 1987) at 506.

<sup>708</sup> *Ibid* at 507.

<sup>709</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>710</sup> *Ibid*.

sometimes a knee-jerk reaction to perceived danger (in this case, the danger of losing one's proprietary interest in their innovation) from internal (employees) or external (competitors) sources. The mechanisms are fluid, vary person-to-person as well as from one situation to another and are sometimes embedded in the ordinary business practices of an enterprise. They could take various forms such as "lead time and first-mover advantage, high capital intensity, complexity of design and / or technology and division of duties, after-sales and other services maintaining quality, reputation, trust and customer loyalty as well as family / community mechanisms in tandem with community sanctions and ostracism for copying or imitation."<sup>711</sup> They are different from formal mechanisms principally because they are not protected by the state. Increasingly, more studies are showing that informal protection instruments gain increased importance in securing innovative returns when compared to formal mechanisms.<sup>712</sup>

#### 4.2.1 Semi-formal IP Appropriation Relevant for Women Producing Cosmetics

##### A. *Nondisclosure Agreements*

A nondisclosure agreement (NDA) is a legal contract between two parties where one party agrees to provide sensitive information to the other party for a stated purpose and duration, and the other party agrees not to disclose that information to any other person. While this is a very common practice in many businesses, the method of entering the contract varies from one entrepreneur to another. In rural areas for instance, it might be executed with the swearing of an

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<sup>711</sup> *Ibid* at 234.

<sup>712</sup> Richard Levin et al, "Appropriating the Returns from Industrial Research and Development" (1987) 18:3, Special Issue on Microeconomics Brookings Papers on Economic Activity 783–832; Fayaz Sheikh, "Exploring Informal Sector Community Innovations and Knowledge Appropriation: A Study of Kashmiri Pashmina Shawls" (2014) 6:3 African Journal of Science, Technology, Innovation and Development 203–212; Chang, "Intellectual Property Rights and Economic Development", *supra* note 539.

oath<sup>713</sup> or the exchange of gifts before witnesses, while in others it is reduced to a legal document, a legally binding contract (making it semi-formal), whether drafted by a lawyer or not. In formal settings it is drafted by a lawyer and is an onboarding requirement for any employee who may have access to such sensitive information of the enterprise.

An NDA is useful when an entrepreneur has developed a new idea for a product and must present that idea to a potential funder but runs the risk of the idea being shared with another competitor (or even taken over by the funder). An NDA is also useful when one is trying to sell a part of a company and must divulge details of its operations. An NDA may help to prevent the cancelation of deals when internal secrets are shared.<sup>714</sup> NDAs also provide enforceable legal protection and lessen the risk of others becoming aware of a trade secret. In rural areas, where many women producing cosmetics in Nigeria operate, an NDA may not have much relevance. This is because they may not be literate and may lack the resources for such formality. Instead, social mechanisms, such as family / community expectations working in tandem with community sanctions and ostracism for copying or imitation,<sup>715</sup> may be more effective than an NDA. Indeed, even among educated entrepreneurs like me, these social mechanisms are heavily relied upon because they are better understood and respected in the community where the business is conducted. In my cosmetics business for instance, it was more effective to rely on the family of my employee to take steps to ensure that their relative did not copy my ideas. I was careful to

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<sup>713</sup> See generally, Eghosa Ekhaton, “Traditional oath taking as an anti corruption strategy in Nigeria” in (2019) 309; Abdulmumini Oba, “Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts” (2008) 52 *Journal of African Law* 139–158.

<sup>714</sup> John Reh, “How to Protect Your Ideas With an NDA”, online: *The Balance Careers* <<https://www.thebalancecareers.com/ndas-protect-intellectual-property-2275250>>.

<sup>715</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73 at 234.

employ staff whose family I knew, and I relied on the family connection and their moral obligation to protect information gained in my employment.

*B. Trade Secrets (Secrecy)*

Trade secrets, generally called secrecy in the informal sector is a very popular mechanism for appropriating IP among women producing cosmetics (as with many innovators in the informal sector<sup>716</sup>). For these innovator's, secrecy is crucial to ensure financial returns from the innovations they produce—at least for a period. “By withholding information about an innovation, innovators can maintain exclusive possession of the valuable knowledge contained in that innovation and therefore retain the exclusive ability to use the innovation to generate economic value.”<sup>717</sup>

Trade secret law has, however, aptly been described as the “orphan child of intellectual property (IP) scholarship”<sup>718</sup> principally because it tends to fall between “the cracks” of various legal regimes. such as labor law, IP law, contract law, etc. While there seems to be widespread agreement on the basic contours of the law, and agreement on the effect of the law, there is no consensus on how to fit trade secrets into the broader framework of legal doctrine.<sup>719</sup> This lack of consensus has contributed to inconsistent treatment of the basic elements of a trade secret cause of

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<sup>716</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 16; Esther Ekong, “Coalescing intellectual property incentives, gender inclusiveness and environmental sustainability for female traditional healers in Nigeria” (2021) 13:7 AJSTID 839 online: <<https://www.tandfonline.com/doi/abs/10.1080/20421338.2021.1889758>>.

<sup>717</sup> David Hannah et al, “Secrets and Knowledge Management Strategy: The Role of Secrecy Appropriation Mechanisms in Realizing Value from Firm Innovations” (2018) 23 Journal of Knowledge Management at 298.

<sup>718</sup> William van Caenegem, *Trade Secrets and Intellectual Property: Breach of Confidence, Misappropriation and Unfair Competition*, (Kluwer Law International 2013) pp. 1 - 14

<sup>719</sup> Mark Lemley, “The Surprising Virtues of Treating Trade Secrets as IP Rights” (2008) 61 Stanford Law Review 358.

action, and uncertainty as to the relationship between trade secret laws and other causes of action.<sup>720</sup>

Consequently, trade secret may be characterized as semi-formal IP in Nigeria's informal economy because there is no direct statutory protection for trade secret in the country. Rather, trade secrets action is subsumed under the law of contract, tort or may lie with laws around confidential (business) information.<sup>721</sup> Despite the absence of a specific trade secret legislation, however, trade secrets remain the default mode of appropriating knowledge in the informal sector.<sup>722</sup> In addition, trade secrets are particularly relevant for women entrepreneurs who carry out innovations that may not fit in with the classical requirements of IP, such as originality, newness, authorship, tangibility, and so on. Most inventions that are ineligible for patents or other IP protection are protected as trade secrets.

A trade secret can be comprised of almost any valuable non-public information, including a process, compilation, device, or technique. Typically, trade secrets cover things like customer lists, recipes, formulas, software, or unpatented inventions. A unique trait of trade secrets is that they are protected without registration or any procedural formalities. Also, unlike patents and trademarks that are registered for a period, a trade secret can be protected for an indefinite period,

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<sup>720</sup> William van Caenegem, "Trade Secrets and Intellectual Property" *supra* note 1

<sup>721</sup> Most notably, section 15(1)(a) of the Nigerian Freedom of Information Act 2011 (FOIA) No. 4 of 2011. mandates public institutions to deny applications for information that contains "trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party."

<sup>722</sup> Brant & Lohse, *supra* note 688.

provided it is not disclosed to the public. They remain the exclusive property of the owner in perpetuity unless their status is compromised.<sup>723</sup>

More importantly, to small entrepreneurs, it is comparatively cheap and easy to obtain trade secrets protection since they can become effective immediately and do not require many of the upfront fees that are typically associated with obtaining a patent. These attributes are particularly appealing to women entrepreneurs in Nigeria. However, the cost of litigating breach of trade secret and the cost of keeping trade secret in perpetuity can be very high. In addition, as found by de Beer et al,<sup>724</sup> the hidden cost of secrecy to the overall growth of a company (and the informal sector) may be higher in the long run as “secrecy impedes the circulation of knowledge, training and thus the growth of the sector.”<sup>725</sup>

Increasingly the world is acknowledging that real invention is first and foremost a human activity. “Inventive capacity is simply the coming together of human knowledge, human ability and human communication to produce innovation.”<sup>726</sup> Human knowledge such as the traditional knowledge of rural communities and the human activities of thought, inference, logic, and inspiration are more closely connected with trade secrets than with patents law or other conventional forms of IP because knowledge is born first in the human mind (where it remains secret until it is revealed). Indeed, this “orphan child” holds a lot of potential for women entrepreneurs innovating in Nigeria’s informal economy as studies<sup>727</sup> have shown that trade secret

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<sup>723</sup>Chidi Oguamanam, “Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept” (2018) CIGI Papers No. 185 online, CIGI<<https://www.cigionline.org/sites/default/files/documents/Paper%20no.185web.pdf>>

<sup>724</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>725</sup> *Ibid* at 249.

<sup>726</sup> William van Caenegem, “Trade Secrets and Intellectual Property” *supra* note 1

<sup>727</sup> James Pooley, “Trade Secrets: the other IP right” (2013) WIPO [https://www.wipo.int/wipo\\_magazine/en/2013/03/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2013/03/article_0001.html); Hall, Bronwyn, Christian Helmers, Mark

is perhaps the most widely used IP protection in informal economies. To cushion the inability to use other formal forms of IPRs, most entrepreneurs in the informal sector typically rely on the “traditional protection strategy of secrecy”<sup>728</sup> to appropriate their knowledge.

### *C. Documentation*

Entrepreneurs in the informal sector may document their ideas and thoughts to prevent the risk of losing key knowledge. In doing so, they can transfer their knowledge onto concrete forms that will enable them to transfer such knowledge only to those they choose. In the cosmetics sector for instance, recipe coding is used to ensure that knowledge is protected. However, to do this the recipe must be documented before coding as well as after coding. Any such document is guarded as trade secret. Documentation can also facilitate the effective sharing of knowledge and reduce the risk of a sudden loss of IP in the case when an entrepreneur becomes indisposed, or a production staff leaves the business. The sharing of such documents, while often based on trust in the informal sector, could be accompanied by an NDA.

Such documents (the coded recipe) must be guarded effectively because the entrepreneur, while trying to keep her innovations secret, may not realize that she “should not store documents on a certain location on the company’s knowledge management system and unwittingly share the secrets with all their co-workers.”<sup>729</sup> This, however, is not a common occurrence among women

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Rogers, and Vania Sena. "The Choice between Formal and Informal Intellectual Property: A Review." (2014) 52:2 *Journal of Economic Literature* 375 online: JSTOR<[www.jstor.org/stable/24433813](http://www.jstor.org/stable/24433813)>.

<sup>728</sup> George Essegbey and Stephen Awuni, “Herbal Medicine in the Informal Sector of Ghana” in Erika Kraemer-Mbula and Sacha Wunsch-Vincent, eds. *The Informal Economy in Developing Nations: Hidden Engine of Innovation?* coll Intellectual Property, Innovation and Economic Development, Cambridge, Cambridge University Press, 2016, DOI : 10.1017/CBO9781316662076 at 225

<sup>729</sup> Hannah et al, “Secrets and knowledge management strategy”, *supra* note 719 at 302.

producing cosmetics in Nigeria's informal sector. Neither I, nor the entrepreneurs I interacted with, knew about knowledge management systems. The use of such technology remains limited in the sector. Rather, women entrepreneurs producing cosmetics in Nigeria merely document their recipes in personal journals and have no exposure to technological information storage systems. However, as their businesses grow and expand, documentation would become useful.

#### *D. Publishing*

Publishing is an important protection method in the service sector. Information regarding the potency of a cosmetic and the producer can be published for two reasons: first, to advertise the product; and second, to let the community know the origin of the product (the producer). Publishing serves as a notice preventing others from claiming ownership of such a product. Women in the cosmetics service sector could publish their methods and ideas widely so that they become well known as the innovator. This is an effective practice in small communities where publishing operates to prevent unauthorized copying and prevents others from claiming recognition (or formal IP like patents or trademarks) in the same area.

Publishing is different from documentation because the content of such publication would not include manufacturing details. Documentation is not made public. Publishing serves to inform the public about a product to enable them make decisions about purchasing or using a service. It directs them to the original source of the product. This could enable innovators like women producing cosmetics to make returns on their investments through patronage. When people identify a certain effective product with an entrepreneur, the entrepreneur may enjoy good will, trust, and customer loyalty that will, in turn, lead to a higher demand for their goods. This may be

more useful to educated women and those in urban areas, who are more likely to have literate customers.

Publishing may not be very relevant for uneducated women in rural areas, either because they are producing products like coconut oil, shea butter, etc., for other cosmetics producers or some of their customers in rural areas may not be literate. On the other hand, in rural communities, news spread fast by word of mouth. Therefore, targeted oral information about a product (a form of verbal publishing) could achieve a similar goal in rural communities. With the right training, illiterate entrepreneurs could leverage this type of protection mechanism.

#### 4.2.2 Informal IP Appropriation Relevant for Women Producing Cosmetics

##### A. *Restricted Access to Knowledge:*

Entrepreneurs in the informal sector protect their knowledge by restricting the number of people who have access to vital information about their creative processes of the innovation. The flipside of this is that such practices could limit the knowledge needed to efficiently carry on production at a larger scale, thus inhibiting scalability and their potential to grow—ultimately creating a barrier to economic growth. However, as found among women producing cosmetics in Nigeria and revealed in a study<sup>730</sup> carried out by Kraemer Mbula in South Africa, most entrepreneurs in the cosmetics sector undertake the manufacturing process by themselves while their employees are responsible for tasks relating to packaging and sales.<sup>731</sup> In this way,

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<sup>730</sup> Kraemer-Mbula, *supra* note 186.

<sup>731</sup> *Ibid.*

entrepreneurs can keep the knowledge to themselves. However, as the business grows (as discussed in the Nigerian case study) it becomes inevitable that they must delegate their duties and thereby share their knowledge to allow for expansion.

#### *B. Tacit Nature of Knowledge in the Informal Sector*

As described earlier, the informal sector is highly populated by women who are sole entrepreneurs who single-handedly execute most roles in all the stages of the production. Aside for the apparent lack of access to capital to employ staff, the handmade cosmetics production sector is particularly populated by women who utilize traditional knowledge to produce their cosmetics. Some gain the knowledge by observing their grandmothers, while others (like me) undertake a form of internship to observe and learn the medicinal value of different agricultural products and how they can be transformed into cosmetics. As a result, many producers just “know” and cannot easily transfer this knowledge by verbalizing or writing down what they know. This could act as a protective mechanism because most of the knowledge resides with (or “in”) the entrepreneur. “Internal knowledge” cannot be transferred to others without intent so there is little risk of knowledge theft.<sup>732</sup>

#### *D. Division of Duties*

Another way IP is appropriated in the informal sector is by division of duties. The entrepreneur sets up daily business duties in a way that each person only knows a part of the process, leaving the entrepreneur as the only one who knows the entire process. This is quite like

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<sup>732</sup> Jörg Thomä & Kilian Bizer, “To protect or not to protect? Modes of appropriability in the small enterprise sector” (2013) 42:1 Research Policy 35.

the Coca Cola trade secret, which rumor claims is so tightly held “that only two Coca-Cola executives know the beverage’s secret formula at a time but each knows only the one half and they are never allowed to travel in the same plane.”<sup>733</sup> By dividing duties in the production process in a way that one employee only has access to information needed for a specific task, the entrepreneur can exercise control over the trade secrets of the company.

*D. Cultivating Loyalty and Commitment of the Personnel:*

Another tactic for ensuring secrets is not shared include entrepreneurs establishing long-term employment relations with their staff. This is even more common in businesses made up of family members. Because businesses in the informal sector is usually small, they can also be tight knit. The employees, often family members or friends, are considered the most important asset of the business and, as such, treated with a high degree of fairness. Even in more formal settings, strategies to maintain staff loyalty are a key part of many businesses. Strategies can include financial incentives, training opportunities, occupational development related incentives to creating a generally pleasant working environment.

*E. Trust and Customer Loyalty*

Trust and customer loyalty is a common form of knowledge appropriation in the informal sector, especially in places where informal institutions are heavily relied upon. Informal institutions, such as family and kinship structures, or social traditions and social norms, are not only important for social development, but useful in entrenching economic development in Third

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<sup>733</sup> “Coca-Cola’s Secret Formula: A Trade Secret Kept for over a century”, (18 March 2016), online: *Bangladesh Journal of Legal Studies* <<https://bdjls.org/coca-colas-secret-formula-trade-secret-kept-century/>>.

World countries, where weak government structures, poor governance, and low political will have been found<sup>734</sup> to prevent economic growth. Through trust structures, copying and imitation is restrained, and innovators can rely on the loyalty they have built over time to safeguard their knowledge. This form of informal IP mechanism can be compared to the Chinese *Guanxi*.<sup>735</sup> *Guanxi* is a term that defines the complex concept of relationship in China, where it is believed that by building and maintaining *guanxi* with personal contacts and business partners, one can ensure a positive and stable relationship.<sup>736</sup> *Guanxi* is considered extremely important for growing business in China. It is described as “the oil that keeps the China motor running.”<sup>737</sup> Trust and customer loyalty is also comparable to the African concept of *Ubuntu*<sup>738</sup>(I am because we are). By maintaining trust and customer loyalty, women producing cosmetics could prevent others from imitation because no one would be willing to receive ill-gotten knowledge from the imitator.

While these informal mechanisms may seem far-fetched to a Western observer, the above tactics form effective mechanisms in the Third World, perhaps especially because they are shrouded in the culture and traditions prevalent in most countries there. These cultures and traditions are an integral part of the Third World and no less valuable than the exclusivist cultures of the Western world. In the next section, the chapter exemplifies how these mechanisms play out

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<sup>734</sup> United Nations Development Programme, “Development challenges and solutions”, (2022), online: *UNDP* <<https://www.undp.org/development-challenges-and-solutions>>.

<sup>735</sup> “Guanxi: The Chinese Cultural Concept”, online: *Commisceo Global Consulting Ltd* <<https://www.commisceo-global.com/blog/guanxi-the-chinese-cultural-concept>>.

<sup>736</sup> *Ibid.*

<sup>737</sup> “Chinese Guanxi: The Oil That Keeps China Running”, (24 June 2020), online: *China Mike* <<https://www.china-mike.com/chinese-culture/guanxi/>>.

<sup>738</sup> “Ubuntu is an African concept referring to humanness. It gives expression to deeply-held African ideals of one’s personhood being rooted in one’s interconnectedness with others.” See, Adran Van Breda, “Developing the Concept of Ubuntu as African Theory for Social Work Practice” (2019) 55:6 *Social Work/Maatskaplike Werk* 439 at 439.

in two Third World communities—the Igbo Apprenticeship System (IAS) in Nigeria and the South African Informal Manufacturers of Home and Personal Care Products.

### 4.3 Informal IP Appropriation in some Traditional Business Communities

#### 4.3.1 Lessons from the Igbo Apprenticeship System (IAS).

The assumption that informal businesses do not care about knowledge appropriation compared to the formal sector is unfounded. All research has shown is that formal IP mechanisms are not prevalent in informal economies. Indeed, other studies have highlighted the strong appropriation systems developed in the informal clusters by groups and communities through which enterprises draw sufficient incentives and motivations for innovations.<sup>739</sup> One such cluster is the Igbo communities of Nigeria.

The Igbo (also Ibo) people are found in southeastern Nigeria and are vested with several customs and traditions. Igbos are best known for their entrepreneurial endeavours, both within Nigeria and around the world. One aspect of the Igbo entrepreneurial system that is relevant to a discussion about informal IP mechanisms is the Igbo Apprenticeship System (IAS).<sup>740</sup> This is a system where a young person (an aspiring entrepreneur, who are most often boys but can be girls), between the ages of 12 and 25, are formally given to (“enrolled with”) an experienced entrepreneur to learn a desired trade or business.<sup>741</sup> “At the core of it, the IAS is a business philosophy of shared

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<sup>739</sup> Sheikh, “Exploring informal sector community innovations and knowledge appropriation”, *supra* note 714.

<sup>740</sup> Ogechi Adeola, *Indigenous African Enterprise: The Igbo Traditional Business School (I-TBS)* (2020).

<sup>741</sup> Ishmael Iwara, Kingsley Amaechi & Vhonani Netshandama, “The Igba-Boi Apprenticeship Approach : Arsenal Behind Growing Success of Igbo Entrepreneurs in Nigeria” (2019) *SI Ubuntu : Journal of Conflict Transformation* 227.

prosperity where participants co-opetitively participate to attain economic equilibrium.”<sup>742</sup> Co-opetition is a way of thinking that combines competition and cooperation.<sup>743</sup> The IAS demonstrates this concept, and offers a good example of how cooperation and sharing can be used to leverage competitors’ strength to thrive together. Here knowledge is shared with a youth who later sets up the same kind of trade as the trainer.

Further context illuminates the importance of the IAS. Only fifty years ago, the Nigeria-Biafra civil war left the Igbos (the major ethnic nationality in the successionist Biafra), largely desolate after they lost virtually all their wealth and were given an “ex gratia” token of £20 irrespective of their deposits in the banks.<sup>744</sup> Like the mythical phoenix, the Igbos have risen from the ashes and rebuilt the Eastern region (Biafra) and acquired a strong economic and wealth profile per capita with minimal government assistance. Their apprenticeship system allowed the art of innovation and business to spread among the Igbo such that today they are globally renown for their entrepreneurship and ingenuity.

There are three major kinds of apprenticeship among the Igbos: namely *Igba-boi* also known as *Igba Odibo* (“become an apprentice”), *Imu Oru* also known as *Imu Oruaka* (“learn a craft”), and *Imu Ahia* (“learn a trade or business”). All three types of apprenticeship have the central objective to transfer knowledge. Each vary, however, in approach. With the *Igba-boi* (*Igba Odibo*) the young person (*boi*) receives free training for a period of pre-agreed years usually

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<sup>742</sup> Ndubuisi Ekekwe, “A Nigerian Model for Stakeholder Capitalism” *Harvard Business Review* (19 May 2021), online: <<https://hbr.org/2021/05/a-nigerian-model-for-stakeholder-capitalism>>.

<sup>743</sup> Barry Nalebuff & Adam Brandenburger, “Co-opetition: Competitive and Cooperative Business Strategies for the Digital Economy” (1997) 25:6 *Strategy & Leadership* 28–33.

<sup>744</sup> Onyuike Ugochukwu, “Biafra: As Igbos remember 54th year of Biafran struggle that became a genocide from 1967 – 1970”, *Triumph Times* (30 May 2021), online: <<https://www.triumphtimes.com/2021/05/30/biafra-as-igbos-remember-54th-year-of-biafran-struggle-that-became-a-genocide-from-1967-1970/>>; See also, Adaobi Nwaubani, “Remembering Nigeria’s Biafra war that many prefer to forget”, *BBC News* (15 January 2020), online: <<https://www.bbc.com/news/world-africa-51094093>>.

ranging from three to ten years. This is different from the *Imu Oru* (*Imu Oruaka*) and *Imu Ahia* approaches, where the training is not free but paid for by the *boi* or *boi*'s parents / sponsors, and these usually last for shorter periods of two years,<sup>745</sup> depending on the type of craft.

Unlike the *Igba-boi / Igba Odibo*, which offers a complete training in all forms of entrepreneurship—management, accounting, purchasing, investing, —the *Imu Oruaka* (“learn a craft”) and *Imu Ahia* (“learn a trade” but also refers to marketing as well as buying and selling), are geared directly towards the transfer of knowledge for a fee. I suggest these can be recognized as forms of IP appropriation in the Igbo business society. Igbo entrepreneurs may protect their IP through the informal mechanisms discussed above, but what the apprenticeship system offers is a way to transfer skills to their apprentice for an agreed fee. This may be even more effective than the patent system because “firms may sometimes refrain from patenting processes to avoid disclosing either the fact or the details of an innovation.”<sup>746</sup> The apprentice system ensures that entrepreneurs teach budding entrepreneurs (the *boi*) the advantages of new or improved products thereby “facilitating direct observation of the product and the technology it embodies.”<sup>747</sup> The apprentice in turn, advertise these products in their own businesses and broaden the scope of sales, thus leading to market growth.

The *Igba-boi / Igba Odibo* training offers an even a more well-rounded apprenticeship that includes all aspects of the business. Terms and conditions are discussed orally between the *boi*'s family and the master, based on trust and credibility. The long period of the apprenticeship serves as an advantage for the master / mistress to enjoy a monopoly over their business for a term (akin

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<sup>745</sup> Iwara, Amaechi & Netshandama, “The Igba-boi Apprenticeship Approach”, *supra* note 726.

<sup>746</sup> Levin et al, *supra* note 714 at 795.

<sup>747</sup> *Ibid.*

to formal IP mechanisms like patents) before the apprentice can go on to practice the same business with skills acquired from the master. The beauty of this arrangement, however, is that at the end of the training, the master not only establishes the *boi* in business (providing the capital and resources to start the same kind of business), but they become friends and business partners who share trade secrets, business opportunities, and integration within a larger social and business network of goodwill. The *boi* (now a new entrepreneur) continues to leverage on their master's influence, gaining access to unlimited loan facilities. In this arrangement, the masters always remain mentors for their lifetime and are the first to be approached for help in the event of a problem.

This method of mentorship, sharing, and support is an integral part of African communities. IP protection is melded into the system as the trainee is only gradually (and over many years) taught how to duplicate the master's innovation. The long period of apprenticeship also enables the trainee to gain valuable information, laying the groundwork for them to form their own business network. About two years before the end of the apprenticeship, the master allows the apprentice to work with minimal supervision. By this time, the *boi* is well versed in the master's trade secrets.

This system is applied in all forms of businesses in Igbo society, from manufacturing to sales. It is, however, mostly aimed at boys and young men because most families are less willing to let their daughters live with a male entrepreneur (who may also be single), for the number of years it takes to learn a trade. Although, traditionally, this was a male-centred arrangement (it was typical that young males left formal education after primary or post-primary schools to undertake

education under the apprenticeship model<sup>748</sup>), women are not precluded from these. Women, instead, usually learn at established businesses where they pay to be taught for six months to one year, all while still living at home. As cultural and societal embargoes are gradually lifted on women, more women are participating in the “standard” system of apprenticeship, particularly in sectors such as the clothing, cosmetics, or food industry. As will be seen in chapter five, the apprenticeship system is also quite common among women producing cosmetics, where knowledge is shared usually with a younger family member for a period. It is therefore worthwhile to take this successful cultural system into consideration when stakeholders explore ways of recreating a more inclusive IP system.

#### 4.3.2. Lessons from South African Informal Manufacturers of Home and Personal Care Products

South Africa *appears* to be doing better with women’s equality initiatives given that South Africa ranks 16 in the Global Gender Gap Index ranks while Nigeria ranks 128 out of 163 countries,<sup>749</sup> and given the fact that half of South Africa’s Cabinet ministers are women.<sup>750</sup> Yet despite these sterling accomplishments, women in South Africa, like women in Nigeria, face high rates of gender-based violence (GBV), high female unemployment, and a lack of representation of women in top management positions in the private sector.<sup>751</sup> The apartheid system in South Africa created discrimination at the political, social, economic, and constitutional levels, which did not disappear (except as official policy) when the country became a democratic nation. While the transformation process has led to numerous positive steps towards achieving gender equality,

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<sup>748</sup> Ekekwe, *supra* note 744.

<sup>749</sup> “The Global Gender Gap Index 2020 Rankings”, online: *Global Gender Gap Report 2020* <<https://wef.ch/2sBb7HE>>.

<sup>750</sup> Dominique Dryding, *Despite Progressive Laws, Barriers to Full Gender Equality Persist in South Africa*. (Institute for Justice and Reconciliation, 2019).

<sup>751</sup> *Ibid.*

especially regarding radical change of the legislative as well as of political power relations, the “economic power relations have not yet begun to shift.”<sup>752</sup> Women in South Africa still find themselves excluded from the formal economy and are found in low paying jobs in economic sectors. Like Nigerian women, those who are lucky enough to find a job never make it to the middle and top management echelons, particularly in the private sector. Both countries have an ongoing need to grow an inclusive economy to transform the power relations between women and men, thereby “building a society where women are free to make choices and not be hampered by economic and social pressures.”<sup>753</sup>

Erika Kraemer-Mbula’s study of the informal manufacture of home and personal care products in South Africa (the study)<sup>754</sup> therefore offers a good example of how IP is appropriated in the informal cosmetics sector. The study adopts a systemic approach to examine the informal economic activities generated around the manufacture of home and personal care products, exploring these activities as part of a broader economic, social, and institutional system in which informal manufacturers operate. It explores the extent to which “communities” in the informal sector produce, manage, protect, and share new knowledge, and provides a great example of how IP is appropriated in the informal economy. While the study did not have gender as its focus, the informal manufacturing of personal care products has direct relevance to this research and offers an exemplar of how innovation takes place in the informal sector. More so, the similarity in the plight of women in both countries makes Kraemer-Mbula’s study relevant to this research.

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<sup>752</sup> Veronika Wittmann, “Gender and empowerment in South Africa” (2021) 6:4 *Multicultural Education & Technology Journal* 248–260 at 252.

<sup>753</sup> Phumia Williams, “Empowering women means dealing with the past” (1 August 2019), online: *South African Government* <<https://www.gov.za/blog/empowering-women-means-dealing-past>>.

<sup>754</sup> Kraemer-Mbula, *supra* note 186.

Like in Nigeria, the formal home and personal care industry in South Africa is dominated by a few large, foreign multinationals and domestic companies. But the sector has a huge number of microenterprises operating informally and dedicated to the production of lotions, cosmetics, soaps, detergents, and the like. “These informal businesses not only provide a form of employment and livelihood for South Africa’s most disadvantaged population segments but also target a large existing customer base demanding cheap and affordable consumer goods, a section of demand that is often overlooked, misunderstood and underestimated in South Africa.”<sup>755</sup> Kraemer-Mbula finds that formal mechanisms of knowledge appropriation (such as patents and trademarks)—used to protect innovators from imitation—may have limited applicability and coverage for certain industries and companies. Rather, as similarly found among women producing cosmetics in Nigeria, other appropriation mechanisms, such as secrecy and division of duties, are likely to be more applicable in the context of microenterprises and informal enterprises.

Kraemer-Mbula also finds that the “perception of a need to appropriate knowledge may be expected to relate to the perception of ‘ownership’ of knowledge itself.”<sup>756</sup> Most informal manufacturers of home and personal care products in South Africa who participated in the study (76%), indicate they do not consider that the ideas of the products they make belong to them. According to Kraemer-Mbulu, “this is an important premise to bear in mind when analyzing suitable mechanisms of knowledge appropriation for the informal sector.”<sup>757</sup> In addition, it must be observed that entrepreneurs in the informal sector, be they women producing cosmetics in Nigeria or participants of the South African study, are concerned about knowledge protection

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<sup>755</sup> *Ibid* at 147.

<sup>756</sup> *Ibid*.

<sup>757</sup> *Ibid* at 176.

principally as it relates “to their perception of strong competition and their fear that they will lose market share if new competitors get established in the same geographical area in which they operate.”<sup>758</sup> To guard against this loss of their market share, these manufacturers use some type of mechanism, either formal or informal, to protect their knowledge. Most of the respondents in the study (80%) had their own brand, as they identify their product with a name and / or a logo, often displayed on the product. Again, a brand is not necessarily associated with having a registered business.

As also found among women producing cosmetics in Nigeria, Kraemer-Mbula’s study indicates that secrecy is widely used, with nearly half of the companies (47 %) who participated in the study, saying they keep some of their innovative ideas secret. The study, however, reveals that

effective sharing of information is the most common mechanism of knowledge protection. Through this practice, companies share some of their knowledge with other micro manufacturers in exchange for other knowledge that may be useful for their own business. This type of exchange does not involve monetary transactions but appears to be guided by a code of honor and trust among producers and a sense of responsibility to their community.<sup>759</sup>

Division of duties is another popular means to ensure that knowledge is protected within the company and is likewise common among women producers in Nigeria, where the division of duties usually means the owner undertakes manufacturing while their employees are responsible for tasks relating to packaging and sales. Another important trait in the informal sector is managing customer relationships. Several participants in Kraemer-Mbula’s study expressly mentioned the

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<sup>758</sup> *Ibid.*

<sup>759</sup> *Ibid.*

importance of customer relationship management. This was similarly found among women producing cosmetics in Nigeria (discussed in chapter five). Very few of the participants in Kraemer-Mbula's study (4%) had a contractual agreement with a manufacturer to whom they have outsourced the development of formulas and none of them reported having filed a patent or used copyright. However, informal manufacturers often see secrecy as a barrier to growth in that they express concern about training new people whom they fear may then start their own business and become competitors.

As similarly found in Nigeria, Kraemer-Mbulu's study reveals a basic lack of awareness of IP generally, ranging from ignorance of IP issues and IP legislation in South Africa or were unaware of the technicalities of IPRs. Several participants, for example, were not bothered about IP policy or considered it irrelevant to their line of business. A few who were aware of IP mechanisms and considered IP relevant for their business found it too expensive to acquire, while others (32%) considered IP as unsuitable for or inaccessible to micro-manufacturers, essentially indicating that they see it as out of their reach. Indeed, IP is generally understood as equivalent to formal mechanisms such as patents and trademarks and most of the respondents (92%) had never attempted to apply for a patent, trademark, or other formal mechanisms of knowledge appropriation.<sup>760</sup> Kraemer-Mbulu's study highlights the importance of raising awareness of IP mechanisms, but this must be accompanied by a reduction in the cost of "formal knowledge appropriation instruments for informal enterprises."<sup>761</sup>

Again, where formal IP mechanism was considered, trademarks were regarded as a suitable means of knowledge appropriation, since trademarks allow brand recognition to be established

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<sup>760</sup> *Ibid.*

<sup>761</sup> *Ibid* at 181.

through the registration of the brand name, a logo or even a package design. The respondents consider trademarks to be potentially useful in building an identity in the marketplace. However, they also acknowledged that the cost of enforcement would prevent them from pursuing formal action in case of infringement. The study also showed that respondents who did file a trademark application did so with the assistance of a business incubator guiding the process. In Nigeria, entrepreneurs also must rely on others to guide the trademark registration process thus making the actual cost of trademark registration far higher than the official fees.

It is particularly important to note the place of intrinsic motivations (i.e. a behavior that is driven by an individual's perception of personal satisfaction or reward) in local innovation. It is important to acknowledge that intrinsic motivations play a major role in the informal sector populated by women and sole entrepreneurs. In this sector, "the wheel of economic development in such societies is kept moving by 'personality' and 'will' of individuals"<sup>762</sup> and the motive to accumulate private property is only a fraction of why people innovate. Here, individuals, and not corporate R&D units, are the main agents of innovative activities.<sup>763</sup> For this reason, as found among the Igbos in Nigeria and innovators in South Africa, effective sharing of information is the most common mechanism of knowledge protection.

Altruism occupies a big stage in the innovative activities embarked upon by entrepreneurs, and they may be satisfied if "the innovation is able to solve some of the daily problems faced by themselves or their communities, disregarding the prospects for private appropriation or monetary gains."<sup>764</sup> Of course, this is not to claim that pecuniary gains from innovation are not important to

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<sup>762</sup> Saradindu Bhaduri & Hemant Kumar, "Extrinsic and Intrinsic Motivations to Innovate: Tracing the Motivation of 'Grassroot' Innovators in India" (2010) 10 *Mind & Society* 27 at 28.

<sup>763</sup> *Ibid.*

<sup>764</sup> *Ibid* at 31.

innovators in the informal sector. They are very important, but innovators do not tend to see perpetual exclusion of others as the only way to guarantee gains. The Igbos, for instance, are very wealthy entrepreneurs, yet it is important to them to share their knowledge and facilitate wealth expansion through the apprenticeship system, as discussed above. With the shared history of the civil war and its devastating impact on them, they may be more motivated by the need to regain the lost glory of their people than by “immediate” pecuniary gain. They understand that a tree does not make a forest and are therefore willing to transfer knowledge to ensure the expansion of the Igbo nation, knowing it will invariably bring them greater pecuniary gain. Indeed, “for centuries in the Igbo nation, they have kept this culture alive by reminding everyone of a popular saying, “*onye aghala nwanne ya,*” which means, “none should leave his or her brethren behind,” in communities or in the markets. The key focus of IAS is to prevent poverty by mass scaling opportunities for everyone.”<sup>765</sup>

Similarly, South Africans recovering from the ravages of apartheid, may be more concerned with building up their people. Other communities also have their own histories and motivations, and these drive their decisions around innovation and knowledge appropriation. Therefore, reforms in the IP system must allow for a case-by-case assessment of what IPRs are suited or relevant for each community. These examples should persuade us to develop an understanding of the complex canvas of human motivation behind innovative activities which ultimately direct knowledge (IP) appropriation.

#### 4.4 Conclusion

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<sup>765</sup> Ekekwe, *supra* note 744.

This chapter set out to explore forms of semi-formal and informal IP that are being used or could be readily used in the informal sector, especially in the face of the challenges of utilizing formal IP mechanisms. The chapter examined informal forms of knowledge transfer drawing on a feminist / TWAIL philosophy, which argues that as constituted, international law cannot promote women's development because it legitimizes and sustains the unequal structures and processes in global markets, such that the Third World continues to serve as sources of raw materials for European capitals. Rather, the protection of IP should be tailored according to the domestic environment in which the IP law operates and in the context of their specific development needs. The chapter identified various forms of semi-formal and informal IP mechanisms appropriated in the informal sector and examined how they are utilized in the IAS in Nigeria and among South African Informal Manufacturers of Home and Personal Care Products. An examination of these two communities supports other studies<sup>766</sup> that found the motive to accumulate private property is only one among many reasons why people innovate. While intangible assets are indeed valuable, the overboard granting of monopoly rights to previous creators may actually slow down innovation and destroy a culture's ability to respond flexibly to future opportunities and dangers.

At the end of this exploratory analysis, a nagging question emerges: Do the advocates of semi-formal and informal IP wish to bring these methods of appropriation into the IP regime thus stamping them with formality? I would suggest instead that the exploration offers insights into the various mechanisms to show that innovation is indeed taking place in the informal sector and knowledge is being appropriated through informal mechanisms without innovation being stilted because of it. WIPO supports and recommends activities such as this exploratory exercise to

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<sup>766</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73; Thomä & Bizer, "To protect or not to protect?", *supra* note 734; Bhaduri & Kumar, "Extrinsic and Intrinsic Motivations to Innovate", *supra* note 764.

address the everyday challenges which confront rural communities and, in particular, rural women with the principal aim of identifying “practical, grass root solutions for harnessing the opportunities offered by the IP system in order to ensure more effective recognition, protection and management of cultural assets.”<sup>767</sup> Is this support, however, not a roundabout way of “formalizing informality?”<sup>768</sup> Policy-makers must be careful to not impose a mainstream IP regime on the informal sector, since to do so, would be contrary to the values prized by entrepreneurs in the informal sectors, as the two examples of the Nigerian and South African communities highlighted above. These values—trust, sharing, and united commitment to rebuild their society—conflict with the individualism and exclusivism inherent in the IP regime. Such conflict can only produce a two-headed monster, and this will inevitably inhibit innovation because of the confusion it will generate.

The dilemma, as also noted by Essegbey et al,<sup>769</sup> is in finding a way to exploit informality without attempting to convert it to formality under an erroneous assumption that formal IP appropriation is the “only” way to optimize returns on innovation. The successes recorded in the studies cited in this chapter reveal the error of such assumptions. Indeed, the examples offer insight into how informal mechanisms of knowledge appropriation are effectively used in the informal sector—but are very much outside the organizing schemas reflected in the bulk of Western literature or, indeed, law. Attempts to formalize these informal mechanisms may fail for the simple reason that the same kind of incentives that work in the formal sector will not necessarily work in

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<sup>767</sup> “Panama: Empowering Indigenous Women through a Better Protection and Marketing of Handicrafts”, online: <[https://www.wipo.int/wipo\\_magazine/en/2005/06/article\\_0005.html](https://www.wipo.int/wipo_magazine/en/2005/06/article_0005.html)>.

<sup>768</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73 at 292.

<sup>769</sup> George Essegbey, Awuni, S., Essegbey, I. T., Akuffoeba, M., & Mica, B. (2014). Country Study on Innovations, Intellectual Property and Informal Economy: Traditional Medicines in Ghana (13th ed.). World International Property Organization.

the informal sector as well. The two examples above show how non-pecuniary incentives play “significant part in the innovative / creative process in informal communities.”<sup>770</sup> Still, this dilemma needs to be resolved because if informality, though desirable, negatively impacts the scaling up of businesses as claimed, and formalizing them could lead to increasing production and scaling up of the business, then some sort of middle ground must again be explored.

One way forward, echoing Mgbeogi, may be for Third World countries to adopt and implement unique IP regimes, such as those examined in this chapter, that are proven to be responsive to their lived realities.<sup>771</sup> The domestic environment in which IP law operates and the context of the development role of IP must be taken into consideration.<sup>772</sup> Such an IP regime must be accompanied by measures that take cognisance of the development needs of the Third World.<sup>773</sup>

The next chapter presents a case study of women entrepreneurs producing cosmetics in Nigeria and examines the role of gender in the utilization of IP. There I demonstrate how the forms of IP appropriation explored in this chapter have proven to be more responsive to the lived realities of women producing knowledge in Nigeria’s informal sector and that the current IP regime plays no role in the development of women entrepreneurs in Nigeria.

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<sup>770</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73 at 292.

<sup>771</sup> Mgbeoji, *supra* note 680 at 212.

<sup>772</sup> Ayoyemi Lawal-Arowolo & Kunle Ola, eds, *Nigerian Intellectual Property Law: Reform and Development* (London: Routledge, 2022) at 4.

<sup>773</sup> Calestous Juma, “Intellectual property rights and globalization. implications for developing countries” (1999) Science, technology and innovation discussion Paper, online: <[https://www.academia.edu/es/21242639/Intellectual\\_property\\_rights\\_and\\_globalization\\_implications\\_for\\_developing\\_countries](https://www.academia.edu/es/21242639/Intellectual_property_rights_and_globalization_implications_for_developing_countries)>.

## Chapter Five: A Case Study of Nigerian Women Entrepreneurs Producing Cosmetics.

### 5.1 Introduction

Nigerian women are recognized as having an extraordinarily strong entrepreneurial spirit. Indeed, Nigerian women account “for 41% ownership of micro-businesses in Nigeria with 23 million female entrepreneurs operating within this segment.”<sup>774</sup> Despite this remarkable position, women entrepreneurs continue to face challenges and barriers “that limit women from scaling-up their businesses.”<sup>775</sup> As a result, even though there is equal representation of women and men at lower levels of employment in the formal sector, women have very low representation in business leadership positions, with women owning only “20% of enterprises in the formal sector of Nigeria.”<sup>776</sup>

While there have been numerous initiatives<sup>777</sup> in Nigeria to enhance women’s capacity in entrepreneurship, including initiatives that acknowledge the cultural, religious, and legal encumbrances<sup>778</sup> women face in entrepreneurship, the prevailing imbalance in entrepreneurial leadership calls for solutions that go beyond financial empowerment. One such solution is to understand that “the concept of entrepreneurship is itself biased towards men”<sup>779</sup> and there is a

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<sup>774</sup>PwC, *Impact of women on Nigeria’s economy* (2020) at 4.

<sup>775</sup>*supra* note 776.

<sup>776</sup>*Ibid.*

<sup>777</sup> Regional Office for Africa, “Empowering African women to break out of informality”, (16 September 2014), online: <[http://www.ilo.org/africa/media-centre/pr/WCMS\\_307466/lang--en/index.htm](http://www.ilo.org/africa/media-centre/pr/WCMS_307466/lang--en/index.htm)>; “Banks promoting women entrepreneurship development in Nigeria”, (17 December 2019), online: *The Sun Nigeria* <<https://www.sunnewsonline.com/banks-promoting-women-entrepreneurship-development-in-nigeria/>>; “Opportunities for Women in the ACFTA”, online: *UN Women | Africa* <<https://africa.unwomen.org/en/digital-library/publications/2019/07/opportunities-for-women-in-the-acfta>>; “Visa Expands She’s Next Initiative in Africa, Empowering Women Entrepreneurs with Digital Capabilities”, (59:36 200AD), online: *Pulse Nigeria* <<https://www.pulse.ng/business/visa-expands-shes-next-initiative-in-africa-empowering-women-entrepreneurs-with/kt3jgk3>>.

<sup>778</sup> note 779.

<sup>779</sup> Colletah Chitsike, “Culture as a Barrier to Rural Women’s Entrepreneurship: Experience from Zimbabwe” (2000) 8:1 *Gender & Development* 71–77 at 71.

need to change the entrepreneurship narrative to one that recognizes women as entrepreneurial leaders. This is especially important for women entrepreneurs in rural areas, where most grass root initiatives to support women entrepreneurs do not take into account the realities of local entrepreneurial activities, and consequently, cannot identify the relevant support women might need to scale up, beyond financial assistance.<sup>780</sup>

For this reason, in this chapter, a case study of women producing cosmetics in Nigeria examines the role of IP in women's entrepreneurship in a way that "recognizes the importance of gender in relation to the individual, institutional, structural, and cultural factors integral to doing entrepreneurship."<sup>781</sup> Recognizing the gender dimensions of international agreements and policy frameworks, the United Nations Guiding Principles on Business and Human Rights notes that "States should consider the gender impact of international agreements and policy frameworks adopted in all relevant areas, such as labour, trade, finance, investment, intellectual property, development, energy, environment, climate change, health, population, disarmament, peace and security."<sup>782</sup> This chapter similarly considers the gender impact of the IP regime on women's businesses in Nigeria with a focus on the cosmetics sector.

The thesis points to the divide between development in the general context of Third World countries and women's development. In this chapter, I examine the role of IP in gender and development. Women's development is inextricably tied to their freedom to create wealth. If the freedom of labour markets is denied by laws, regulations, or convention<sup>783</sup> such as the IP regime,

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<sup>780</sup> Ishmael Iwara, "Small-Enterprise Capital Mobilization and Marketing in Rural Areas: A Review Synthesis of Stokvel Model" (2021) 27 *Academy of Entrepreneurship Journal* 1.

<sup>781</sup> Clark Muntean & Ozkazanc-Pan, *supra* note 160 at 27.

<sup>782</sup> *Guiding Principles on Business and Human Rights* (United Nations, 2011) at Guiding Principle 10a.

<sup>783</sup> Sen, *supra* note 15.

it thereby impinges on the freedom to transact, which would exacerbate the challenges women face in successfully running their businesses. This is escalated for women entrepreneurs in Nigeria because as Sen explains,

the freedom of women to seek employment outside the family is a major issue in many developing countries. This freedom is systematically denied in many cultures, and this in itself is a serious violation of women's liberty and gender equity. The absence of this freedom militates against the economic empowerment of women, and also has many other consequences.<sup>784</sup>

These unique circumstances must be taken into consideration when examining the role of the IP regime in the development of women entrepreneurs. Therefore, to effectively answer one of the thesis questions—What role does gender play in the acquisition and exploitation of IPRs by women producing cosmetics in Nigeria?—this chapter uses a feminist approach to examine how gender informs the decisions of women entrepreneurs producing natural cosmetics in Nigeria to acquire and utilize IP, and how gendered conceptions in Nigerian society may influence their engagement with the IP regime. Such an analysis will reveal the “value in, and explicitly include what is usually ignored and under-valued in the policy-making process of problem definition and evaluation.”<sup>785</sup>

Applying feminist methods drawing on the perspectives offered by TWAIL scholarship, this chapter carries out an intersectional analysis. Here I am interested in the nuanced and intersectional nature of women's entrepreneurship in a Third World country and their experiences with the current IP regime as entrepreneurs producing cosmetics in Nigeria's informal economy. The analysis takes into consideration the “life-long socialization processes that shape women to be

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<sup>784</sup> *Ibid* at 190.

<sup>785</sup> Vossenberg, “Beyond the Critique”, *supra* note 39 at 13.

equal, but different than men in the ways in which they view the world,<sup>786</sup> and how these shape women entrepreneurs' interactions with IPRs in the marketplace. Guided by the six assumptions of intersectionality discussed by Hancock,<sup>787</sup> I carry out a multi-layered examination of the interactions that Nigerian women entrepreneurs producing cosmetics have with the current IP regime. I identify their unique experiences and challenges in the acquisition and utilization of IP. Through this examination, the possible role of IP as a development tool for women producing cosmetics in Nigeria can become clear.

The role of IP in women's entrepreneurship must be understood as a local practice, taking place in a specific context, and an activity in which gendered power structures such as location, religion, culture, literacy, politics, and much more "are key to shaping specific entrepreneurial experiences and behaviors."<sup>788</sup> For example, Sullivan and Meek<sup>789</sup> highlight how the societal attribution of gender roles and gendered socialization processes create unique barriers to entry for women. Barriers can include unequal access to assets, skewed educational focus areas, and gendered daily activity expectations among women and men. When women's entrepreneurship and development is approached from such a contextual perspective, applying a feminist lens can uncover where stereotypes come into play and how they exert influence on "women's entrepreneurial propensity."<sup>790</sup> Such an analysis can better explain the differences in entrepreneurial activity (including the engagement with IPRs) between women and men.<sup>791</sup>

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<sup>786</sup> Clark Muntean & Ozkazanc-Pan, *supra* note 160 at 2.

<sup>787</sup> Hancock, *supra* note 259.

<sup>788</sup> Vossenber, "Beyond the Critique", *supra* note 39.

<sup>789</sup> Diane Sullivan & William Meek, "Gender and Entrepreneurship: A Review and Process Model" (2012) 27:5 Journal of Managerial Psychology 428.

<sup>790</sup> Diane Sullivan & William Meek, "Gender and Entrepreneurship: A Review and Process Model" (2012) 27:5 Journal of Managerial Psychology 428 at 445.

<sup>791</sup> Clark Muntean & Ozkazanc-Pan, *supra* note 160.

This chapter draws on my personal experience as a Nigerian woman entrepreneur who produced cosmetics from 2002 to 2010, as well as my observations of how other producers carried on their businesses. I draw as well on my experience as a director of a woman's NGO between 2012 and 2014 at the Chadash Phoenix Woman Foundation.<sup>792</sup> Doing so allows me to share the insights I gained from doing capacity-building training with rural women entrepreneurs. Together, my experiential knowledge from both the perspective as an entrepreneur and (effectively) as an educator and advocate offer a correction to the existing literature.

The chapter is divided into four parts. Part one includes the above introduction and continues below with a brief overview of the informal economy. It is necessary to begin a discussion about women entrepreneurs producing cosmetics in Nigeria with an overview of the informal sector because women entrepreneurs innovate mostly in the informal sector. The overview will provide context to help understand the economic environment and how it impacts women's activities and decisions. Part two is made up of two closely related but distinct sub-divisions. The first, gives an overview of the production of natural cosmetics by women entrepreneurs in Nigeria. And, in the second sub-section, I deploy Leslie McCall's<sup>793</sup> methodology of what she classifies as an intra-categorical approach to the study of "multiple, intersecting, and complex social relations"<sup>794</sup> to identify and analyze factors that intersect with gender to look at how these factors affect women in entrepreneurship, and indeed complicate their interaction with the IP regime. Though there, are of course, many intersecting factors, I choose five factors I consider most relevant to women

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<sup>792</sup> note 311.

<sup>793</sup> McCall, *supra* note 217.

<sup>794</sup> *Ibid* at 1772.

producing cosmetics namely: the intersections of gender and religion, gender and culture; gender and geographical location; gender and educational background; and finally, gender and politics.

Part three of this chapter is also sub-divided into two sections. The first section begins with a discussion on IP acquisition and utilization among women producing cosmetics, examining specific challenges they face, and the second section offers a discussion on other forms of knowledge appropriation used by women producing cosmetics in Nigeria. The fourth and final section, offers a critical assessment of what role IP presently plays in the development of women producing cosmetics in Nigeria. I end with the conclusion that the IP regime as currently framed, plays no role in the development of women (producing cosmetics) in Nigeria.

#### 5.1.1 An Overview of Nigeria's Informal Sector

Hancock suggests that more than one category of difference (e.g., race, gender, class) needs to be taken into account to understand complex political problems and processes. This section considers the context of Nigerian women entrepreneurs who operate mostly in the informal sector and face challenges that cannot be reduced to a single category. They face various but interconnected factors and social inequalities prevalent in Third World countries, such as gender discrimination, illiteracy, lack of access to funds, poor infrastructure, poor governance, and so on,<sup>795</sup> which, I argue, contribute to how this group utilizes (or not) IP. These conditions must be taken into consideration because they complicate the use of the IP system especially as they may

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<sup>795</sup> United Nations, *World Social Report 2020: Inequality in a Rapidly Changing World* (UN, 2020).

hinder the ability to enforce one's rights and related costs,<sup>796</sup> and in addition, hinder even their awareness and understanding of IP itself.

The informal sector is shaped not only by economic and institutional processes, but also by social ones. Indeed, labour relations are often based on casual employment, kinship, or personal and social relations rather than contractual arrangements with formal guarantees.<sup>797</sup> Social networks, gender, and local cultures are therefore important in the growth and relevance of the sector.<sup>798</sup> The analysis in chapter four has also shown that very few entrepreneurs use formal IP mechanisms. Rather, semi-formal and informal means of appropriating IP are very common in the informal sector.

The informal sector is described as

a subset of unincorporated enterprises not constituted as separate legal entities independently of their owners. These enterprises are owned by individual household members or several members of the same or different households. They are usually operated at a low level of organization, on a small scale and with little or no division between labour and capital as factors of production.<sup>799</sup>

They consist of units engaged in the production of goods or services with the primary objective of generating employment and incomes to the persons concerned.<sup>800</sup> Informal sector activities refer to the way of doing things in the informal sector. The activities are “characterised by: a) ease of entry; b) reliance on indigenous resources; c) family ownership of operation; d) small scale of

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<sup>796</sup> Committee on Development and Intellectual Property (CDIP), *Conceptual Study on Innovation, Intellectual Property and The Informal Economy* (WIPO, 2013) at 6.

<sup>797</sup> *Resolution concerning Statistics of Employment in the Informal Sector, adopted by the 15th International Conference of Labour Statisticians.* (ILO, January 1993c).

<sup>798</sup> “Informal Sector - An overview” | online:ScienceDirect<<https://www.sciencedirect.com/topics/social-sciences/informal-sector>>.

<sup>799</sup> “Definitions of informal economy, informal sector and informal employment” in *Tackling Vulnerability in the Informal Economy* Development Centre Studies (OECD, 2019) 155.

<sup>800</sup> Jacques Charmes, “The Success Story of a Loose but Useful Concept: Origins, Development, Magnitude and Trends of the Informal Economy” in Jacques Charmes, *Research Handbook on Development and the Informal Economy* (Edward Elgar Publishing, 2020).

operation; e) labour-intensive and adapted technology; f) skills acquired outside the formal school system; and g) unregulated and competitive market.”<sup>801</sup> Jacques Charmes<sup>802</sup> explains that even though formal sector activities are also defined by the exactly obverse characteristics of informal sectors, the informal and formal sectors are not two separate sectors without any “linkages interrelating their respective functioning.”<sup>803</sup> Formal firms can act informally in the way they apply or do not apply rules, while informal firms can comply with formal rules, and both types of firms can, for instance, interact under sub-contracting arrangements.<sup>804</sup> Contrary to common parlance, the informal sector is not synonymous to the informal economy. The term “informal sector” is therefore used loosely in this thesis (and beyond) to refer to the way women producing cosmetics in Nigeria carry out their economic activities. It includes both formal and informal employment in the cosmetics sector. Likewise, the term informal economy (IE) covers a diversity of situations and phenomena. It presents itself in a variety of forms across and within economies, especially in manufacturing and agricultural activities, as well as services that range from retail trading to household services.

The IE represents a significant share of output and employment in many developing [Third World] countries. Estimates suggest that over the past two decades, informal employment or employment in the IE made up more than half of non-agricultural employment in most middle- and low-income countries. Sub-Saharan Africa is the region with the largest estimates for the contribution of the informal sector to gross domestic product (GDP): the IE makes for nearly two-thirds of GDP including agriculture and half of non-agricultural gross value-added (GVA).<sup>805</sup>

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<sup>801</sup> Jacques Charmes, “The success story of a loose but useful concept: origins, development, magnitude and trends of the informal economy” in *ibid* at 23.

<sup>802</sup> Charmes, *supra* note 802.

<sup>803</sup> *Ibid* at 21.

<sup>804</sup> Charmes, *supra* note 802.

<sup>805</sup> Committee on Development and Intellectual Property (CDIP), *supra* note 798 at 2.

Nigeria, a sub-Saharan country, has a large representation of women in the informal economy. This is because, like women all over the world, Nigerian women are often involuntarily excluded from the formal sector by a lack of qualifications or other entry barriers. They must also sometimes choose informal entrepreneurship or employment because they need the autonomy and flexibility to balance work and family responsibilities. In addition, “households often need to supplement income earned in formal employment with informally earned incomes in response to inflation or cutbacks in public services.”<sup>806</sup> Work in the informal economy is unfortunately “often characterized by small or undefined workplaces, unsafe and unhealthy working conditions, low levels of skills and productivity, low or irregular incomes, long working hours and lack of access to information, markets, finance, training and technology.”<sup>807</sup>

Against such a background, it is easy to see why there is minimal interaction with formal IP mechanisms in this sector. A review of literature shows that innovators in the informal sector do not pay much attention to appropriating formal IP.<sup>808</sup> As discussed in chapter four, innovators tend to rely on semi-formal or informal rather than formal appropriation mechanisms. One reason for this is that innovation in the IE frequently takes place in clusters that facilitate the flow of knowledge through interactions and exchanges of ideas.<sup>809</sup> As a result, “the IE has not traditionally been considered as a source of innovation because innovation is often equated with research and development-intensive technological breakthroughs or patentable inventions.”<sup>810</sup> Yet, literature

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<sup>806</sup> Martha Chen, Renana Jhabvala & Frances Lund, “Supporting Workers in the Informal Economy: A Policy Framework” (2002) 58 at 2.

<sup>807</sup> “Informal Economy (Decent work for sustainable development (DW4SD) Resource Platform)”, online: ILO<<https://www.ilo.org/global/topics/dw4sd/themes/informal-economy/lang--en/index.htm>>.

<sup>808</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73; Thomä & Bizer, “To protect or not to protect?”, *supra* note 734; Ekong, *supra* note 718; Essegbey & Awuni, *supra* note 209.

<sup>809</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>810</sup> Committee on Development and Intellectual Property (CDIP), *supra* note 798.

does abound<sup>811</sup> “describing the store of knowledge of biodiversity, agro-forestry, ecology, medicines, crafts, etc., built over centuries by peasants, artisans, women and indigenous people all across the world,”<sup>812</sup> who innovate in the informal economy. These innovators are also in diverse industries, such as the cosmetics sector, where they apply traditional knowledge to modern scientific techniques to produce cosmetics that are demanded all over the world.

### 5.2.1 Production of Natural Cosmetics by Women Entrepreneurs in Nigeria.

Cosmetics production in Nigeria is regulated by the Nigerian National Agency for Food and Drug Administration and Control (NAFDAC).<sup>813</sup> NAFDAC defines cosmetics to include “any substance or mixture of substances intended to be rubbed, poured, sprinkled or sprayed, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the complexion, skin, hair or teeth and includes deodorants & detergent powder.”<sup>814</sup> This thesis focusses specifically on local, handmade cosmetics often referred to as “natural” or “organic” cosmetics. According to NAFDAC, a cosmetic product is termed organic if it contains 70% agricultural ingredients.<sup>815</sup> Even though the NAFDAC manufacturing guidelines<sup>816</sup> directs that raw materials must not be contaminated by rodenticides, insecticides,

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<sup>811</sup> Chen, Jhabvala & Lund, *supra* note 647; Kraemer-Mbula & Wunsch-Vincent, *supra* note 192; Charmes, *supra* note 802.

<sup>812</sup> Amit Basole, “The Informal Sector from a Knowledge Perspective” (2014) YOJANA, online: <<https://www.researchgate.net/journal/Yojana-0044-0515>>at 2.

<sup>813</sup> *S5 National Agency for Food and Drug Administration and Control(NAFDAC) Act Cap N.1 LFN 2004 (NAFDAC).*

<sup>814</sup> *S31 ibid.*

<sup>815</sup> See FAQ, “Micro, Small & Medium Enterprises (MSME) – NAFDAC”, online: <<https://www.nafdac.gov.ng/our-services/micro-small-medium-enterprises-msme1/>>.

<sup>816</sup> *NAFDAC Good Manufacturing Practice Guidelines for Cosmetics Products 2021* (National Agency for Food & Drug Administration & Control (NAFDAC) Drug Evaluation & Research (DER) Directorate, 2021).

etc.,<sup>817</sup> it does not make specific reference to the use of chemicals like pesticides and herbicides in the production of the agricultural products (such as lemons, mint leaves, avocados, etc.), which form the foundation of natural cosmetics that ultimately affect the human body and the environment. A discussion about the safety of natural or organic cosmetics products is, however, not the focus of this research. Regardless of these issues, most handmade cosmetics are advertised as 100% “natural” or “organic,” because these are the current buzzwords in the cosmetics sector as consumers are concerned with the effects of chemicals and synthetic products on their body. Further, there is a lack of specific legislation on the subject of “natural” and “organic” in the cosmetics sector all over the world (not just Nigeria). The discrepancy between private norms and institutional perceptions of natural cosmetics increases the uncertainty of what is really “natural” or “organic.”<sup>818</sup>

As a result of a growing awareness of the need to protect the environment and people’s desire for a healthier life, natural (nature-based) cosmetics now occupy centre-stage in cosmetics production and the industry is growing rapidly. In some parts of the world, the notion of “natural” is an integral part of the consumer’s choice and accounts for a fair percentage of the decision to purchase a natural or organic cosmetic.<sup>819</sup> Indeed, it has been predicted “that the natural and organic cosmetics market is set to witness a stellar CAGR [Compound Annual Growth Rate] of 9.76% during the forecast period (2020–2027) and reach a valuation in excess of USD 33.04 Bn.”<sup>820</sup>

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<sup>817</sup> See para. 9.3.4 *ibid.*

<sup>818</sup> “Natural and Organic Cosmetics Market Share, Growth, Trend Analysis to 2027 | MRFR”, online: <<https://www.marketresearchfuture.com/reports/natural-organic-cosmetics-market-7257>>.

<sup>819</sup> “Organic and natural cosmetics: what do consumers think today? - Trends”, online: <<https://cosmeticobs.com/en/articles/patterns-54/organic-and-natural-cosmetics-what-do-consumers-think-today-5937?page=14>>.

<sup>820</sup> note 820.



Figure 2: Picture of a cosmetic product labelled as 100% organic.<sup>821</sup>

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<sup>821</sup>Produced by a Nigerian Cosmetics company in Allen Avenue, Lagos Nigeria. See “Herbal Repair Scrub – ellensbeauty”, online: <<https://ellensbeauty.com/product/herbal-repair-scrub/>>.

While the consumers of cosmetics produced by women entrepreneurs are not the focus of this research, they are important to this analysis because women entrepreneurs bear consumers in mind throughout the process of production and distribution of cosmetics. Consumers' perception of cosmetics is therefore very important to producers of cosmetics. For consumers generally, natural cosmetics are any cosmetics made "purely" from plants and fruits. But there are two problems with this definition. One, it eliminates naturally occurring minerals which are also considered natural and used by cosmetics producers. Second, it presupposes that no chemicals whatsoever are added to the cosmetics. Yet nature does not produce sufficient chemicals that work best to solve the problems that cosmetics are meant to solve.<sup>822</sup>

Producers of cosmetics need cleansing surfactants,<sup>823</sup> emulsifiers,<sup>824</sup> thickeners,<sup>825</sup> chelating agents<sup>826</sup> and very importantly, preservatives,<sup>827</sup> to produce effective cosmetics. and the fact is there are not many natural occurring types of these chemicals.<sup>828</sup> Indeed, "even most of the

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<sup>822</sup> VibeThemes, "What is a natural cosmetic?", (3 April 2017), online: *Chemists Corner* <<https://chemistscorner.com/what-is-a-natural-cosmetic/>>.

<sup>823</sup> Surfactant is a shorter term for surface active agent which lowers the surface tension between two liquids, between a gas and a liquid or between a liquid and a solid. For instance, to mix oil and water, a surfactant is added to form a homogenous mixture. Cleansing surfactants are very useful for face cleansers. See "Natural surfactants in cosmetics: What are they and how do they work?", (14 July 2021), online: *School of Natural Skincare* <<https://www.schoolofnaturalskincare.com/surfactants-in-natural-cosmetics/>>; Krister Holmberg, "Natural surfactants" (2001) 6:2 *Current Opinion in Colloid & Interface Science* 148–159.

<sup>824</sup> Emulsifiers are used in creams and lotions and perform the same role as surfactants. See *ibid.*

<sup>825</sup> Thickening agents are used to control the viscosity (or thickness) of cosmetic products, particularly creams and lotions. They are lipid, naturally occurring, mineral or synthetic thickeners. See, VibeThemes, "Thickening Agents for Cosmetic Formulations", (16 June 2014), online: *Chemists Corner* <<https://chemistscorner.com/thickening-agents-for-cosmetic-formulations/>>.

<sup>826</sup> "A chelating agent is a chemical compound that reacts with metal ions to form stable, water-soluble metal complexes. The agent rearranges the metal's chemical composition and improves the metal's general stability and likelihood to bond with other substances." See "What is a Chelating Agent? - Definition from Corrosionpedia", online: <<https://www.corrosionpedia.com/definition/254/chelating-agent>>.

<sup>827</sup> Preservatives are natural or synthetic ingredients that are added to products to prevent them from spoiling and causing adverse health reactions to consumers. Preservatives are added to cosmetics to reduce the risk of microbial contamination of the product and to ensure the product remains suitable and safe during shelf-life and the period of its use by consumers. See, "Preservatives", online: <[https://ec.europa.eu/growth/sectors/cosmetics/cosmetic-products-specific-topics/preservatives\\_en](https://ec.europa.eu/growth/sectors/cosmetics/cosmetic-products-specific-topics/preservatives_en)>.

<sup>828</sup> VibeThemes, *supra* note 824.

natural colorants that exist in nature are not useable because they are contaminated with dangerous heavy metals.”<sup>829</sup> To produce effective cosmetics, one must chemically modify natural ingredients. The extent of such modifications varies from one producer to the other and form the basis for how different producers define natural. It is largely up to the producer to decide which definition of natural fits their brand story and formulation style. The cost of producing truly natural cosmetics is high because the natural forms of the ingredients listed above are usually present in small quantities and the separation process can be tedious.<sup>830</sup> In most instances the cost of separation / isolation will by far exceed the manufacturing cost of equivalent synthetic ingredient.<sup>831</sup> Consequently, very few cosmetics could qualify as “natural,” but there is still a desire for cosmetic marketers to sell their products as natural or organic,<sup>832</sup> because that is what consumers want.

One of the earliest forms of local cosmetic production in Nigeria is the production of skin lightening remedies with natural products like lemon, honey, aloe vera, and such, which local women produce to sell to women who cannot afford imported cosmetics. Long before Cheryl Harris examined how whiteness, initially constructed as a form of racial identity, evolved into a form of property,<sup>833</sup> Nigerian, indeed African women were trying to acquire whiteness as a currency of acceptance, even in their own land, among their own kind. Colonial rule in Nigeria, as with most of the African continent, changed social relations on the basis of color. It produced and reproduced stereotypes, and social hierarchies that now percolate with themes of “white saviorism,” in which the First World and all it embodies represented the “only way.” “White

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<sup>829</sup> *Ibid.*

<sup>830</sup> Holmberg, *supra* note 825.

<sup>831</sup> *Ibid.*

<sup>832</sup> VibeThemes, *supra* note 824.

<sup>833</sup> Cheryl Harris, “Whiteness as Property” (1993) 106:8 Harvard Law Review 1707.

supremacy as forcefully asserted on Africans, meant that the color white was the embodiment of cleanliness, beauty, privilege, and a desirably good life.<sup>834</sup> Consequently, many Nigerian women wanted to have a light skin color (appear white). The desire to become equal with white standards of beauty still pervades the minds of the colonized, particularly the women. Lighter skin represents beauty, social capital, and economic status.<sup>835</sup>



Figure 3: Picture of a whitening cosmetic product produced in Nigeria

This ironically led to the beginning of a booming industry — both for local and international cosmeticians. Nigerian markets were flooded with foreign goods including cosmetics. Indeed, it

<sup>834</sup> Takudzwa Hillary Chiwanza, “The Complex Skin Lightening Crisis In Africa – Will It End? | The African Exponent.”, online: *The African Exponent* <<https://www.africanexponent.com/post/7268-the-complex-skin-lightening-crisis-in-africa-will-it-end>>.

<sup>835</sup> *Ibid* See also, Margaret Hunter, “‘If You’re Light You’re Alright’: Light Skin Color as Social Capital for Women of Color” (2002) 16:2 *Gender and Society* 175–193.

was a status symbol among peers to be known to use only imported cosmetics. Avon cosmetics<sup>836</sup> was particularly popular among Nigerian women like my mother in the 70s.

The sharp increase in oil revenue in the early 1970s, enabled Nigeria to embark on an ambitious public investment program, aimed at extending and improving infrastructure and social services. This led to rising wages and appreciating currency, which negatively impacted the profitability of non-oil exports and undermined their competitive position internationally, while cheap food imports competed with domestic food production. The agricultural and manufacturing sector of the economy were affected the worst as import duties and prohibitions “favored imports of intermediate goods and parts for assembly into consumer durables and capital goods.”<sup>837</sup> Then, in the early 1980s, the international price of oil fell sharply, and Nigeria’s economy came tumbling down. A Structural Adjustment Program (SAP) was introduced in 1986. Under SAP, Nigeria reformed its foreign exchange system, trade policies, as well as business and agricultural regulations<sup>838</sup> to encourage local manufacturing products including cosmetics. Import restrictions were introduced under the comprehensive import supervision scheme in 1979, and the SAP forced indigenous entrepreneurs to produce Nigerian brands.<sup>839</sup>

This push factor (import restrictions) combined with the pull factor (new appetite for natural / organic cosmetics) presented an opportunity that women entrepreneurs seized as they launched start-ups. Finding the comparative ease (availability of agricultural products, low capital,

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<sup>836</sup> “Our Story | Avon”, online: *Avon Worldwide* <<https://www.avonworldwide.com/about-us/our-story>>.

<sup>837</sup> *Nigeria Structural Adjustment Program Policies, Implementation, and Impact* (Western Africa Department Country Operations Division, 1994) at viii.

<sup>838</sup> note 839.

<sup>839</sup> *Ibid.*

the possibility of working from home, and existing marketing networks such as churches and other social gatherings) of doing cosmetics business, they became producers of cosmetics. The local cosmetics sector blossomed as many brands of body lotions, creams, soaps, hair creams, and face make ups are now produced locally.<sup>840</sup> As a result, women producing cosmetics make up a good part of the 41% of the micro-enterprises discussed above. The concern for this research is to examine whether a context-driven IP regime could lead to the “scaling up”<sup>841</sup> of women’s businesses beyond the level of micro-enterprise and possibly improve their representation in business leadership positions, thereby contributing towards bridging the economic gap between men and women entrepreneurs in Nigeria. To do so, however, one must understand some of the factors that influence women’s entrepreneurship in the first place. As stated earlier, these factors could complicate the use of the IP system.

### 5.2.2 Intersectional Analysis of Factors that Intersect with the Challenge of Gender Discrimination in Women’s Entrepreneurship

This chapter holistically examines what role gender would play in the acquisition and exploitation of IPRs in Nigeria. However, “gender is always complicated by intersectionality.”<sup>842</sup> Among Nigerian women entrepreneurs there are several factors that intersect with gender to the extent that, not taking them into consideration when considering gender will only perpetuate the exclusion of vulnerable groups. Therefore, to incorporate often “ignored and excluded populations

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<sup>840</sup> *Market Acceptability of Locally Made Cosmetics Products (beauty Aids) In Nigeria – (A Case Study of Female Consumers In Enugu Urban)* (Projectng).

<sup>841</sup> The role of IP in “scaling up” businesses for women in the cosmetics sector in Nigeria has not been the focus of this research. However, the phrase is used in this research in a very simple sense to mean the ability of a business to grow in such a way that its revenues exceed its costs and this leads to expansion of the business.

<sup>842</sup> Constance Backhouse, “Claire L’Heureux-Dubé: A Controversial Judge on a Controversial Court in a Controversial Time.” (2017) 51:2 & 3 *Revue juridique Thémis de l’Université de Montréal* 277–300 at 289.

into pre-existing frameworks and broaden our knowledge base regarding traditional questions”<sup>843</sup> about the role of IP, I deploy McCall’s approach of intra categorical complexity,<sup>844</sup> which focuses on particular social groups at neglected points of intersection, to reveal the complexity of lived experiences within such groups.<sup>845</sup> This approach enables me to tease out some<sup>846</sup> of the different factors that intersect with gender, and cause different experiences for women entrepreneurs in entrepreneurship, thereby complicating their interaction with the IP regime. As with case studies, this research delves into the “complexities of social life—to reveal diversity, variation, and heterogeneity,”<sup>847</sup> and emphasizes the “differences among women as a call to examine structural inequalities among women, especially among different classes of women.”<sup>848</sup> In this segment, therefore, I examine the intersections of gender and religion; gender and culture; gender and geographical location; gender and education, as well as gender and politics. The analysis shows that patterns of gender inequality are not the same across the classes.<sup>849</sup>

#### A. Gender and Religion

There are several religions practiced in Nigeria but the most common are Christianity, Islam, and African Traditional Religions. The term religion is used loosely in this analysis to refer to any

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<sup>843</sup> Hancock, *supra* note 259 at 248.

<sup>844</sup> McCall, *supra* note 217.

<sup>845</sup> *Ibid* at 1774.

<sup>846</sup> One of the criticisms against intersectionality is the endlessness of differences even within categories and the definitional problem of who defines when, where, which, and why particular differences are given recognition while others are not. See Alice Ludvig, “Differences Between Women? Intersecting Voices in a Female Narrative” (2006) 13:3 *The European journal of women’s studies* 245. However, I chose some intersecting factors I consider to be germane to the arguments of this thesis. See also, Anna Carastathis, “The Concept of Intersectionality in Feminist Theory” (2014) 9:5 *Philosophy Compass* 304.

<sup>847</sup> McCall, *supra* note 217 at 1782.

<sup>848</sup> *Ibid* at 1788.

<sup>849</sup>

or all of them. The power of religion is one of the greatest forces that has ever been.<sup>850</sup> The definition of religion as “the most comprehensive and intensive manner of valuing known to human beings”<sup>851</sup> aptly sums up the significance of religion to this analysis. Its power to consume and control the response of human beings to their environment was used very effectively by colonialist to subdue the colonies. In the precolonial period, Nigerian women played a major role in social and economic activities.<sup>852</sup> “The most serious threat to the influence and privileges of women occurred during the 20th century, when patriarchy combined with colonial changes to alter gender relations.”<sup>853</sup> One of the tools used by the colonialists to achieve this alteration was religion. The role of religion in Nigeria particularly cannot be over emphasized. The country has been dramatically described as “the most religious country in the world,”<sup>854</sup> even long after the colonialist left the Nigerian shores. From Muslim women living in purdah (or not) to Charismatic or Pentecostal Christian women, to women African traditional worshippers, the roles and attitudes of Nigerian women are deeply determined by religious tenets. Indeed, one of the principal areas of concern and recommendations made by the Committee on the Elimination of All Forms of Discrimination Against Women,<sup>855</sup> in its concluding observations on Nigeria’s sixth periodic report on its compliance with CEDAW, was that awareness-raising and advocacy campaigns be

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<sup>850</sup>Edward Parrinder, “African Traditional Religion”(1976) online: Goodreads<[https://www.goodreads.com/work/best\\_book/1443908-african-traditional-religion](https://www.goodreads.com/work/best_book/1443908-african-traditional-religion)>.

<sup>851</sup>Frederick Ferre, “Basic Modern Philosophy of Religion” online: <<https://www.amazon.ca/Basic-Modern-Philosophy-of-Religion/dp/B000HI58Z2>>.cited in *Philosophy of Religion* [https://www.qcc.cuny.edu/socialsciences/ppecorino/phil\\_of\\_religion\\_text/PAPER\\_1\\_OVERVIEW/What\\_is\\_religion.htm](https://www.qcc.cuny.edu/socialsciences/ppecorino/phil_of_religion_text/PAPER_1_OVERVIEW/What_is_religion.htm)

<sup>852</sup> Significant roles were played by prominent women such as Queen Amina of Zaria, Moremi of Ife, Emotan of Benin and Omu Okwei of Ossomari and many more women all over Nigeria. See, “The role of Nigerian women | Britannica”, online: <<https://www.britannica.com/topic/role-of-Nigerian-women-1360615>>.

<sup>853</sup> *Ibid.*

<sup>854</sup>“Facts About Nigeria: Current & Historical Facts About Nigerian Culture, Religion, & Tradition”, online: <<https://naijagists.com/facts-about-nigeria-kids-culture-history-religion-tradition/>>.

<sup>855</sup> UN CEDAW, *supra* note 55.

developed and implemented, and include involving religious and traditional leaders (among others), to enhance understanding of the provisions of the Convention, support the principle of gender equality, and the prohibition of discrimination.<sup>856</sup>

Religion usually provides ways for people to deal with the hardships associated with life and often promises a better life. Indeed, many Nigerians rely on God or some superior being for everything: from their next meal to their very survival in an insecure environment. In addition, religion “serves as a uniting force for populations in their resistance of unjust, corrupt or ineffective governments and provides an identity for minority groups that otherwise don’t fit in.”<sup>857</sup> As a result, there is an extreme dependence on what religion says about the role of women in the society. Indeed, religion has proven to be quite detrimental in its undermining of Nigerian women’s roles in religious leadership, which in turn, led to the undermining of the leadership role of women in the secular world.<sup>858</sup> This thesis points out “the seemingly invisible yet critical threads associated with religion that shape a woman’s life; threads associated with self-understanding and self-definition.”<sup>859</sup>

Two mindsets—“the perceived social acceptability and the perceived feasibility of entrepreneurship”<sup>860</sup> —were identified by Henley as drivers that make a discussion about the influence of religion on entrepreneurship relevant.<sup>861</sup> According to Henley, “entrepreneurship is a

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<sup>856</sup> *Concluding observations of the Committee on the Elimination of Discrimination against Women*, by UN CEDAW, [digitallibrary.un.org](http://digitallibrary.un.org) (UN, 2008) at Para 14.

<sup>857</sup> Zainab Salbi, “The Impact of Religion on Women in the Development Process” (2003) 1:1 Annual Journal of Women for Women International 1 at 3.

<sup>858</sup> miriamhamdy, “The impact of religion on women in the development process”, (7 April 2018), online: *The Nation of Nonbotany* <<https://nationofnonbotany.wordpress.com/2018/04/07/the-impact-of-religion-on-women-in-the-development-process/>>.

<sup>859</sup> *Ibid* at 4.

<sup>860</sup> Andrew Henley, “Does religion influence entrepreneurial behaviour?” (2017) 35:5 International Small Business Journal 597–617.at 600

<sup>861</sup> *Ibid*.

values-based phenomenon which may be framed by both intrinsic and extrinsic religious orientations.<sup>862</sup> Religion, in particular, plays a vital role in the way it imparts values and societal norms.<sup>863</sup> Balog et al,<sup>864</sup> examining the intersection of entrepreneurship, religion, and spirituality, confirm that religion provides “an understanding of how an entrepreneur’s heightened consciousness in terms of his / her personal values and beliefs can impact his or her business activities and crucial characteristics of the entrepreneurial process, such as the recognition of opportunities, the creation of new ventures, as well as the operation and growth of these firms.”<sup>865</sup>

The IP regime is seen as one way of unlocking the entrepreneurial spirit through the allocation of IPRs over one’s creation. However, if the framers of IP policies do not approach the study of the entrepreneurial mind from the perspective of the values that drive such a mind, it will be impossible to understand “entrepreneurial cognitions, motivations, and subsequent behaviors” with a view to unlocking the entrepreneurial spirit through the allocation of IPRs. IP policies like every other policy are largely influenced by the values that govern the people they are aimed at.

As Koffas explains:

the anthropo-philosophical and Christian principles—other than being structural elements of human behavior—serve as collective values as well as guiding principles for the harmonious working together of social life and state intervention when social policy is applied at the macro level. In any case, the effectiveness of each decision to intervene, and the accomplishment of its objectives, is highly dependent on its ideological background, which exists in relation to the current social values. The existence of social equality and justice, the reduction of social problems, as well as the reallocation of goods and services, presuppose the smooth operation of the value system and the preservation of its fidelity.<sup>866</sup>

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<sup>862</sup>*Ibid.*

<sup>863</sup>*Ibid.*

<sup>864</sup>Angela Balog, LaKami Baker & Alan Walker, “Religiosity and spirituality in entrepreneurship: A review and research agenda” (2014) 11 *Journal of Management*.

<sup>865</sup>*Ibid* at 1.

<sup>866</sup>Stefanos Koffas, “Principles and Values as Essential Elements that Shape Social Policy” (2017) 5 *Sociology and Anthropology* 627–634 at 627.

What makes one business grow and expand, and another not? This research argues that to understand the possible role that IP may have on women entrepreneurs, stakeholders must carefully consider the cognitive structures that drive their decision-making. Research has shown “that change manifests itself in significant changes in deep cognitive structures.”<sup>867</sup> Such deep cognitive structures play a pivotal role in wo(men)’s entrepreneurial attitudes. Consequently, it is important to examine what “differs in the deep cognitive structures of successful entrepreneurs...and the deep beliefs and assumptions that drive them.”<sup>868</sup> A concerted understanding of these deep structures will lead to the substantive growth (not just numerical growth, as is the present case) of women entrepreneurs. Like Krueger<sup>869</sup> asserts, to answer the question of what makes one entrepreneur scale their business while the other does not, “we must first identify the deep beliefs that anchor and shape knowledge structures...which in turn influence knowledge content.”<sup>870</sup> This is important because these beliefs play a role in what entrepreneurs perceive as relevant in new knowledge, and how they respond to opportunities.

Examining deep beliefs affords researchers the opportunity to better understand entrepreneurship because, according to Kruger, “behind entrepreneurial action are entrepreneurial intentions, behind entrepreneurial intentions are known entrepreneurial attitudes, behind entrepreneurial attitudes are deep cognitive structures and behind deep cognitive structures are deep beliefs.”<sup>871</sup> Moreover, “religious ideas are legitimate contributors to democratic conversation

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<sup>867</sup>Norris Krueger, “What Lies Beneath? The Experiential Essence of Entrepreneurial Thinking” (2007) 31:1 *Entrepreneurship Theory & Pract* 123–138.

<sup>868</sup>*Ibid* at 123.

<sup>869</sup>Krueger, “What Lies Beneath?”, *supra* note 869.

<sup>870</sup>*Ibid* at 124.

<sup>871</sup>*Ibid* at 147.

and debate. They can deepen our appreciation of shared concepts that are central to IP: ownership, creativity, justice, and fairness.”<sup>872</sup> However, because these deep beliefs have an impact on discrimination against, and inequality of women, it is important therefore, to be cognizant of how religion aggravates gendered conceptions of entrepreneurship for women entrepreneurs in Nigeria, particularly in the rural areas. This includes the role of religion in the utilization of IP by women.

## B. Gender and Culture

Shinnar et al<sup>873</sup> defined culture as “a collective programming of the mind which distinguishes the members of one group or category of people.”<sup>874</sup> The authors assert that “cultures exhibit an unequal distribution of power, strong hierarchies, control mechanisms and an emphasis to obeying those in position of power.” The power dynamics in cultural settings was illuminated at a capacity-building training<sup>875</sup> for women entrepreneurs in Nigeria several years ago that I facilitated. One of the participants expressed the view that women ought to come to terms with the reality that their businesses cannot go beyond a certain level. She said:

My mom was an entrepreneur, and my dad was a civil servant. She most likely never heard the word ‘branding’ all her life. However, when in 1992 she wanted to register her distribution chain, she did it in my father’s name because it would be “disrespectful” to put her name “out there.” I watched my father take most of the accolades for her hard work all the time and found it most offensive as a girlchild. To worsen it, my mom had given birth to only girls and so her position in the family was quite “shaky” and she dared not risk drawing attention to herself! Now, I see these

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<sup>872</sup> Thomas Berg, “Forward, Intellectual Property and Religious Thought” (2013) 10:3:1 579–589 at 581.

<sup>873</sup> Rachel Shinnar, Olivier Giacomini & Frank Janssen, “Entrepreneurial Perceptions and Intentions: The Role of Gender and Culture” (2012) 36 *Entrepreneurship Theory and Practice* 465–494.

<sup>874</sup> *Ibid.*

<sup>875</sup> “Growing your Business through Branding,” training session : Chadash Phoenix Woman Conference 2012 held at Asaba, Delta State Nigeria on September 14, 2012

kinds of things happen over and over, even to educated businesswomen. Nothing has changed.<sup>876</sup>

If the IP regime is to impact women entrepreneurs, the context in which entrepreneurship takes place must be considered.<sup>877</sup> Ojediran and Anderson<sup>878</sup> in “Women’s Entrepreneurship in the Global South: Empowering and Emancipating?,” argue that “institutions—formal and informal, cultural, social, and political—create gendered contexts in the Global South, where women’s entrepreneurship is subjugated and treated as inferior and second class.”<sup>879</sup> The authors discussed “how the interplay of tradition, culture, and patriarchy seem to conspire to subordinate the efforts of women entrepreneurs in the global south.”<sup>880</sup> They note “that entrepreneurship is deeply, socially embedded and cannot be understood from a purely economic perspective.”<sup>881</sup> This thesis aligns with and supports the authors’ argument that “the form and structure of entrepreneurial pursuits that women can engage in are largely determined by both formal (policies, laws, and regulations) and informal (societal values, culture, and family norms) factors”<sup>882</sup> These factors work in tandem to create limitations or opportunities for the entrepreneur.

Indeed, individual personalities, which can be understood as an off-shoot of one’s environment, greatly influence entrepreneurial activity. This is even more so for women entrepreneurs who face “role complexity, especially when combining the roles of working mother

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<sup>876</sup> Anonymous, *ibid*

<sup>877</sup>Funmi (Olufunmilola) Ojediran & Alistair Anderson, “Women’s Entrepreneurship in the Global South: Empowering and Emancipating?” (2020) 10:4 Administrative Sciences 87.

<sup>878</sup>*Ibid*.

<sup>879</sup>*Ibid* at 1.

<sup>880</sup>*Ibid*.

<sup>881</sup>*Ibid*.

<sup>882</sup> Ojediran & Anderson, “Women’s Entrepreneurship in the Global South”, *supra* note 83 at 3.

and wife,”<sup>883</sup> and who, unlike their male entrepreneurs face unique challenges when trying to get started as entrepreneurs or when trying to expand their business activities.<sup>884</sup> Unique challenges include stereotypes about what women can or cannot do. For instance, women, sometimes irrespective of their educational status, constantly give in to societal and family pressure not to “outshine” their husbands. Historically, particularly during colonialism, motherhood was women’s major role. This has continued over the years to the extent that the prioritisation of this role ensures that any engagement in entrepreneurial activities should not encroach on the responsibilities of Nigerian women as mothers. Indeed, most Nigerian women are expected to stay home to raise children and care for their family. No entrepreneurial activity that has the potential to impinge on this primary function will be ventured into in the first place, but if ventured into inadvertently, such activity will be jettisoned as soon as there is a conflict of the roles (between mother and entrepreneur).

I started producing cosmetics because it was the only thing I could do from home. I did not realize that my business could grow so fast. People come from all over to buy my body butters. Then I had to get a shop because I needed a contact place so that strangers don’t come to my house. Unfortunately, I started to have problems at home because I was not there when my kids returned from school, and eventually I had to close the shop. Now I just produce what I can from home. I will expand when my children grow up.<sup>885</sup>

Mordi et al, in “The Role of Cultural Values in Understanding the Challenges faced by Female Entrepreneurs,”<sup>886</sup> examine the challenges female entrepreneurs face in the development

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<sup>883</sup>“The impact of culture on women entrepreneurship”, online: *UKEssays.com*<<https://www.ukessays.com/essays/sociology/the-impact-of-culture-on-women-entrepreneurship-sociology-essay.php>>.

<sup>884</sup>*Ibid.*

<sup>885</sup> Anonymous participant at a Chadash Phoenix Woman capacity building program, held in Asaba, Delta state, Nigeria in 2013.

<sup>886</sup>Chima Mordi Et Al, “The Role of Cultural Values in Understanding the Challenges Faced by Female Entrepreneurs in Nigeria” (2010) 25 *Gender in Management: An International Journal*.

of their business in the context of Nigeria. The authors, through qualitative research, found that Nigerian women “experience difficulties relating to family commitments and access to finance – as well as problems gaining acceptance and accessing networks.”<sup>887</sup> They also argue that “cultural values specific to the situation mean that these challenges, while common to female entrepreneurs in other national contexts, ‘play out’ differentially and that they are experienced with different levels of depth and ‘intensity.’”<sup>888</sup> Cultural values often act to shape societal gender roles and stereotypes in terms of the occupations considered appropriate for men or women. Gender role stereotypes lead to gender characterization of chores / tasks as predominantly feminine or masculine. Gender stereotypes not only describe differences in how men and women operate but prescribe norms regarding behaviours that are suitable for how men and women should behave in each situation.<sup>889</sup>

### C. Gender and Geographical Location

The effect of IP on women entrepreneurs producing cosmetics is also influenced by the geographical location they innovate. There are significant differences between women’s entrepreneurship in the urban and rural areas of Nigeria, which must be taken into consideration if inclusive IP reforms are to take place. While the policies and programmes targeted specifically to the development of entrepreneurship may not differ much with respect to location, (since to foster entrepreneurship in urban or rural locations, entrepreneurs all need access to capital, labour, markets, and good management skills), “the inputs into an entrepreneurial process, capital,

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<sup>887</sup>*Ibid* at 1.

<sup>888</sup>*Ibid*.

<sup>889</sup> Shinnar, Giacomini & Janssen, “Entrepreneurial Perceptions and Intentions”, *supra* note 875 at 468.

management, technology, buildings, communications and transportation infrastructure, distribution channels and skilled labour,<sup>890</sup> are considerably easier to access in urban areas. Moreover, the urban–rural divide is often linked to educational background. Most women urban entrepreneurs are more likely to be educated above their rural counterparts, and are more likely to have an educated spouse, and are more likely to be middle-class. Consequently, most traditional / cultural constraints that beset rural women do not resonate with urban women entrepreneurs with the same contextual intensity. This creates a different set of dynamics for women innovating in the rural locations. It would be inequitable to lump them together when making policies. Rural entrepreneurship has been recognised as a major driver of development in Third World countries. This is more so in Nigeria where Nigeria’s rural dwellers constitute 48% of the country’s total population.<sup>891</sup>

The description of rural entrepreneurship as “a force that mobilises other resources to meet unmet market demand, the ability to create and build something from practically nothing, the process of creating value by pulling together a unique package of resources to exploit an opportunity,”<sup>892</sup> very aptly describes the activities of women who produce natural cosmetics in rural communities. The urban entrepreneurs rely on their counterparts in rural communities to produce cosmetics bases (such as body butters) which urban entrepreneurs valorize and produce in commercial quantities. Cosmetics producers like me and my contemporaries in Lagos and other cities in Nigeria rely on rural entrepreneurs for their coconut oil, mango oil, lemon oil, ginger oil,

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<sup>890</sup> T Petrin, *Partnership and institution building as factors in rural development*, paper presented at the Sixth Session of the FAO/ECA Working Party on Women and the Agricultural Family in Rural Development, Innsbruck, Austria, 13–16 October. (FAO, 1992).

<sup>891</sup> “Rural population (% of total population) | Data”, online: World Bank<<https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS>>.

<sup>892</sup> Petrin, *supra* note 892.

carrot oil and shea butter, which we use for creams and lotions. Some of the rural entrepreneurs mix these oils into body butters using technologies such as blenders and grinders, thereby creating their own product sold directly to consumers or to middle persons, mainly women who market these products in the urban areas.

Yet, rural entrepreneurs face challenges of neglect by the government that include inadequate infrastructure, poor knowledge about emerging markets, the lack of facilities for staff development, and inadequate finance—conditions far worse than their urban counterparts. They have even more limited access to capital and technology than their counterparts in the urban areas and must rely on their traditional knowledge to convert natural resources to marketable goods. Of course, they may have the advantage over urban entrepreneurs of having direct access to the agricultural products that are used for cosmetics, but entrepreneurial behaviour—the ability to spot unconventional market opportunities—is most lacking in rural areas because of the scarcity of other inputs like capital and the list above.<sup>893</sup>

Also, even though it is mandatory for companies to register with Corporate Affairs Commission as it shows that the business is a legal entity and is on the public register of duly registered companies, most entrepreneurs I interacted with in rural areas do not have such registration. They more easily get away with not complying with these restrictions because they are removed from close monitoring. This is not the case with their counterparts in urban areas who are constantly “on the run from the police” and NAFDAC monitoring team to bypass the requirement that all cosmetic products labels shall state the brand name (where applicable), the product statement of identity, batch number, net content, manufacturing and expiry date,

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<sup>893</sup> *Ibid.*

manufacturer's name and country of origin, NAFDAC registration number, storage condition, list of ingredients, and any other information as may be prescribed by NAFDAC.<sup>894</sup> The impact of policies (whether NAFDAC policies or IP policies) are therefore different for women entrepreneurs depending on their location.

It would be erroneous not to take the differences between innovating in the rural and urban locations of Nigeria into consideration when making IP reforms because while gendered conceptions apply to both women in rural and urban areas, they are exacerbated for women in rural areas because of lower literacy levels and less access to technology. Such a contextual perspective will engender grassroots models anchored in the realities of rural entrepreneurial activities to ensure proper identification of the exact nature of IP reforms necessary for enterprise growth and women's development.<sup>895</sup>

#### D. Gender and Educational Background

The most recent figure for the percentage of educated women (over the age of 25) in Nigeria is 43.3% in 2006.<sup>896</sup> Less than half of the Nigerian women population attained lower secondary education in Nigeria by 2006. It has been claimed that Sub-Saharan Africa is one of the two global regions showing the strongest causality between education and gender inequality.<sup>897</sup> In considering the role of gender in the utilization of IP, therefore, stakeholders must take into consideration the number of women who could be excluded from the IP regime because of their educational

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<sup>894</sup> note 817.

<sup>895</sup> Iwara, "Small-Enterprise Capital Mobilization and Marketing in Rural Areas", *supra* note 7.

<sup>896</sup> "Educational attainment, at least completed lower secondary, population 25+, female (%) (cumulative) - Nigeria | Data", online: World Bank <<https://data.worldbank.org/indicator/SE.SEC.CUAT.LO.FE.ZS?locations=NG>>.

<sup>897</sup> "The effects of education on gender equality", online: *Ahead Education* <<http://ahead-education.eu/the-effects-of-education-on-gender-equality.html>>.

background. These women do not only suffer from the gendered conceptions of the current IP but suffer more when reforms aimed at removing gender barriers do not recognize other factors that intersect with gender, such as educational backgrounds. Many women innovating, particularly in rural areas, have no knowledge of IP simply because they are not educated (in addition to the general lack of awareness of formal IP in the informal sector).

The current IP regime through its policies seems to reward certain individuals (educated and IT savvy) at the expense of others. For the average Nigerian woman like me, education was a means to independence and equality as many, particularly in Southern Nigeria were socialized to see education as a means of mobility. However, the economic status or cultural beliefs of parents often impeded the girlchild from education and so the attempt to escape gender discrimination by acquiring education did not materialize for many women. Research in Nigeria shows how limited educational exposure prevents Nigerian women from developing skills for independent lifestyle and willful entrepreneurship.<sup>898</sup> These barriers inevitably lead women to question their self value, worth, and intellect in ways that leave them feeling defeated. As they boldly take up small-scale businesses like cosmetics production, they often recognize that others do not view them as capable individuals. They are often denied opportunities to participate in, or benefit from, micro-finance schemes and other entrepreneurial support within their community.

I started producing cosmetics by chance. My grandmother mixed aloe vera juice with two other plants and it totally cured the skin pigmentation I had suffered from all my life. When my friends and neighbours noticed the difference on my face, they all wanted to have what I used. My grandmother showed me how to make the mixture and before I knew what was happening, I was making good money from selling that mixture. I was advised to apply to a microfinance bank to get a loan to expand the business. When I went to meet the manager, he discovered I did not know the meaning of 'business plan' and he told me I won't qualify for the loan. When I told him I would

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<sup>898</sup> Adekola Oluwatomipe et al, "Exploring the Hindrances to Women Entrepreneurship, Development and Prosperity in Nigeria" (2015) 2015 Journal of Entrepreneurship: Research & Practice.

learn how to prepare one, he asked me if I had finished secondary school and I said no. He said no problem that I should go and bring my business plan. He never picked my call again and I never got the loan. But thank God one of my brothers loaned me some money and I am supplying many people with my products.<sup>899</sup>

The above is an experiential illustration of the double jeopardy women face countering not just stereotypes concerning their sex but also their educational background. Unfortunately, even those who accomplish the necessary basic educational qualifications find that they encounter prejudices expressed by other women who are more educated than them and get preferential treatment when vying for loan.

Even when we come to capacity-building programs for women like this one, some women who are more educated than others will just be acting like others are ignorant. And at the end of the day, they are the ones that will get all the contacts for special programs. We are all women suffering from gender discrimination in our businesses but those of us that are not educated suffer more discrimination as there is always something that will lead to rejection.<sup>900</sup>

Indeed, women entrepreneurs find themselves within multiple discourses that interweave and coincide with one another. Their lived experiences are multifaceted. It is therefore imperative that policymakers holistically acknowledge the influences of these intersecting factors in women's entrepreneurship to create an inclusive legal environment. IP policies must create the context in which all aspects of women's entrepreneurship may be acknowledged and brought to the forefront.

#### E. Gender and Politics

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<sup>899</sup> Anonymous participant at a Chadash Phoenix Woman capacity building program, held in Asaba, Delta state, Nigeria in 2013.

<sup>900</sup> Ibid

This research has decried the double jeopardy that Nigerian women entrepreneurs face, both as women entrepreneurs in a Third World country, as well as in the socio-cultural contexts they must navigate in Nigeria. Politics plays a significant role in this navigation. As Enloe argues, “no individual or social group finds itself on the “margins” of any web of relationships...[women entrepreneurs] without some other individual or group having accumulated enough power to create the “center” somewhere else.”<sup>901</sup> This assertion applies both to Third World countries who are seen to be on the margins of development by First World countries (the acclaimed “center”) as well as to women in Nigeria who have been flung to the margins of their citizenship by the political class (center) and government through repugnant laws, policies, and culture in Nigeria’s patriarchal environment.

The intersection of gender and politics is therefore another crucial factor that should be considered when exploring the role of gender in IP. In Nigeria, gender has become a socio-cultural construct that assigns roles, attitudes, and values, considered appropriate for each sex.<sup>902</sup> Who assigns these roles, attitudes, and values? In a patriarchal society like Nigeria, it starts with the family and is institutionalized by the government through discriminatory laws and policies. The patriarchal system explains the relative disempowerment of Nigerian women and is accompanied by a collection of “cultural and religious beliefs, some of which are integrated into customary law and infringe on the rights of women.”<sup>903</sup> Indeed, these beliefs are not only integrated into customary

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<sup>901</sup> Cynthia Enloe, “Margins, Silences, and Bottom Rungs: How to Overcome the Underestimation of Power in the Study of International Relations” in *The Curious Feminist*, 1st ed (University of California Press, 2004).19 at 20

<sup>902</sup> Onyinyechi Ihesiaba, “Nigeria’s Journey to Gender Inclusivity; Examining the Gender Equality Opportunity Bill.”, online: *Girl Child Care Advancement Initiative (GCCAI)* <<https://gccaing.org/2020/10/04/nigerias-journey-to-gender-inclusivity-examining-the-gender-equality-opportunity-bill/>>.

<sup>903</sup> Joseph Egwurube, “Challenges Facing Women Empowerment in Contemporary Nigeria” (2016) Université de La Rochelle, online: <<https://vdocuments.net/download/challenges-facing-women-empowerment-in-rsum-138-challenges-facing-women-empowerment>> at 142.

law but are enshrined in the constitution of Nigeria and national laws.<sup>904</sup> Every attempt to change these laws and introduce laws that would secure the rights of women in Nigeria has met with stiff resistance from a male dominated legislature.

The most recent of these is the Gender Equality Opportunity Bill (the Bill) which was first initiated in 2010 and has been rejected thrice (2010, 2016, 2018)<sup>905</sup> by the Nigerian National Assembly (NASS). The Bill sought to guarantee the rights of women to equal opportunities in employment; equal rights to inheritance for both male and female children; equal rights for women in marriage and divorce; equal access to education, property / land ownership, and inheritance. It also sought to protect the rights of widows; guarantee appropriate measures against gender discrimination in political and public life and ensure the prohibition of violence towards women.

Some of the reasons given for opposition to the Bill are that equating opportunities infringes on the provisions of the Quran and the Bible, and that the Bill contravenes the tenets of Islam.<sup>906</sup> To them, women should not have the right to equivalent opportunities with men because of their understanding of religious distribution of power. On 1 March 2022, Nigerian lawmakers voted on 68 Bills that sought to alter the Nigerian Constitution.<sup>907</sup> Of the 68 bills, five sought to promote more opportunities for women in political parties, governance, and the society at large.

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<sup>904</sup> See e.g. S26(2) Constitution of the Federal Republic of Nigeria (CFRN) 1999 Cap C23 Laws of the Federation of Nigeria (LFN) 2014, which does not allow a Nigerian woman to transmit her nationality to her foreign spouse on the same basis as a Nigerian man; S55 Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960) 19 LFN, 1990 which allows wife battery as chastisement as long as grievous harm is not inflicted; S55 Labour Act Cap L1 LFN, 2004 which prohibits women from working at night in certain sectors of employment; and S360 Criminal Code Act Cap P19 LFN, 2010 which classifies sexual assault against female victims as a misdemeanor.

<sup>905</sup> Ihesiaba., *supra* note 904.

<sup>906</sup> “Needless squabble over gender equality bill”, (4 January 2022), online: *Punch Newspapers* <<https://punchng.com/needless-squabble-over-gender-equality-bill/>>.

<sup>907</sup> Jibrin Ibrahim, “Constitutional amendment process without Nigerian women.”, *Premium Times* (4 March 2022), online: <<https://www.premiumtimesng.com/opinion/515131-constitutional-amendment-process-without-nigerian-women-by-jibrin-ibrahim.html>>.

These five bills were all rejected. One of the bills sought to allocate 35 percent of political positions based on appointment to women. There was also a separate bill to create special seats for women in National and State Assemblies, while another would have given women the right to be recognized as legitimate indigenes of their husbands' states after five years of marriage.<sup>908</sup>

Consequently, Nigerian women embarked on a five day protest at the National Assembly against the rejection of the bills.<sup>909</sup> This protest was reminiscent of the Aba Women's Riots of 1929<sup>910</sup> where Nigerian Igbo women organized a massive revolt against the policies imposed by British colonial administrators in southeastern Nigeria and touched off the most serious challenge to British rule in the history of the colony.<sup>911</sup> Nigerian women are, therefore, not lacking in feminist and anti-colonial protest, but sadly, they are still fighting for their economic independence almost one century after. The male-dominated legislature has continued to suppress women through extant laws, by frustrating bills that seek to empower women. To pacify the protesting women, Nigeria's lower house of parliament rescinded its decision on three of the bills that it discarded at the constitutional amendment session with a decision to reconsider the bills when it reconvenes for another parliamentary session.<sup>912</sup> What the "reconsideration" holds for Nigerian women is yet to be known at the time of this writing. However, if one is to follow the antecedents of the Nigerian

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<sup>908</sup> "Women statement on the rejection of gender bills by NASS", (5 March 2022), online: *Businessday NG* <<https://businessday.ng/bd-weekender/article/women-statement-on-the-rejection-of-gender-bills-by-nass/>>.

<sup>909</sup> "Gender Bills: Nigerian Women Continue Protest at NASS For Fifth Day – Channels Television", online: <<https://www.channelstv.com/2022/03/10/gender-bills-nigerian-women-continue-protest-at-nass-for-fifth-day/>>; Oladayo Jonathan, "Nigeria: Gender Bills - Nigerian Women Set to Hold 'Mother of All Protests'", *Premium Times* (7 March 2022), online: <<https://allafrica.com/stories/202203070226.html>>.

<sup>910</sup> "Aba Women's Riots (November-December 1929) •", (27 March 2009), online: <<https://www.blackpast.org/global-african-history/aba-womens-riots-november-december-1929/>>.

<sup>911</sup> *Ibid.*

<sup>912</sup> Ope Adetayo Egbejule Eromo, "Nigerian parliament rescinds decision on gender equality bills", (8 March 2022), online: <<https://www.aljazeera.com/news/2022/3/8/nigerian-parliament-rescinds-decision-on->>.

legislature, it is difficult to be optimistic. This response looks like a delay tactics given that the current 9th National Assembly's tenure will expire in May 2023.

Added to the male dominance in the legislature, is the violent nature of political activities which has frightened many women away from partisan politics<sup>913</sup> thus reducing the number of women who venture into politics in Nigeria. In addition, another “systemic constraint on the presence of women in the political arena is the godfather model of political activities in Nigeria.”<sup>914</sup> Here rich male political sponsors (“godfathers”), who control political party nominations, refuse to support or sponsor women candidates, the latter who often do not have the required financial resources to fund their political aspirations. “Politics in Nigeria has thus been overtly and excessively monetized and this marginalizes women from active participation.”<sup>915</sup> Indeed, there is a clear lack of political will to use public policy to support women's representation in government.<sup>916</sup>

Various studies<sup>917</sup> of women entrepreneurial development show how environmental factors such as financing accessibility, government policy, family and community support, and business support services, affect their development. Among these factors, government policy has a significant effect on women's development. The results of a study<sup>918</sup> revealed that government policy as an environmental factor has negative correlation with women entrepreneurship

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<sup>913</sup> Egwurube, *supra* note 905 at 144.

<sup>914</sup> *Ibid* at 145.

<sup>915</sup> *Ibid*.

<sup>916</sup> Admos Chimhowu, Sushila Zeitlyn & Omowumi Asubiaro Dada, *Gender in Nigeria Report 2012. Improving the Lives of Girls and Women in Nigeria, Issues, Policies, Action*. (The British Council Nigeria, 2012).

<sup>917</sup> ILO, *Assessing the Enabling Environment for Women in Growth Enterprises: An AfDB/ILO Integrated Framework Assessment Guide* (ILO, 2007); O H Abimbola & Mayowa G Agboola, “Environmental Factors and Entrepreneurship Development in Nigeria” (2011) 13:4 *Journal of Sustainable Development in Africa* 166.

<sup>918</sup> Chinonye Okafor & Chima Mordi, “Women Entrepreneurship Development in Nigeria: The Effect of Environmental Factors” (2010) 64:4 *Petroleum-Gas University of Ploiesti BULLETIN* 43–52.

development and this affects other factors.<sup>919</sup> Some of the questions included in an International Labour Office (ILO)'s checklist for assessing the enabling environment for women in growth enterprises<sup>920</sup> integral to this research include:

Is there a National Gender Policy or Gender Equality Act that aims to secure the rights of women in society and the economy? Is there a process for enforcing the implementation of gender policies? Does the lead unit responsible for implementing the gender policy have resources to be able to operate effectively? Does it have political 'teeth'?'<sup>921</sup>

Sadly, the answers to these questions as seen in this analysis are in the negative. Any reforms in IP policies must therefore take the political environment, particularly as it affects women's entrepreneurship, into consideration if any meaningful reforms are to take place.

Suffice it to say that IP protection comes with its own myriad issues. When this is coupled with the vulnerable position of women entrepreneurs in Nigeria, it is wise to step back to assess the nuance of women entrepreneurship in Third World countries like Nigeria that affect entrepreneurship, and further, to carry out necessary and relevant reforms in the IP regime. This section has taken into consideration the factors of religion, culture, geographical location, educational background, and politics. Opderbeck,<sup>922</sup> exploring the potential for an IP theory that treats human beings as social creatures, not just "utility maximizing machines,"<sup>923</sup> argues that "intellectual property theory in particular requires a thick ontology of human beings, human cultures, and human ideas. Only as we begin to develop such thick accounts of life and information

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<sup>919</sup> *Ibid.*

<sup>920</sup> Small Enterprise Development Programme, Job Creation and Enterprise Development Department ILO, *supra* note 904.

<sup>921</sup> *Ibid* at 52.

<sup>922</sup> David Opderbeck, "Beyond Bits, Memes and Utility Machines: A Theology of Intellectual Property as Social Relations" (2013) 10:3:8 University of St Thomas Journal 738–773.

<sup>923</sup> *Ibid* at 738.

can we begin to establish frameworks for mediating aporias that arise from the apparently competing goals of access and innovation.”<sup>924</sup>

This sub-section has provided a nuanced look of the lived realities of women entrepreneurs producing cosmetics in Nigeria. By examining the intersections of gender and religion; gender and culture; gender and geographical location; gender and education as well as gender and politics, it has shown that there are different patterns of gender inequality. In the next section, the analysis shows how these different patterns influence the appropriation of knowledge by women entrepreneurs.

### 5.3.1 IP Appropriation by Women Producing Cosmetics in Nigeria.

For this analysis, I rely again on the definition of “appropriation” by de Beer, Kun, and Wunsch-Vincent as “a way of realizing pecuniary or non-pecuniary benefits from an innovation, often but not always by excluding third parties from copying or by taking ownership of the original innovation via legal means.”<sup>925</sup> Appropriation may include “formal and informal mechanisms by which individuals or firms can somehow capture returns from an initial investment in innovation.” Women producing cosmetics in Nigeria, like all innovators, aim to reap a return on their investment in the business by maintaining some form of exclusivity over their knowledge related to the innovative cosmetic production process or cosmetics products.<sup>926</sup> It has been argued by some that an entrepreneur’s ability to capture profits generated by an innovation is determined by the

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<sup>924</sup> *Ibid* at 740.

<sup>925</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73 at 233.

<sup>926</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

efficacy of legal mechanisms of protection (as well as the nature of technology).<sup>927</sup> However, there is still a high level and pervasive ignorance about IP as a legal regime in Nigeria<sup>928</sup> that the question of the efficacy of legal mechanisms of protection is moot. Rather, as similarly found elsewhere,<sup>929</sup> for many innovative small firms the key question is not whether to use IPRs or not, but whether to protect innovations from imitation at all.<sup>930</sup>

This was my personal experience as an entrepreneur in Nigeria— even as a lawyer. I was never concerned about using IPRs (because I was ignorant of them), but I was anxious to ensure that my competitors did not know the different raw materials I used in my cosmetics, for as long as possible. Like most women in Nigeria who turn to entrepreneurship, I was unable to gain employment in the formal sector for over ten years after my bachelor’s degree. Starting a natural cosmetics business was an easy thing to do because it did not require too much capital, and I did not have to pay for a shop to run the business. Several years beforehand, and just a few weeks before my wedding, my friends arranged with Hadjia<sup>931</sup> an older woman who was renown in Zaria, Kaduna State, Nigeria, for her local cosmetics, to make a potion that would transform me into a light-skinned damsel in two weeks. The aim was to make me more beautiful (whiteness being associated with all that was beautiful, at the time) on my wedding day. Having lived all my life in a dark skin, I was afraid that neither I nor my fiancé would recognise me if I suddenly turned white,

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<sup>927</sup> David Teece, “Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy” (1986) 15:6 *Research Policy* 285.

<sup>928</sup> Communique of NIALS- Open AIR International Conference in Intellectual Property Capacity Building for Development: The Role of Scholars. November 20, 2012. Online;<://nials-nigeria.org/text/Open%20Air%20Doc.pdf>

<sup>929</sup> Thomä & Bizer, “To protect or not to protect?”, *supra* note 734.

<sup>930</sup> *Ibid.*

<sup>931</sup> This is not someone’s name. Older Muslim women are generally referred to as Hadjia. The word is derived from Haajan, or Hajjan which is a name for women who have performed the religious rite of ‘hajj.’ In Northern Nigeria however, most Muslim women, especially older ones are respectfully called ‘hadjia.’

so I declined the offer. However, I settled for a body butter that would make my skin softer, and found it very effective. Ten years later, I revisited the woman to strike a business deal with her. By this time, I had moved from Northern Nigeria to Eastern Nigeria, and had a ready clientele anxious to try the different cosmetics promising a range of effects. My own experience in the cosmetics sector supports Kraemer-Mbula's finding that knowledge does get transferred from individual to individual via informal training in the community.<sup>932</sup>

To widen her supply chain, Hadjia was willing to share some of her knowledge with me for a fee, so that I could reproduce or at least combine some of her ingredients to produce cosmetics. I undertook informal training with her to enable me produce natural cosmetics like her. In the beginning though, I merely bought her products to sell to my clients. After a few months, I upgraded her products by improving the packaging and trying out some of the knowledge of raw materials I had learned from her. Hadjia and I informally produced bespoke cosmetics that had no NAFDAC registration. Neither did they have any brand name. These were special cosmetics for specific customers and their needs (such as, dry skin, skin lightening, facial discoloration, acne, etc.), and none of the cosmetics had a long shelf life. Between 2010 and 2012, I sold an average of five-million-naira (N5,000,000 or \$39,000CAN, at the time) worth of cosmetics. I did not require a special office as I operated from my interior decoration shop. I also had a ready clientele of customers who patronized my interior décor outfit, and thus, I did not have to hire additional staff. It was a convenient enterprise.

By 2017, there were over 41.543 million micro, small and medium enterprises (MSMEs) in Nigeria.<sup>933</sup> These businesses not only provide employment and generate income for many

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<sup>932</sup> Erika Kraemer-Mbula, "Informal Manufacture of Home and Personal Care Products in South Africa" (2016) 16.

<sup>933</sup> "Reports | National Bureau of Statistics", online: <<https://nigerianstat.gov.ng/elibrary/read/966>>.

disadvantaged women in Nigeria, but also target a large existing customer base demanding cheap and affordable consumer goods. The analysis of IP appropriation by women producing cosmetics in Nigeria is therefore undertaken from the perspective of MSMEs. Again, however, within this category of women entrepreneurs, we find significant difference in the way they perceive IP. The “acknowledgement of differences among women”<sup>934</sup> is a central theme of this research, and I argue that women entrepreneurs ought not be lumped together as one category when considering IP reforms. Deploying McCall’s intra-categorical complexity approach, in the preceding sub-section, I focused on particular social groups at neglected points of intersection, that is, people whose identity cross the boundaries of traditionally constructed groups, to reveal the complexity of lived experiences within such groups.<sup>935</sup>

In this sub-section, I further deploy McCall’s inter- categorical approach,<sup>936</sup> which begins on the premise that there are relationships of inequality among already constituted social groups such as women entrepreneurs. I identify women producing cosmetics at the micro level and those producing cosmetics above the micro level, using these as the center of analysis of IP appropriation by women entrepreneurs producing cosmetics. I use intersectionality as an analytic tool to show “the complex impact of the simultaneous operation of multiple socially constructed categories and social contexts on an individual, not only vis-à-vis other groups but also vis-à-vis other individuals classified within the same group.”<sup>937</sup> The research finds two attitudes towards the appropriation of IP by women entrepreneurs producing cosmetics in Nigeria’s informal sector, — agitation for

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<sup>934</sup> Kathy Davis, “Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful” (2008) 9:1Feminist Theory 67 at 70

<sup>935</sup> McCall, *supra* note 217 at 1774.

<sup>936</sup> McCall, *supra* note 217.

<sup>937</sup> Jane Bailey et al, “Getting at Equality: Research Methods Informed by the Lessons of Intersectionality” (2019) 18 International journal of qualitative methods 160940691984675- at 3.

stronger IP protection and ignorance of IP protection. Like a pendulum, the arguments for or against IP swing between the two sides of the same coin.

The following comments from women producing cosmetics in Nigeria exemplify the differences among women entrepreneurs as a category of analysis, as well as illustrate the schism between proponents and opponents of IP. On one side are established business entrepreneurs innovating above micro level—in the main, CEOs of cosmetics companies pushing for stronger IP protection and laws to clamp down counterfeiting:

People have been calling me in Nigeria here (sic) that my products are all over the market, but they are counterfeit ones. It is very painful that you spend your time, money, energy, invest all you have to create a brand and it is gone just like that. I have to use my money to repair potholes on the roads leading to my office, I run on generator; I provide my own water and others and people fake them. After all that, somebody would just come to pirate what you have slaved for, it is so sad... We cannot create brands and they go down the drain just like that.<sup>938</sup>

If anybody steals what someone else slaved for and sells to make money, it is robbery. They kill brands and government is campaigning for Small and Medium Enterprises (SMEs) in the country; war against corruption and still no strong policy for piracy.<sup>939</sup>

Women entrepreneurs producing cosmetics, who have successfully grown their businesses past the micro level, are of the opinion that they need a stronger IP regime to ensure that people do not imitate their products. As I could not directly interview these women, I can only draw from such comments that they have no problems acquiring IP themselves and are therefore calling for stronger IP measures. Indeed, their brands can be

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<sup>938</sup> Tara Fela-Durotoye founder and Chief Executive Officer of House of Tara International. speaking on the sideline of the campaign against piracy, intellectual property theft and counterfeiting in Lagos with the theme: “United We Stand”. See, BellaNaijacom, “#UnitedWeStand: Tara Fela-Durotoye, Oke Maduewesi, Others take a Stand Against Piracy in Nigeria”, (25 February 2017), online: *BellaNaija* <<https://www.bellanaija.com/2017/02/unitedwestand-tara-fela-durotoye-oke-maduewesi-others-take-a-stand-against-piracy-in-nigeria/>>.

<sup>939</sup> Oke Maduewesi, Chief Executive Officer of Zaron Cosmetics expressing her views about piracy, *Ibid*.

seen all over the internet. A quick look on their profiles online shows these women are educated and accomplished entrepreneurs whose legitimate challenges are quite different from their counterparts running micro enterprises. Yet, the challenges they are facing are also a consequence of an IP regime that is not suited to the development needs of Nigeria, as will be elaborated in the last section of this chapter.

On the other side of the debate are micro business entrepreneurs who are mostly ignorant about IP mechanisms or do not relate in any way with the regime.

What is copying? We all use the same natural products that nature has freely given to us, who is stealing from who? If I mix and produce something that looks similar to another brand but cheaper and more affordable, is that an offence? That is not the problem in this country. The real problem is that the Nigerian government does not make resources available to everyone and this system where the rich is getting richer, and the poor are getting poorer. What concerns a hungry man with IP?<sup>940</sup>

NAFDAC, however, stipulates that no cosmetics shall be manufactured, imported, exported, advertised, sold, distributed, or used in Nigeria unless they have been registered in accordance with the provisions of NAFDAC,<sup>941</sup> other related legislations, and the accompanying NAFDAC Guidelines.<sup>942</sup> A fundamental precondition for this registration is that evidence must be shown of registration of the brand name of the cosmetic product with Trademark Registry in the Ministry of Industry, Trade and Investment. This should be done in the name of the owner of the trademark / brand name.<sup>943</sup> In the end, therefore, all women entrepreneurs producing cosmetics, irrespective of

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<sup>940</sup> Anonymous speaker at the “Growing your Business through Branding” session, Chadash Phoenix Woman Conference 2012 held at Asaba, Delta State Nigeria on September 14, 2012

<sup>941</sup> note 72.

<sup>942</sup> note 86 S1(2).

<sup>943</sup> Paragraph 3.1.4 *ibid.*

their strata, must confront the issue of trademarks.



Figure 4: Example of locally made cosmetics with its trademark by Missy Cosmetics <sup>944</sup>

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<sup>944</sup> “Missy Naturals | Facebook”, online: <<https://www.facebook.com/missynaturalsbeauty/>>.



Figure 5: A picture of locally produced cosmetics with trademark by Missy Cosmetics<sup>945</sup>

In addition, there must be evidence of satisfactory inspection issued by the relevant Directorate or Good Manufacturing Practice (GMP) certificate for product line (companies with registered products).<sup>946</sup> This is the real problem for women entrepreneurs innovating at the level of micro enterprises. The Cosmetic GMP guidelines<sup>947</sup> provide a long list of conditions that must be met to ensure that products are consistently manufactured in conformity with quality standard. These guidelines are for the manufacture, storage, and shipment of cosmetic products.<sup>948</sup> The conditions for meeting the GMP inspection are so challenging that many entrepreneurs try to circumvent this requirement by finding ways to sell unregistered cosmetics.<sup>949</sup>

More importantly, the cost associated with registering trademarks as well as the administrative process, cause entrepreneurs in the informal sector to shy away from registering their brands. Even though the official fee of registering one's trademark at the Nigerian trademark registry is currently N40,000 (approximately \$110CAD), other issues such as legal advice, logistics, official corruption, make the actual cost of trademark registration far higher than the posted fees. Indeed, most women I interacted with as cosmetics producers, like me had neither trademark registration nor NAFDAC number because the requirements for registration were too cumbersome and expensive. My counterparts in Lagos would always share stories of how they arranged with bus drivers to move their goods to Balogun market<sup>950</sup> as early as 4:00AM so that by

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<sup>945</sup> *Ibid.*

<sup>946</sup> Paragraph 3.1.5 note 86.

<sup>947</sup> See generally, Paragraph 6, note 430.

<sup>948</sup> *Ibid.*

<sup>949</sup> "NAFDAC Report: Large Percentage of Drugs Unregistered In Nigeria | FDAnews", (April 2006), online: *FDAnews* <<https://www.fdanews.com/articles/85951-nafdac-report-large-percentage-of-drugs-unregistered-in-nigeria>>.

<sup>950</sup> "New Balogun Market: Hub Of Fake Cosmetics Products", online: *New Balogun Market* <<https://luvchioma.blogspot.com/2014/11/new-balogun-market-hub-of-fake.html>>.

the time policemen and NAFDAC monitoring team got on the road to start clamping down on goods without NAFDAC numbers, their cosmetics were already inside the market. All they needed was to get their cosmetics into the market for their customers would buy them.

In recognition of the importance of this sector (cosmetics producers in micro enterprises), NAFDAC identified the issue of registration of products as a challenge. It instituted several activities which include further review of guidelines, and streamlined the registration processes to handle the peculiar difficulty of registration, with the aim of removing other critical bottlenecks that hinder the smooth regulatory compliance of MSMEs.<sup>951</sup> According to NAFDAC, production of cosmetics as a micro enterprise means the entrepreneur employs less than ten (10) employees.<sup>952</sup> Under micro scale production therefore, some of the requirements for GMP, such as certificate of analysis of raw material or finished products, are optional. Trademark registration was also made optional for micro scale production, even though it is encouraged.<sup>953</sup> The irony, however, is that most producers are not aware of this option. (Indeed, I only learned about this option during this research.) None of the other cosmetic producers I have interacted with over the years knew there was such a consideration for small businesses. Neither do the lawyers whose services they engage to facilitate the registration of their products with NAFDAC (deliberately or ignorantly) inform their clients that they have the option of not getting trademark registration before they can register their products with NAFDAC. In fact, the regulation<sup>954</sup> remains unchanged and the information about the option to not to get trademark registration is only published on the NAFDAC FAQ

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<sup>951</sup> note 817.

<sup>952</sup> *Ibid.*

<sup>953</sup> *Ibid.*

<sup>954</sup> 3.1.4 note 86.

page.<sup>955</sup> As a result, the optional requirement for small scale cosmetics production to obtain trademark registration before they can register their cosmetics with NAFDAC has not removed the hardship caused by the requirement in the first place. Consequently, like Kraemer- Mbulu's findings in the home products sector of South Africa,<sup>956</sup> very few women entrepreneurs producing natural cosmetics have their products formally tested or registered with NAFDAC.

Indeed, between 2012 and 2020 only 1,142 cosmetics trademarks were registered by the Nigerian Trademark Registry.<sup>957</sup> While this number may appear comparatively high, since most countries do not require trademark registration for a cosmetic to be registered, it is not so in Nigeria where trademark registration is a precondition for cosmetics registration with NAFDAC. Compared to the millions of cosmetics products in Nigerian markets, this number is low. In the United States (US) for instance, unlike drugs, medical devices, and foods, there is no requirement for cosmetics to be registered. What the United States Federal Drug Agency (FDA) (the equivalent of Nigeria's NAFDAC), like the Cosmetic Regulations in Canada, requires, is that all cosmetic product labels be clearly labeled and to distinctly list all the ingredients included in the cosmetic product. Rather, the US FDA maintains the Voluntary Cosmetic Registration Program (VCRP), for cosmetic establishments and formulations and, as its name indicates, this program is voluntary.<sup>958</sup> In addition, since the Nigerian Trademark Registry does not disaggregate applicant data by sex,<sup>959</sup> I do not know how many of these trademark registrations were made by women

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<sup>955</sup> FAQ: Must a client have a Trade Mark before product registered? Answer: NAFDAC encourage trademark registration however is optional for Micro scale See, note 817.

<sup>956</sup> Kraemer-Mbula, *supra* note 934 at 153.

<sup>957</sup> Trademark database, "Ministry of Industry, Trade and Investments Commercial Law Department Trademarks, Patents and Designs Registry", online: *IPONIGERIA* <<https://www.iponigeria.com/OurServices>>.

<sup>958</sup> "Cosmetic Regulation and Labeling in the U.S.", online: *FDAImports* <<https://www.fdaimports.com/regulations/cosmetics/>>.

<sup>959</sup> Trademark database, note 959.

entrepreneurs. Previous reports from WIPO have however shown that the number of women who hold IP rights is significantly less than men.<sup>960</sup>

Importantly, this is a minuscule number recorded by the Nigerian Trademark Registry, compared to the size of the cosmetics industry in Nigeria.<sup>961</sup> In 2017, the haircare market was valued at 116.6 billion naira, while skincare products generated a sales value of 92 billion naira.<sup>962</sup> From my interactions with other producers of cosmetics and my own experience, I know that many cosmetics products are being sold without trademark registration and NAFDAC number. These are all branded “fake products” by NAFDAC because of their lack of registration.<sup>963</sup> By categorizing cosmetics with drugs and requiring trademark registration for the registration of cosmetics, women entrepreneurs, who are well represented in the cosmetic sector, are further excluded from the IP regime. Although WIPO has reported that there was a strong growth in trademark filings in 2021 (despite the pandemic),<sup>964</sup> Nigerian women entrepreneurs are not a big part of that finding. It is true that during the pandemic, women entrepreneurs producing cosmetics in Nigeria found “opportunities to reach customers in new ways, open up new markets and bring their ideas to the world,”<sup>965</sup> they did not use trademarks as indicated by the numbers in the Nigerian trademark registry. Some of the possible reasons for this have been noted throughout this chapter, but below are some additional reasons women entrepreneurs do not appropriate knowledge through the IP regime.

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<sup>960</sup> Its latest data show that just 30.5% of the international patent applications filed via the Organization included at least one women inventor .note 179.

<sup>961</sup> note 68.

<sup>962</sup> note 67.

<sup>963</sup> note 952; note 951.

<sup>964</sup> “World Intellectual Property Indicators Report: Worldwide Trademark Filing Soars in 2020 Despite Global Pandemic”, online: <[https://www.wipo.int/pressroom/en/articles/2021/article\\_0011.html](https://www.wipo.int/pressroom/en/articles/2021/article_0011.html)>.

<sup>965</sup> *Ibid.*

### 5.3.1.1 Challenges

#### 1. Lack of Awareness

There is an acute lack of knowledge about IP protection in Nigeria. Even though it is tempting to say that there is less awareness of IP among entrepreneurs in rural areas, this would be inaccurate. As explained earlier, in my case, I turned to entrepreneurship after my bachelor's degree, and I lived in the city. Yet I had no awareness of formal IP protection, despite innovating in a knowledge-based field like the production of cosmetics. However, like every entrepreneur, I wished to prevent others from “stealing” my ideas and therefore deployed secrecy without labelling my protection mechanism (secrecy) as a form of IP protection. While the level of awareness may have improved in the last decade, it remains very low.

#### 2. Working in Groups

Women producing cosmetics in Nigeria, particularly in rural areas, work in groups. The IP concepts of ownership and exclusion are alien to their perception of knowledge. Indeed, sometimes the person responsible for the act of creation (for instance, using palm kernel oil for skin toning) cannot be identified.<sup>966</sup> Gearhart-Sema also describes in detail the hardship that the definition of an invention in IP wreaks on traditional knowledge (TK) of women.<sup>967</sup> Cosmetics producers rely, to a large extent, on TK some of which is said to be easily accessible as part of common knowledge or passed on through informal training. However, as cautioned by Kraemer Mbulu, “the concept of

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<sup>966</sup> Francis Kariuki, “Notion of ‘Ownership’ in IP: Protection of Traditional Ecological Knowledge vis-a-vis Protection of T K and Cultural Expressions Act, 2016 of Kenya”, (2020), online: <<https://www.semanticscholar.org/paper/Notion-of-%E2%80%98Ownership%E2%80%99-in-IP%3A-Protection-of-of-T-K-Kariuki/7d94df084b40b09ea40fd3ec578ababda7a810a2>> at 93.

<sup>967</sup> Gearhart-Sema, “Women’s Work, Women’s Knowing”, *supra* note 25.

traditional knowledge is wide and open to interpretation, which calls for closer attention of its role in this manufacturing sector and possibly further research.<sup>968</sup> Suffice to say that women producing cosmetics particularly in rural areas often utilize their traditional knowledge of agricultural products like shea nuts, palm nuts, fruits, and herbs to produce cosmetics, and tend to work in groups. As discussed in chapter three, the Nigerian IP legal framework, in addition to ongoing arguments about TK, does not provide for collective marks, which could have been utilized by these women. Without this option, women's innovations from the IP regime were excluded from the start.

### 3. Systemic Barriers

Systemic socio-economic and political barriers often stand in the way of women's success. While the challenges associated with the current IP regime are faced by both male and female entrepreneurs, the vulnerable position of women in the African society exacerbates the effect of the current IP regime on women producing cosmetics. Women and girls are often marginalized from social, economic, and political processes.<sup>969</sup> Women still lack access to good quality land, property, and inheritance rights, and gender-based violence as well as discrimination persist in many areas.<sup>970</sup> As long as women entrepreneurs are subjugated and treated as inferior and second class<sup>971</sup> through the interplay of tradition, culture, patriarchy, and politics, they cannot take advantage of business opportunities, including legal / formal IP appropriation.

### 4. The Cost of Obtaining IPRs

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<sup>968</sup> Kraemer-Mbula, *supra* note 934 at 153.

<sup>969</sup> Jeremy de Beer et al, *Integrating Gender Perspectives into African Innovation Research* (OpenAIR, 2017).

<sup>970</sup> Blerta Cela, Irene Dankelman & Jeffrey Stern, "Bookshelf: Powerful Synergies: Gender Equality, Economic Development and Environmental Sustainability" (2014) 22 *Reproductive Health Matters* 197–199.

<sup>971</sup> Funmi (Olufunmilola) Ojedian & Alistair Anderson, "Women's Entrepreneurship in the Global South: Empowering and Emancipating?" (2020) 10:4 *Administrative Sciences* 87.

As discussed above, it is expensive to register for trademarks and other formal IPRs. While the statutory fees may not be high, the accompanying costs are usually astronomical for women facing the challenge of access to funds. Due to a lack of education and awareness, women always rely on lawyers who charge exorbitant fees, and can take advantage of their vulnerabilities. Facing technological challenges, these women must rely on lawyers or middlemen to do simple online registrations, which cost less. Paucity of quality power supply and a host of other challenges unique to Third World countries like Nigeria turn ordinarily simple processes to Herculean tasks. NAFDAC's requirement for evidence of trademark registration has contributed to excluding many producers of cosmetic products from getting NAFDAC registration, and yet the process for getting the trademark registration is still onerous to many classes of entrepreneurs. The complaint of a local cosmetics producer explains further:

My face cleanser was selling so well, and I even had an order to supply shops in Niamey. To export my product, I had to get NAFDAC number because of Customs. I tried to get the NAFDAC number for the face cleanser, but I could not get it because I had no trademark registration. The lawyer who was helping me with the trademark registration kept asking for more money and even the wahala [stress] of getting the GMP [Good Manufacturing Practice] certificate...was a tug of war. At last, I lost that opportunity and now I just focus on selling my products around here."<sup>972</sup>

## 5. Corruption

A common theme that emerged from my interactions with other women entrepreneurs is a distrust for the Nigerian regulatory system. Most entrepreneurs are afraid to “divulge

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<sup>972</sup> Anonymous speaker at the “Growing your Business through Branding” session, Chadash Phoenix Woman Conference 2012 held at Asaba, Delta State Nigeria on September 14, 2012

requisite information that will aid facilitate the application for IPRs ideas.”<sup>973</sup> Again, owing to corruption and weak institutions, women entrepreneurs are afraid to share their ideas with officials, whose duty is to assist them with their registrations, because of the fear that officials could reveal confidential information to competitors, even after receiving bribes to facilitate the registration process. While such a situation may be incomprehensible to women entrepreneurs in other parts of the world, it is the lived reality of women entrepreneurs in the Third World. Further, women entrepreneurs who have tried to protect their knowledge through formal IPRs, like the above-mentioned CEOs<sup>974</sup> of cosmetics companies, are unable to leverage on their IP assets because of weak institutions.

### 5.3.2 Other Forms of Knowledge Appropriation Used by Women Producing Cosmetics in Nigeria

It would be erroneous to presume that because most women entrepreneurs producing cosmetics in Nigeria do not protect their knowledge using the formal IP legal framework, they have no ways of protecting their innovations from others without permission. Indeed, as seen in the previous chapter (four) innovators in the informal sector have innovative and effective ways of protecting knowledge. Below are some of the ways women producing cosmetics in Nigeria presently do so:

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<sup>973</sup> “Challenges from Idea to Market: The Experience of a Local Inventor/SME - Dr. Umaru Dikko Radda”, online: <[https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=335881](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=335881)>.

<sup>974</sup> BellaNaija.com, *supra* note 940.

A. *Secrecy*

Consistent with other research on the informal sector,<sup>975</sup> most women (and men) entrepreneurs rely on secrecy to protect their innovations. Research conducted on women traditional healers in Nigeria also show that traditional healers rely mostly on secrecy to protect their knowledge.<sup>976</sup> This finding is in tandem with my own experience as a cosmetics producer as well as observations among my counterparts in the sector. Secrecy may be described as the default mode for protecting IP in the informal sector. Secrecy is particularly relevant for women entrepreneurs who operate mostly in this sector and carry out innovations that may not fit in with the classical requirements of IP such as originality, newness, authorship, tangibility, and so on. More importantly to small entrepreneurs, secrecy comes with no material cost to them. To cushion the inability to use other formal forms of IPRs, most entrepreneurs in the informal sector typically rely on the “traditional protection strategy of secrecy”<sup>977</sup> to protect their knowledge.

B. *Recipe coding*

Recipe coding is one innovative way cosmetics producers now protect their knowledge. At an online training I participated in some years ago,<sup>978</sup> fledging cosmetics producers were taught how to code their recipes to prevent their production staff from

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<sup>975</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>976</sup> Ekong, *supra* note 718.

<sup>977</sup> George Essegbey and Stephen Awuni, “Herbal Medicine in the Informal Sector of Ghana “ in Erika Kraemer-Mbula and Sacha Wunsch-Vincent, eds. *The Informal Economy in Developing Nations: Hidden Engine of Innovation?* coll Intellectual Property, Innovation and Economic Development, Cambridge, Cambridge University Press, 2016, DOI : 10.1017/CBO9781316662076 at 225

<sup>978</sup> The training was organised by Ms Kusin the CEO of Missy Naturals. Missy Naturals is a fast-growing natural cosmetic company in Nigeria. See, “Missy Naturals”, online: <<https://missynaturals.com/missy/aboutus>>.

knowing the exact names and measurements used for producing specific items. For instance, if the recipe called for two slices of cucumber, one level spoon of honey, and one gram of emulsifier to produce a phial of night face cream, the three items could be coded 1X-B12sCR. This code would be written and shared only with the staff (store manager) who hands out the ingredients for production. This staff would not be a part of the production process and may even operate from a different location to limit their interaction with the production staff. A staff who picks up the written coded recipe would have no idea what it means. This is an effective way of ensuring that one's innovation is not misappropriated. As a business expands, secrecy becomes more difficult because the bigger one's production staff, the greater the risk of one's knowledge being misappropriated. Recipe coding therefore ensures that no matter how many people are involved in production, there is less risk of them stealing one's innovation. Each innovator creates codes for the different ingredients and gives those codes to the manufacturer who supplies the chemicals used for cosmetics production and / or the store manager. The trick is to interchange the codes and create different levels of information sharing.

### *C. Control of supply chain*

The manufacturer (supplier) of the naturally derived chemicals used for cosmetics, such as emulsifiers or thickeners, must ensure that the product is delivered by supply agents who do not have any access to the packaging and coding of the ingredients. The production staff and the supply agents are clearly separated. Supply agents deliver these ingredients to the company and do not have any interaction with the production staff. To ensure secrecy,

different supply agents are used with each batch. The company signs a nondisclosure agreement with the manufacturer setting out all these rules.

However, in an environment like the Ojota Chemical Market<sup>979</sup> in Nigeria, a nondisclosure agreement is often no more valuable than the paper it is written on. Consequently, it is incumbent on the entrepreneurs to take their own practical steps to ensure these measures are adhered to. Very often as I found among women producing cosmetics, a family could hand over their daughter to be trained by the entrepreneur. Such a “student” would come to learn all aspects of the production on the condition of trust until she is released to start her own business. This is similar to the IAS discussed in chapter four, and the entrepreneur freely shares her trade secret with this student as she grows in the business.

#### *D. Nondisclosure agreements*

The use of nondisclosure agreements is common at the level of production, where every employee joining the company is expected to sign one (this is another example of the fluidity of the formal / informal concept<sup>980</sup>). Again, this is only common among enterprises in the urban areas. In rural areas, there is less awareness of such documents. Rather, families are often involved in the hiring process and during the pre-boarding, a meeting would be held by the family of the new employee and the employer, and the family would reassure the employer that the employee will not “disgrace” the family by exposing the secrets of the business to a competitor or carrying on the same business in the locality. Similar to the IAS discussed in chapter four, a family could hand over their daughter to be trained by the

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<sup>979</sup> Ojota Chemical Market is the largest chemical market in Nigeria, located in the heart of Lagos state, Nigeria. “Ojota Chemical Market”, online: <<https://ojota-chemical-market.business.site>>.

<sup>980</sup> See, Charmes, *supra* note 802.

entrepreneur. Such a “student” would come to learn all aspects of the production on the condition of trust until she is released to start her own business. This is also like the family / community mechanisms that work in tandem, such as community sanctions and ostracism for copying or imitation found elsewhere.<sup>981</sup>

Other covert means of appropriation are also used. For instance, as a cosmetics producer, I never employed anyone who was literate, for core production. All I needed was someone who could take simple instructions in pidgin English and was diligent. The moment they became too familiar with the processes it was time to move them to another section, such as sales. This was my own innovative way of ensuring that my recipes were not understood and reproduced by others. In addition, cosmetics producers are careful to court personal relationships with their customers to maintain trust and customer loyalty. When customers have a sense of loyalty towards a manufacturer, it is more difficult for competitors to lure them away. As a cosmetics producer I endeavoured to establish friendships with as many customers as possible, and thereby enjoyed their exclusive patronage for a time.

Through these ways, entrepreneurs innovating in the informal sector successfully appropriate their knowledge without relying on the formal IP regime. Indeed, most entrepreneurs use these mechanisms without labelling them as IP mechanisms. This is the lived reality for many women entrepreneurs particularly those in the micro-enterprise level. IP proponents, however, claim they need formal IP mechanisms to help scale up their businesses and that IP is a key factor promoting economic development.

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<sup>981</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73 at 253.

#### 5.4. The Role of IPRs in the Development of Women Producing Cosmetics in Nigeria

Nigeria may have the highest number of women entrepreneurs in the world,<sup>982</sup> however, as discussed above, most of these women entrepreneurs are innovating at the level of micro-enterprises. Even though women entrepreneurs play significant roles “in each node of the value chain: from product conception, through design, production of raw materials and intermediate inputs, marketing, distribution and support to the final consumer,”<sup>983</sup> gender inequalities in access to education and training, economic assets and financial services, continue to define the level in the value chain where they dominate.<sup>984</sup> “Women continue to be seen as less innovative or less entrepreneurial than their male counterparts”<sup>985</sup> at every level of the cosmetics value chain. This is because of stereotypes that influence and are influenced by “disparities in the industries where women entrepreneurs start their business,”<sup>986</sup> “the degree of success that women entrepreneurs enjoy, the amount of investor confidence women enjoy, and how success is measured to begin with.”<sup>987</sup> This thesis asserts that these are some of the reasons for the very low representation of women in business leadership positions, with women owning only 20% of enterprises in the formal sector of Nigeria.<sup>988</sup> What role would IP play in correcting this situation? In essence, how would IP policies engender the development of women entrepreneurs producing cosmetics in Nigeria?

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<sup>982</sup> The Global Entrepreneurship Monitor, <https://harambeetoday.org/images/PDFS/GEM2013Report.pdf>.

<sup>983</sup> “The Business and Development Cases for Engaging Women in Global Value Chains”, online: *UN Women* <<https://www.unwomen.org/en/news/stories/2011/5/the-business-and-development-cases-for-engaging-women-in-global-value-chains>>.

<sup>984</sup> *Ibid.*

<sup>985</sup> de Beer et al, *supra* note 971 at 1.

<sup>986</sup> de Beer et al, *supra* note 971.

<sup>987</sup> *Ibid.*

<sup>988</sup> *supra* note 776.

As laid out in the conceptual framing of this thesis, this research has framed development from the perspective of critically examining the IP regime as a system of power that potentially inhibits the freedom of the Third World to develop. It has questioned assumptions about the role of the IP regime in the improvement of women's businesses in Third World countries and explored whether and / or how to localize its impact in the context of complex global issues regarding IP protection. When development in the Third World is framed thus, development concerns can be driven by innovation and the need to create an environment for development that is inclusive, sustainable, and equitable.<sup>989</sup> As earlier argued, development is like “groping for stones to cross the river,”<sup>990</sup> because development involves constant experimentation with policies that may work or not. The IP regime is one of such set of policies. In chapter three, the international and national legal framework for IP was examined and revealed several gaps in the framework that could lead to the exclusion of women producing cosmetics in Nigeria's informal sector. This present chapter has deployed feminist methods of intersectionality to describe the lived realities of women producing cosmetics in Nigeria, and how those actors appropriate their knowledge.

The analysis shows that the current IP regime does not have a clear positive impact on the development of women when one approaches development as a process of expanding the real freedoms that women entrepreneurs enjoy in a Third World country like Nigeria.<sup>991</sup> Economic growth is a necessary condition of that development. Here a “society develops economically as its members increase jointly their capacity for dealing with the environment.”<sup>992</sup> This capacity

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<sup>989</sup> note 19.

<sup>990</sup> *Ibid* at 4.

<sup>991</sup> Sen, *supra* note 15 at 3.

<sup>992</sup> Nsongurua Udombana, “The Third World and the Right to Development: Agenda for the Next Millennium” (2000) 22:3 Human Rights Quarterly 753–787 at 755.

depends on the way entrepreneurship takes place (amongst other factors).<sup>993</sup> Women producing cosmetics still face too many “unfreedoms”<sup>994</sup> in entrepreneurship and in the current IP regime.

In addition to economic growth, as Sen explains, “development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.”<sup>995</sup> Women’s development must not be seen from a dominant perspective that is only “concerned with economic growth, promoted by the competition between players on a market, idealised as a free market, with emphasis on ‘free,’”<sup>996</sup> when they are still plagued with unfreedoms in their creativity and innovation because they do not meet western conceptualizations of creativity, innovation and knowledge appropriation.

Through an intersectional analysis, this chapter has revealed the different layers of unfreedoms Nigerian women entrepreneurs continually face. An IP regime that does not take into consideration the sources of these unfreedoms is of little benefit to these women. A cursory look at the nature of technical assistance offered by WIPO<sup>997</sup> and the international community shows no assistance that takes women’s lived realities into consideration. The extensive IP training and teaching activities provided to Third World countries are rarely “accompanied by a broader reflection about their content, orientation and the extent to which they address development concerns”<sup>998</sup> and gender. Rather, there have been numerous IP trainings in Nigeria such as the

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<sup>993</sup> *Ibid.*

<sup>994</sup> Sen, *supra* note 11 at XII.

<sup>995</sup> *Ibid* at 3.

<sup>996</sup> Jens Christensen, “Reframing Economic Development: Thing or Mystery?” (2009) 23:6 *International review of applied economics* (*International Review of Applied Economics*) 723–741 at 721.

<sup>997</sup> “Technical Assistance Database: Activity Details”, online: <<https://www.wipo.int/tad/en/activitydetails.jsp?id=8875>>.

<sup>998</sup> Jeremy de Beer & Chidi Oguamanam, *Intellectual Property Training and Education: A Development Perspective* (International Centre for Trade and Sustainable Development (ICTSD), 2010) at vii. The authors, in this seminal study of the role of IP education in the Third World acknowledged the significant role of WIPO in organizing and delivering

Training of Trainers' Workshop on the Effective Use of Technical and Scientific Information and Evaluation of the National TISC Project<sup>999</sup> and workshops on patent cooperation. These do not have any bearing on women innovating in Nigeria's informal sector. All these programs and training are focussed on entrenching Western standards of IP on Nigeria and "building respect for IPR as a strategic resource for economic growth."<sup>1000</sup> Worse still, as discussed in the previous chapter, these trainings focus on technology as the only means to development—a conceptualization of technology that is completely out of sync with the lived realities of women entrepreneurs in Nigeria.<sup>1001</sup>

The international community seems more interested in revamping the IP landscape in Nigeria to conform to their own standards than with learning and supporting appropriation mechanisms relevant in the context of the country. When one considers the size of Nigeria's informal sector, and the huge number of women innovating in that sector at the level of micro-enterprises, it becomes obvious that it is more relevant to support the country to integrate community-based knowledge-sharing mechanisms, or support the country to catch up by imitating and adapting advanced technologies through 'informal' channels, such as reverse engineering

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IP training and education in Third world countries like Nigeria, particularly in the Nigerian Copyright Commission (NCC) and associated entities where public awareness on IP issues have been effectively raised. Yet they identified that the problem remains that the trainings focus mainly on piracy and the enforcement concerns of rights holders, and do not facilitate more context-sensitive discourse about broader socio-economic and cultural implications of IP issues and human development. Consequently, these trainings have not impacted on piracy, for instance, in Nigeria as the rate of piracy remains high. According to the authors, "the approach that the NCC champions in Nigeria issues from the conventional claim that stronger IP protection inevitably promotes innovation and economic growth in developing countries. This uncritical and context-neutral attitude toward IP connects with the one-size-fits-all approach too often promoted in developing countries. The NCC's approach gives little consideration to the contextual profile of Nigeria as a developing country, which ought to have a more reflective interest in critical issues of equity and balance in IP." At 23.

<sup>999</sup> note 545.

<sup>1000</sup> note 547.

<sup>1001</sup> Valbona Muzaka, "A dialogic approach to understanding regime conflicts: the case of the development agenda" (2017) 38:1 Third World quarterly 61–83 at 73.

involving minor changes,<sup>1002</sup> and that “‘informal’ knowledge transfer may be more important than ‘formal’ transfer.”<sup>1003</sup>

WIPO while acknowledging the gender gap, still focuses on promoting the protection, utilization, and enforcement of IP by women,<sup>1004</sup> without providing trainings that could promote values, such as the cultural notions of ownership and sharing, in these communities which could engender their economic growth. The commitments set out in the Joint Declaration on Trade and Women’s Economic Empowerment<sup>1005</sup> to promote female entrepreneurship and trade, identify barriers that limit women’s participation in trade and include women-led businesses in value chains, amongst others, are not reflected in the technical assistance offered so far in Nigeria.

The African Continental Free Trade Area (AfCFTA) was a tremendous milestone for women in the pursuit of integrated and inclusive economic growth in Africa, particularly as it is likely to foster industrialization and regional competitiveness through the creation of regional value chains and improved agro-processing.<sup>1006</sup> Nigeria signed the Agreement on 7 July 2019 and ratified it on 5 December 2020. Again, IP plays a major role in the agreement and the Nigerian Office for Trade Negotiation (NOTN) has already embarked on the AfCFTA Phase II negotiations which cover IPRs. The success of value chains expected through AfCFTA will, however, depend on addressing identified key challenges to women’s effective participation in them. The current IP regime is one such challenge and, as opined by Adewopo et al, it is important “to avoid the temptation of canvassing for more and stronger IPR protection that favours private commercial

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<sup>1002</sup> Chang, “Intellectual Property Rights and Economic Development”, *supra* note 555.

<sup>1003</sup> *Ibid* at 301.

<sup>1004</sup> note 560.

<sup>1005</sup> note 2.

<sup>1006</sup> note 779.

interest, unless to the extent possible to promote, preserve and protect the national interests within the AfCFTA.”<sup>1007</sup>

As part of its efforts to strengthen the protection and enforcement of IPR in Third World countries, the European Commission releases a regular report.<sup>1008</sup> The main objective of the report is

to identify third countries in which the state of IPR protection and enforcement (both online and offline) gives rise to the greatest level of concern and thereby to establish an updated list of so called ‘priority countries.’ This is not an exhaustive analysis of IPR protection and enforcement around the world. ‘Priority countries’ are not necessarily those where IPR protection and enforcement is the most problematic in absolute terms but rather those where such deficiencies are deemed to cause the greatest economic harm to EU interests. This report will help focus efforts and resources of the European Commission on countries and on the specific areas of concern, with the aim of improving IPR protection and enforcement worldwide.<sup>1009</sup>

Nigeria is one of the ‘priority’ countries. According to the report, enforcement remains a source of serious concern in Nigeria. This is blamed on “gaps in the legal framework on enforcement, the lack of enforcement capacities, appropriate training, dissuasive sanctions and the weak coordination between enforcement authorities.”<sup>1010</sup> The conclusion was that enforcement measures remain insufficient to tackle the high level of counterfeiting in Nigeria.<sup>1011</sup> This is just one example of radical narratives perpetuated by dominant cultures to exclude Third World narratives. Blinded to the obstructionist nature of the IP legal framework, which could mortally stall the development

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<sup>1007</sup> Adebambo Adewopo, Desmond Oriakhogba & Chijioko Okorie, “Negotiating the Intellectual Property Protocol under the Agreement Establishing the African Continental Free Trade Area: Priorities and Opportunities for Nigeria” (2021) *Law and Development Review* at 5.

<sup>1008</sup> *Report on the protection and enforcement of intellectual property rights in third countries* (European Commission, 2021).

<sup>1009</sup> *Ibid* at 3.

<sup>1010</sup> *Ibid* at 46.

<sup>1011</sup> note 1010.

of women if allowed, the West continues to find ways to impose stronger Western standards of appropriation using exclusive metrics for measuring innovation in the Third World.

To address the problem of IP enforcement in countries like Nigeria, “the Commission services launched a Pan-African technical cooperation programme (the AfrIPI Project) in 2020 to support the preparation of an IP Protocol in the context of the negotiations on the African Continental Free Trade Area.”<sup>1012</sup> Not surprisingly, again, the primary objectives of AfrIPI is, among others, to promote IP international agreements for a reinforced cooperation between EU and Africa and strengthen national and regional IP institutions, networks, and tools, to increase a user-friendly and efficient protected IP system. However, I argue that these problems will persist until the international community takes due cognizance of the lived realities of innovators, particularly women, in Third World countries like Nigeria, and considers more fully what appropriation mechanisms are suitable for them.

This must begin with the realization that the First World can not set the standard for development in the Third World. Rather, the First World must learn about Third World innovation and knowledge appropriation and replace the current exclusive IP framework with distributive frameworks which are more suited to the lived realities of the Third World. The Third World does not only exist to soothe the First World and ensure that the “greatest economic harm to EU interests”<sup>1013</sup> (and the whole West) is prevented. What about the great economic harm that continues to be inflicted on the rest of the Third World by the First World, long after they gained their political liberty, through neoliberal economic ideas, policies and structures that limit social

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<sup>1012</sup> *Ibid* at 47.

<sup>1013</sup> *Ibid* at 3.

services, empower multinational corporations, and exacerbate economic inequality? Who will ensure that the greatest economic harm is not done to the Third World?

There is no one answer to these questions, but it is time to acknowledge that there are other ways to appropriate IP outside the present legal regime, and that those ways may be more effective in promoting inclusive development. Stakeholders, including CEOs who have broken the glass ceiling and are part of the 20% who own enterprises in the formal sector of Nigeria,<sup>1014</sup> must go back to the drawing board and realistically find inclusive frameworks to appropriate knowledge in Nigeria, taking into cognizance the reality of innovating in Nigeria's largely informal economy. In this way, some of the challenges these CEOs face with counterfeiting may be mediated.

In conclusion, I join others in echoing<sup>1015</sup> that the IP regime, as currently framed, plays no role in women's development in Nigeria. If development, as framed in this research, is to be seen in the lives of women entrepreneurs in Nigeria, then stakeholders must decolonize how innovation is framed, take a communal approach to IP, and focus on "fostering homegrown solutions—ones based on the realities of their own circumstances, be they natural resources, geographic location, or culture."<sup>1016</sup> In the next and concluding chapter, this thesis proffers some recommendations for a hybrid IP regime that may be relevant to the lived realities of women producing cosmetics in Nigeria and that may effectively impact women's development in Third World countries like Nigeria.

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<sup>1014</sup>*supra* note 776.

<sup>1015</sup> Caroline Ncube speaking at the Business Unity South Africa (BUSA) conference entitled Leveraging the AfCFTA to Boost Women's Economic Empowerment, argued that "IP presently plays no role in women's trade because of the challenges they face in getting registrations for their IPRs." See <<https://www.uneca.org/events/atpc/conference-leveraging-afcfta-to-boost-women-economic-empowerment>>

<sup>1016</sup> Daniel Isenberg, "How to Start an Entrepreneurial Revolution" (2010), online: *ResearchGate* <[https://www.researchgate.net/publication/265536827\\_How\\_to\\_Start\\_an\\_Entrepreneurial\\_Revolution](https://www.researchgate.net/publication/265536827_How_to_Start_an_Entrepreneurial_Revolution)> at 4.

## Chapter Six: Conclusion and Recommendation

### 6.1 Introduction

No individual or social group finds itself on the “margins” of any web of relationships—a football league, an industry, an empire, a military alliance, a state—without some other individual or group having accumulated enough power to create the “center” somewhere else. Beyond its creation, there is the yearly and daily business of maintaining the margin where it currently is and the center where it now is. It is harder for those at the alleged center to hear the hopes, fears, and explanations of those on the margins, not because of physical distance—the margin may be two blocks from the White House, four stops on the Paris metro from the Quai d’Orsay—but because it takes resources and access to be “heard” when and where it matters. Consequently, those who reside at the margins tend to be those deemed “silent.” They are either imagined having voices that simply cannot be heard from so far away or portrayed as lacking language and articulateness altogether: the taciturn Indian, the deferential peasant, [the woman entrepreneur in a Third World country], the shy woman.<sup>1017</sup>

I set out to draw women entrepreneurs in Third World countries from the margins of development by adding their voices to on-going conversations about the role of IP in development. To do this, the thesis started by providing a brief background on the evolution of the protection of IP. Tracing this evolution showed that the monopolistic control over the commercial benefits of one’s creation for a given period, has been one of the foremost objectives of IP. This objective, driven by the consolidation of power and political agendas, has also been wrapped with the palliative message that IPRs are an effective strategy to sustain the growth and development of innovation (entrepreneurship). This palliative, a political rhetoric, has been offered as a one size

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<sup>1017</sup> Cynthia Enloe, *supra* note 903.19-29 at 20

fits all capsule through policies that do not take enough consideration of the development levels of countries.

As a result, there have been questions about how suitable the IP regime is for the Third World: an IP regime that has always been imposed on Third World countries, first through IP laws that came from colonialism, then through international law as Third World countries ratify IP treaties, and more forcefully since the WTO incorporated IP into the trade regime through TRIPS. By providing the Greek gifts of technical assistance and IP education that do not “acknowledge uncertainty, nuance, and complexity in IP administration,”<sup>1018</sup> the First World (Centre) has ensured that the Third World remains on the margins of development as consumers of products of the First World. Deeper in this margin are women entrepreneurs in Third World countries whose voices have been muffled by their relative position and roles in society.

However, the literature reviewed in this study has shown that the voices of the Third World can no longer be silenced. Scholars<sup>1019</sup> are now questioning the suitability of the WTO standards for IP for Third World countries<sup>1020</sup> and of how IP standards, as harmonized through TRIPS, will affect Third World countries.<sup>1021</sup> It is against this background that my research joined the voices by investigating what role gender-responsive IP policies, as an add-on to the conversation, could play in achieving sustainable socioeconomic development for women entrepreneurs in the specific context of emerging cosmetics sector of Nigeria. To allow for a rigorous analysis, I chose the trademark regime as an exemplar of the IP regime. This is because the registration of trademark is

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<sup>1018</sup> de Beer & Oguamanam, *supra* note 465 at 265.

<sup>1019</sup> See for example, amongst many others, Chidi Oguamanam, *Intellectual property in global governance: A development question*; Ruth L Okediji, “WIPO-WTO Relations and the Future of Global Intellectual Property Norms” (2008) 39 *Netherlands yearbook of international law* 69–125; Chon, *supra* note 36.

<sup>1020</sup> Yu, *supra* note 118.

<sup>1021</sup> Drahos, *supra* note 112.

a precondition for the registration of a cosmetic in Nigeria by the NAFDAC,<sup>1022</sup> and when entrepreneurs operating in the informal sector do use IP, trademarks are considered important.<sup>1023</sup>

To cover the gap found in the literature review as described in chapter two of this thesis, I approached this investigation from a feminist perspective by first trying to find out what is wrong with women's development in the Third World, followed by an investigation of what the current IP regime has to do with creating, reinforcing, and maintaining what is wrong, and finally by reimagining what the ideal environment for women's entrepreneurship would be, and how the IP regime could help women to get to that ideal.<sup>1024</sup> To do this effectively, the thesis followed a process of decolonizing development. Rather than continuing the First World's narrative of underdevelopment, I reframed the concept of IP and development from the perspective of critically examining the IP regime as a system that potentially inhibits the freedom of the Third World to develop. Here, I framed the Third World as a group of countries with diverse but a shared history of Western dominance who have joined their voices to resist the universalization of Eurocentric norms and values.<sup>1025</sup> Because of the tremendous role of women in the development of the Third World, this thesis has specifically framed 'Third World development' as a process of expanding the real freedoms,<sup>1026</sup> women (entrepreneurs) in a Third World country like Nigeria enjoy.

I have not only questioned assumptions about the role of the IP regime in the development of the Third World generally but more specifically, in the improvement of women's businesses in Third World countries, with the aim of finding out whether and/or how to localize its impact in the

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<sup>1022</sup> note 72.

<sup>1023</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73.

<sup>1024</sup> Mary Anne Case, "Of Richard Epstein and Other Radical Feminists" (1994) 18 Harv J L & Pub Pol'y 369-407 at 370.

<sup>1025</sup> Mickelson, "Rhetoric and Rage", *supra* note 17.

<sup>1026</sup> Sen, *supra* note 15.

context of complex global issues regarding IP protection. This analysis has exposed how women's development is inextricably tied to their freedom to create wealth and that the denial of freedom of labour markets by laws, regulations, or convention<sup>1027</sup> such as the IP regime, impinges on their freedom to transact and exacerbates the challenges that women face in entrepreneurship.

The thesis started by providing the conceptual clarification, a synopsis of literature reviewed, the theoretical framework for this research as well as the methodology utilized to answer the research question in the first two chapters. It went on to examine the international and national legal framework for trademarks in the third chapter with a view to answering the research question — does the current regulatory framework of IP law in Nigeria have the potential to support women entrepreneurs producing cosmetics to optimize their potential in the marketplace? Here, guided by a TWAIL theoretical framework, I deployed the feminist method of asking the woman question to scrutinize the language of the provisions and found several gaps in the existing IP regime on trademarks in Nigeria that may hinder women entrepreneurs producing cosmetics from optimizing their potential in the marketplace.

The analysis revealed the high cost of pursuing litigation and the problem of determining well known marks in the international arena and how these issues affect women entrepreneurs innovating in the informal sector of developing country like Nigeria uniquely. I argue also that even though TRIPS purportedly set out to bridge these gaps, this is not the experience for women entrepreneurs in Nigeria because TRIPS is fraught with unresolved ambiguities and lopsided plans for technical assistance that have no relevance for the lived reality of these women entrepreneurs. Particularly, TRIPS does not seem to take into consideration the development needs of Third

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<sup>1027</sup> *Ibid.*

World countries and the role of women entrepreneurs in meeting those needs. As a result, TRIPS does not specifically target strengthening the capacity of women to leverage trademark as an economic tool to support their role in that development.

The analysis of the Nigerian trademark law (the Act) further revealed that the Act is insensitive to the specific needs of the country. This is because the Act, a vestige of colonialism, has not been amended in over fifty years to fit the current realities of innovation in Nigeria. This research has noted the incredible size of Nigeria's informal economy and the innovations that take place in the informal sector. Yet the Act has not been amended to accommodate the dynamism in the sector. IP protection mechanisms such as collective and service marks which may have accommodated the typical creative innovations of women in the informal sector of Nigeria are still not provided for in the Act.

Consequently, in chapter four, the thesis in answering the research question— would a context-driven IP regime help to bridge the economic gap between men and women entrepreneurs in Nigeria? — explored forms of semi-formal and informal IP that are being used or could be readily used in the informal sector in the face of the challenges of utilizing formal IP mechanisms in the sector. In the chapter, I deployed the feminist method of asking the woman question to examine how innovations are appropriated in informal economies. Using two examples — the Igbo Apprenticeship System (IAS) in Nigeria and the South African Informal Manufacturers of Home and Personal Care Products, I examined how semi formal and informal IP mechanisms are being used in the informal sector. The analysis showed that innovators in the informal sector do use different forms of IP appropriation mechanisms and points that a context-driven IP regime could help to bridge the economic gap between men and women entrepreneurs in Nigeria. The problem

as admitted at the end of the analysis in that chapter, is in finding how rural communities and particularly, rural women can be supported by identifying practical, grass roots solutions for harnessing the opportunities offered by the IP system to ensure more effective recognition, protection and management of cultural assets, without again formalizing these semi-formal and informal IP mechanisms.

The fifth chapter delved specifically into examining the lived realities of women entrepreneurs in the Third World through a case study of women entrepreneurs producing cosmetics in Nigeria, to examine if and how IP is appropriated in this sector. To answer the thesis question — what role would gender play in the acquisition and exploitation of IPRs by women producing cosmetics in Nigeria? — this chapter applied a feminist approach to examining how knowledge is appropriated among women entrepreneurs producing natural cosmetics in Nigeria, what role gender could play in their decision to acquire and utilize IP and how gendered conceptions in the society could influence their engagement with the IP regime. Because “gender is always complicated by intersectionality,”<sup>1028</sup> I examined the intersections of gender and religion; gender and culture; gender and geographical location; gender and education as well as gender and politics, and the examination exposed how patterns of gender inequality are not the same across the classes.<sup>1029</sup>

By teasing out the different factors that intersect with gender, the research drew in the voices of ignored and excluded populations into pre-existing frameworks and exposed the different experiences women entrepreneurs face in entrepreneurship, and how these experiences complicate their interaction with the IP regime. The analysis carried out in this chapter showed that semi and

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<sup>1028</sup> Backhouse, *supra* note 844 at 289.

<sup>1029</sup> McCall, *supra* note 217.

informal IP is also more utilized by women entrepreneurs (producing cosmetics) in Nigeria and that gender plays a significant role in the acquisition and exploitation of IPRs. The analysis in this chapter further confirmed the finding in chapter three that the current IP regime does not accommodate the innovations of women entrepreneurs in Third World countries like Nigeria, as well as the finding in chapter four that semi-formal and informal IP are more relevant for entrepreneurs in the informal sector. Flowing from this analysis, the chapter went on to assess the role of IPRs in the development of women producing cosmetics in Nigeria and concluded that the IP regime as currently operated plays no role in the development of women (producing cosmetics) in Nigeria.

## 6.2 Conclusion

Flowing from these analyses, this thesis concludes that formal IPRs as currently operated are not a development tool for women entrepreneurs in Third World countries. However, as stated earlier, the argument of this thesis is not about choosing between strong IP protection and offering no protections for IP at all. Rather, this thesis has explored other forms of knowledge (IP) appropriation with a view to understanding what reforms may be needed in the current IP regime to better accommodate innovations in informal economies generally, and more specifically, acknowledge and reward the innovations of women entrepreneurs like those producing cosmetics mostly in Nigeria's informal sector. The research has underscored the need for the Third World to adapt and innovate IP protection, within their own realities instead of importing IP laws and policies wholesale. By carrying out a feminist analysis, the research has exposed how women entrepreneurs experience the legislative framework of IP differently and underscored the need for radical IP reforms in Nigeria if IP protection is to positively impact women's development in

Nigeria. IP protection must be undertaken in the broad sense of knowledge appropriation rather than the formal IP regime as presently canvassed by the First World. Women producing cosmetics as well as women entrepreneurs in other forms of business innovations, do not always require formal IP protection to grow their businesses. While formal IP protection may have significance for some fields of innovation particularly IT services and other technology-based innovations, this research has shown that this is not the case for women entrepreneurs innovating in the informal sector. The reforms in the IP regime must therefore recognize and accommodate the semi-formal and informal forms of IP protection commonly in use in the informal sector.

This research has been about a feminist worldview, about another way of looking at the role of IP in development through a set of values designed to rescue an almost forgotten people — women in forgotten parts of the Third World. It has adopted a gender transformative approach that is aimed at addressing imbalanced power dynamics and relations found in rigid gender norms and roles, as well as gender-blind or discriminatory legislative and IP policy frameworks that create and perpetuate gender inequality. IPRs could have many effects on growth, some positive and some negative. But the significance of these effects would be dependent on circumstances in each country. However, in a broad setting of appropriate complementary policies and contextual regulations, IPRs could play an important and positive role in promoting economic growth. Indeed, the system of IPRs itself may be structured in particular ways to favour dynamic competition within a system of rights and obligations.<sup>1030</sup>

Still, while the research acknowledges the significance of IP protection in today's economic and political space, something is missing in the match between what the Third World

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<sup>1030</sup> Keith E Maskus, "Intellectual Property Rights and Economic Development" (2000) 32:3/4 Case W Res J Int'l L 471 at 473.

has been led to believe about IP and what the Third World has come to discover that the protection of IP is about. A regime built on exclusively Eurocentric values and norms, that does not take cognisance of the rich values and norms of the “others” (whether out of self-interest or sheer ignorance) is a dysfunctional and incomplete regime.<sup>1031</sup> The Third World must resist the tendency to ignore or resist ideas that conflate the standard assumptions on which the IP regime has been built, however questionable, however suspect their results.<sup>1032</sup> It is also true as argued by Morin and Gold,<sup>1033</sup> that the arguments for or against IP protection are dependent on the social environment. In their view,

it is alternatively claimed that IP fosters or hinders international trade, that trademarks protect or rob consumers, that copyrights provide incentives for or deter creativity, and that patents guard the natural right of inventors to the fruits of their intellectual effort or, alternatively, impede the natural right of deprived communities to have access to the latest pharmaceutical technologies. This complex and evolving ideational environment is consistent with the view that socialization is multidirectional and multidimensional.<sup>1034</sup>

This reinforces the point that each country is different and therefore should tailor its IP policy to its own needs.<sup>1035</sup> This thesis does not claim to give conclusive solutions to the tensions and confusions surrounding the development role of IP protection today, but it has raised enough questions to engender reforms that may make IP appropriation tomorrow, different from what it was yesterday.

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<sup>1031</sup> Joan Chittister, *Heart Of Flesh: Feminist Spirituality for Women and Men* (Grand Rapids, Mich : Ottawa: Wm. B. Eerdmans Publishing Co., 1998).

<sup>1032</sup> *Ibid.*

<sup>1033</sup> Morin & Gold, “An Integrated Model of Legal Transplantation”, *supra* note 474.

<sup>1034</sup> Jean-Frederic Morin & E Richard Gold, “International Socialization at the State and Individual Levels: Mixed Evidence from Intellectual Property.” (2017) 29:4 Cambridge Review of International Affairs 1375–1395 at 1382.

<sup>1035</sup> Daniel Gervais, “IP Calibration” in *Intellectual Property, Trade and Development* (Oxford: University Press, 2014).

The Covid-19 travel restrictions which began March 2020 and largely continued up to the time of conducting and concluding this research made it impossible for me to travel to Nigeria to generate data from the field as originally designed. This turned into an opportunity to rethink the research methodology. I sought and received ethics clearance from the University of Ottawa Research and Ethics Board to include my personal experiences as an entrepreneur and producer of cosmetics in this analysis, thereby enabling me to contextualize the analysis in this research. Importantly, drawing on my personal experience as a woman entrepreneur enabled me write in Nigerian women entrepreneurs who are absent from the literature. My experiences and narratives were however only used in a “demonstrative mode,”<sup>1036</sup> as the data do not speak for themselves but “instead are used in exemplary ways to illustrate”<sup>1037</sup> my thoughts. Thematic analysis of both the literature and my personal experiences were undertaken simply to elucidate the ideas and not to produce data for statistical analysis or theorizing. There is therefore need for further research on the measurable role of IPRs in women’s development. Drawing on my own experience in this research however offered a way to bring otherwise missing insight into the study of IP and may “point the way” for future research. The thesis now offers the following sets of recommendations.

## 6.3 Recommendations

### 6.3.1 Recommendations Emanating from the Case Study

#### 1. *Changing Reform Perspectives through a Gender Based Regulatory Impact Analysis*

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<sup>1036</sup> Connelly & Clandinin, *supra* note 312 at 290.

<sup>1037</sup> *Ibid* at 11.

The case study of women entrepreneurs producing cosmetics in Nigeria revealed the nuances of women's entrepreneurship and the unique challenges women face in the current IP regime. To favorably reposition women entrepreneurs, IP reforms must proceed from the mindset that mainstreaming gender in economic policies is a *sine qua non* of economic development and not mere benevolence to women. With such a mindset will come the recognition that women experience the adverse impact of policies differently, and a renewed commitment to remove existing barriers in those policies. The UN Working Group on Business and Human Rights recognizes that

women and girls experience adverse impacts of business activities differently and often disproportionately. They also face additional barriers in seeking access to effective remedies. Moreover, because of intersecting and multiple forms of discrimination, different women and girls may be affected differently by business activities in view of their age, colour, caste, class, ethnicity, religion, language, literacy, access to economic resources, marital status, sexual orientation, gender identity, disability, residence in a rural location, and migration, indigenous or minority status.<sup>1038</sup>

To mitigate this, States are advised “to employ gender equality as a cross-cutting theme in drafting, revising and assessing all laws and regulations that have a bearing on promoting and ensuring business respect for human rights.”<sup>1039</sup> Also, States should consider “the gender impact of international agreements and policy frameworks adopted in all relevant areas, such as labour, trade, finance, investment, intellectual property, development, energy, environment, climate change, health, population, disarmament, peace and security.”<sup>1040</sup> In the same

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<sup>1038</sup> note 4 at 6.

<sup>1039</sup> *Ibid* at 12.

<sup>1040</sup> *Ibid* at 19.

vein, Nigerian stakeholders should carry out a gender-based regulatory impact analysis (RIA) of IP laws to ensure that agreements and policy frameworks negotiated in a multilateral setting promote substantive gender equality and avoid exacerbating existing discrimination faced by women.”<sup>1041</sup>

“RIA is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives.”<sup>1042</sup> According to the OECD, “conducting RIA within an appropriate systematic framework can underpin the capacity of governments to ensure that regulations are efficient and effective in a changing and complex world.”<sup>1043</sup> Rather than transplanting international IP laws in the name of adjusting their IP laws to suit their national interests,<sup>1044</sup> the government should carry out a gender based RIA on existing national IP laws taking into consideration the unique context of the environment where these laws are to take effect in order to craft context specific IP laws.

Nigeria could take the example of the government of Canada which instituted the Gender-Based Analysis Plus (GBA+)<sup>1045</sup> in 1995 to advance gender equality in Canada as part of the ratification of the United Nations’ Beijing Platform for Action. The GBA+ is an analytical method for the assessment of

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<sup>1041</sup> Guiding Principle 10, note 4.

<sup>1042</sup> “Regulatory Impact Analysis - OECD”, (12 February 2021), online: <<https://www.oecd.org/regreform/regulatory-policy/ria.htm>>.

<sup>1043</sup> *Ibid.*

<sup>1044</sup> Drahos, *supra* note 112.

<sup>1045</sup> “Gender-based Analysis Plus”, (31 March 2021), online: *Government of Canada* <<https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/what-gender-based-analysis-plus.html>> Last Modified: 2022-06-16.

systemic inequalities, through a gender- and diversity-sensitive approach to assess how diverse groups of people experience policies, programs, and initiatives.<sup>1046</sup> The “plus(+)” in GBA+ recognizes that GBA+ is not only about gender differences but considers other identity factors like race, ethnicity, religion, age, etc., and how the interaction between these factors influences the way people might experience government policies and initiatives.<sup>1047</sup> This research has revealed how women entrepreneurs at multiple intersections of identity experience IP differently. One of the first outcomes of a regulatory impact assessment of IP laws and policies that is guided by the GBA+ will be a change in the mindset of stakeholders.

When IP reforms are approached with a mindset that recognises women as critical to development, more rigorous effort will be channeled towards seeking ways to promote IPRs that can be easily accessed by women, with minimal consequences on their socio-cultural makeup. Sharing, for instance is a religious and cultural norm in most African communities. Taking this into consideration will enable local IP policy drafters to formulate IP policies that do not promote exclusion. Nigerian women entrepreneurs particularly at the grass root level, work and innovate in groups, this mindset would enable stakeholders see the importance of IPRs such as collective marks (which Nigeria does not yet provide for). A regulatory impact assessment of IP laws and policies that is guided by the GBA+ would engender more inclusive IP laws and policies that

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<sup>1046</sup> *Ibid.*

<sup>1047</sup> *Ibid.*

*“do not constrain but enable business respect for human rights.”*<sup>1048</sup> Such a gender responsive assessment would respond to differentiated, intersectional and disproportionate adverse impacts of IP laws on women’s entrepreneurship as well as to discriminatory norms and patriarchal power structures that underpin discrimination.<sup>1049</sup> To achieve this, it is very important to engage gender-sensitive experts and critically assess those who conduct the process and the metrics used in deciding what policy qualifies as meeting the requirements of a GBA+ .

## *2.Reforming IP laws in Nigeria.*

The reforms of IP laws I recommend here must be preceded by the gender based regulatory impact assessment recommended above. Calls for reforms of IP laws in Nigeria have been going on for the past two decades. However, this research has shown the need to pursue targeted reforms that will address the challenges faced by innovators (women entrepreneurs) in extant policies. It is doubtful if the Bills presently before the Nigerian National Assembly, as discussed in chapter three, will be sufficient to favorably reposition Nigerian women in the marketplace. Nigeria must reform its IP laws to reflect its current realities. The current realities for Nigeria as discussed in this research include: the incredible size of its informal economy; the significant population of women

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<sup>1048</sup> Guiding Principle 3note 4.

<sup>1049</sup> *Ibid.*

entrepreneurs in that informal economy; the high rate of illiteracy particularly among women in the country; the culture of its people, and the deplorable state of infrastructure, to mention a few. This research has also discussed the peculiar realities like patriarchal structures such as historical misogyny; the influence of culture and religion, etc., that affects women's entrepreneurship in Nigeria. It is therefore incumbent on the government to take these realities into consideration when making reforms to provide relevant and context driven national IP laws and policies.<sup>1050</sup>

It is true that trademarks can be valuable to Third World countries and can be especially valuable to traditional communities where traditional knowledge is utilized to produce these cosmetics, as trademark protection has the potential to develop their brand recognition.<sup>1051</sup> However the scope of trademarks registration in Nigeria remains narrow and rigid because registration is restricted to conventional trademarks at the detriment of nonconventional trademarks. While some<sup>1052</sup> may be advocating for a stronger trademark regime, I argue that Nigeria needs not a stronger trademark regime but a contextual trademark regime. Indeed, the current trademark law slows down the market activities it seeks to regulate.<sup>1053</sup> The absence of protection for collective marks

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<sup>1050</sup> Nigeria also has a general obligation to eliminate all forms of discrimination against women under CEDAW.

<sup>1051</sup> Ayoyemi Lawal-Arowolo, "Two strings on a Bow: Scope of Registrable Trademarks from the Era of Traditional Knowledge to Digital Technology in Nigeria (pre and post 1965)" in *Nigerian Intellectual Property Law* (Routledge, 2022).

<sup>1052</sup> BellaNaija.com, *supra* note 940.

<sup>1053</sup> Lawal-Arowolo, *supra* note 1053.

and service marks in the law has excluded many potential businesses from taking advantage of the possible benefits of these rights.

This research has also exposed the hardship and counterproductivity of requiring trademark registration for NAFDAC registration. NAFDAC itself, in recognition of the hardship this requirement poses for entrepreneurs producing cosmetics made this requirement optional for micro scale businesses.<sup>1054</sup> However, when you consider the size of the same sector (by 2017, there were over 41.543 million Micro, Small & Medium Enterprises (MSMEs) in Nigeria.<sup>1055</sup>), it behoves that a closer look be taken at totally removing that requirement. As explained earlier, NAFDAC along with other regulatory bodies in Nigeria like the Nigeria Copyright Commission (NCC) and the Standards Organisation of Nigeria (SON) have been collaborating with the Nigerian Customs in the fight against counterfeiting in Nigeria.

By making trademark registration a requirement for cosmetics (as well as drugs, food, and other regulated products), NAFDAC seeks to prevent counterfeiting through IP protection. Now, rather than make room for millions of businesses to introduce unregistered products into the market because of the hardship caused by its principal requirements, it would be expedient to go back to the drawing board with the trademark office and other IP stakeholders in Nigeria, and rethink other IP mechanisms that would be more effective for their goal. Rather than claiming to exempt this class of businesses, the government

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<sup>1054</sup> note 817.

<sup>1055</sup> note 935.

should explore other forms of protection that would be relevant and easily accessible to mostly small businesses in the informal sector.

IP laws and policies must recognize the innovations of women and the importance of semi-formal and informal IP protection mechanisms to them, by making gender transformative IP policies that directly factor in their lived realities. This can also be achieved (including) through the provisions of collective marks and service marks. The domestic environment is recognized as the most decisive factor for the development of an IP regime, which can only thrive in a conducive and enabling environment for creativity and innovation. This is particularly so in the case of Nigeria, with a promising and vibrant creative sector that could benefit from a contextual IP regime for sustenance and growth.<sup>1056</sup> Such a contextual IP regime in Nigeria must be a “collaborative intellectual property.”<sup>1057</sup>

3. *Collaboration between National IP offices and Cooperative Associations and the Creation of Geographically Based Associations of Informal Producers.*

Like the guilds of merchants and craft workers in the 19th century (discussed in chapter three), women cooperatives in Nigeria are very strong and influential in setting standards for their products, and they generally participate in economic programs that improve their status quo. These cooperatives through the traditional ‘esusu’ system, support their members to scale up their businesses and can be relied

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<sup>1056</sup> Lawal-Arowolo & Ola, *supra* note 774 at 4.

<sup>1057</sup> de Beer et al, *supra* note 193 at 379.

upon to coordinate their members to participate in relevant capacity building programs fashioned with their lived realities in view. Through such networking, drafters of IP policy can integrate the context of the environment into deciding what works in that environment. For Nigeria, that environment is the informal sector and any meaningful initiative for development must radically include the optimization of semi-formal structures that already exist in the sector, such as women cooperatives. This is a gender responsive initiative that the government and IP stakeholders can embark upon. These cooperatives can be supported (including the provision of technical support) to be “platforms for the exchange and collective protection of knowledge among informal entrepreneurs.”<sup>1058</sup>

In addition, “geographically based associations”<sup>1059</sup> should be created among women producing cosmetics representing micro-producers of cosmetics. This would not only ensure the inclusion of all producers irrespective of their locations in the new IP regime envisioned in this research but expose the different forms of knowledge being produced in different locations. For instance, while women in Akwa Ibom state of Nigeria may be versed in the knowledge of producing cosmetics from ‘mmanyanga’ (palm kernel oil), their counterparts in neighboring Igbo communities of Imo and Abia states may be producing cosmetics from ‘nzu’ (calabash chalk). The geographically based association “would act as a knowledge broker or intermediary, responsible for developing collective semi-formal protection mechanisms such as documentation and creating a database of ideas for product and process improvement

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<sup>1058</sup> Kraemer-Mbula, *supra* note 186 at 179.

<sup>1059</sup> *Ibid* at 180.

to be made accessible to its members.”<sup>1060</sup> According to Kraemer-Mbula, “this type of representative organization would serve as a bridge between informal manufacturers and the wider support and innovation system, connecting informal actors to opportunities emerging in formal organizations relating to technology transfer, training and the like.”<sup>1061</sup> Equally important, leaders of these cooperatives and associations are stakeholders who should be brought into any meaningful consultation about IP initiatives before decisions are made, or when making reforms in IP policies.

### 6.3.2 Policy Recommendations

#### 1. *Revolutionizing the Content of IP Education.*

IP trainings so far have been centered on a trade-based framework that emphasized “strong, harmonized protection as a means to facilitate technology transfer to spur economic growth in developing countries.”<sup>1062</sup> This is a colonialist narrative that has obscured the political and ideological nature of the IP regime, making it impossible to question the validity and ability of the current IP regime to serve the different economic and social realities prevailing in Third World countries.<sup>1063</sup> Dispatching experts to develop IP legal systems and provide trainings that are rarely relevant to rural producers of knowledge,<sup>1064</sup> in Third World countries serve to reinforce the categorization of First world knowledge

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<sup>1060</sup> *Ibid* at 179.

<sup>1061</sup> *Ibid* at 180.

<sup>1062</sup> de Beer & Oguamanam, *supra* note 465 at 265.

<sup>1063</sup> Muzaka, “A dialogic approach to understanding regime conflicts”, *supra* note 96 at 78.

<sup>1064</sup> See for instance, note 545.

as “valid” and knowledge produced in the Third World as “useless” for developmental purposes, thereby reinforcing the assumed role of the IP regime in the development of Third World countries.<sup>1065</sup> “Few if any of the activities undertaken by IP training and education providers expressly or adequately integrate a development dimension, and in particular materials reflecting principles underpinning or recommendations comprising the Development Agenda.”<sup>1066</sup> IP training and teaching activities ought not be the same for audiences in Third World and First World countries. They should not be the same in all audiences even in the same country.<sup>1067</sup>

As I have argued in this thesis, the IP regime was not established to aid the Third World to “catch up” with the First World, rather it was established with the aim of safeguarding the competitive advantage of First World countries in “key knowledge industries by maintaining – not narrowing – the technological and knowledge gap.”<sup>1068</sup> This research has shown that there are intergroup and intragroup differences in levels of development and in socio-economic circumstance. These must be taken into consideration when designing IP training and awareness programs. A gender transforming starting point in reframing the role of IP in development therefore would be to unpack these narratives by redesigning IP trainings that flow from the environmental reality in each location and are fashioned to enhance the rich innovative forms of appropriation already

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<sup>1065</sup> Muzaka, “A dialogic approach to understanding regime conflicts”, *supra* note 96 at 78.

<sup>1066</sup> de Beer & Oguamanam, *supra* note 1000 at vii.

<sup>1067</sup> de Beer & Oguamanam, *supra* note 1000.

<sup>1068</sup> Muzaka, “A dialogic approach to understanding regime conflicts”, *supra* note 96 at 76.

taking place in different communities. As seen in this illustration of women entrepreneurs producing cosmetics, as well as the examples of the IAS and Kraemer Mbula's South African study, entrepreneurs (innovators) already practice appropriation mechanisms be it secrecy or customer loyalty, without labelling it as IP appropriation. Appropriation efforts must therefore be considered from the perspective of existing "social systems – specifically family structures, community networks and commercial clusters – within which the informal economy operates. Here, knowledge flows are characterized by trust, reputation, reliability, social and cultural signaling, and the willingness to pool resources and collaborate."<sup>1069</sup>

A revolutionized education should be a two-way IP education where IP 'experts' can learn from indigenous communities and build upon their knowledge thereby building a culture of reciprocity. The "experts" would first acknowledge these practices and contextually design trainings to enhance and leverage on relevant and successful appropriation mechanisms rather than imposing the existing frameworks of IPRs. Such an appreciation of practices related to IP and innovation will help Third World countries "design appropriate, context-specific systems of knowledge governance."<sup>1070</sup>

## 2 *Providing IP and Business Clinics in Rural Areas.*

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<sup>1069</sup> de Beer, Kun & Wunsch-Vincent, *supra* note 73 at 254.

<sup>1070</sup> de Beer & Oguamanam, *supra* note 465 at 265.

When the content of IP education has been revolutionized to include context specific systems of knowledge governance, IP and business clinics should be provided in rural areas. This should be conducted with the aim of educating women about semi formal and informal IP mechanisms and providing technical support where needed. Often, all these entrepreneurs may need are support with registering their businesses, training about business trends, and accessing finance for their businesses. Liaisons with cooperative associations as discussed before, can ensure that women not only have access to entrepreneurship schemes that factor in the nuances of innovating in the informal economy but provide a forum for organizing contextual IP and business clinics in rural areas.

This research has noted the level of ignorance about IP protection mechanisms among many entrepreneurs in Nigeria (even when in practice they are informally using these mechanisms without so naming them). It is therefore important to raise awareness which could help them choose what semi formal or informal IP protection mechanism would work best for them. Women entrepreneurs cannot make informed decisions about what they do not know or understand. Like Kraemer-Mbula<sup>1071</sup> recommends, government bodies and local IP agencies should “run awareness campaigns targeting informal settlements and metropolitan areas with a high concentration of informal activity. Campaigns would be run in collaboration with technology transfer organizations, incubators

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<sup>1071</sup> Kraemer-Mbula, *supra* note 186 at 180.

and higher education institutions, as these formal actors appear to have closer connections to informal manufacturers.”<sup>1072</sup> The target of such campaigns should be micro and informal manufacturers to raise their awareness of the possibilities offered by the country’s existing IP framework and strengthen informal mechanisms of knowledge appropriation already used by them, as revealed in this research. This again would work seamlessly if IP agencies collaborated with cooperative associations and geographically based associations recommended above. In addition, for such IP clinics to be relevant and effective, “government and agencies should develop appropriation mechanisms suitable for informal enterprises, offering lower costs and easier access possibly using cell phones for updates given the wide use of mobile telephony across informal networks.”<sup>1073</sup> This could potentially lead to broader use of formal mechanisms of knowledge appropriation by informal producers as those informal enterprises that manage “to access information and use formal knowledge appropriation mechanisms to gain economic advantages such as reputation effect, access to finance and other benefits”<sup>1074</sup> may generate higher income and become motivated to formalize their business.<sup>1075</sup>

However, the aim of the IP and business clinics recommended here is not to create a new layer of exclusion where the most marginalized micro-entrepreneurs that are unable to access information and use formal IP

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<sup>1072</sup> *Ibid.*

<sup>1073</sup> *Ibid.*

<sup>1074</sup> *Ibid* at 180.

<sup>1075</sup> *Ibid.*

mechanisms could be left behind. The aim is to create an opportunity for inclusion of the most marginalized, therefore these clinics must be organized with the view to accommodate every entrepreneur irrespective of their level of exposure to technology.<sup>1076</sup> This again can be achieved more easily by collaborating with cooperative associations in rural communities who are familiar with the needs and realities of their members.

3 *Rethinking Categories Used in Women's Entrepreneurship Analysis and Collecting Sex-disaggregated IP data in Nigeria.*

Through an intersectional analysis, this research has shown how different groups of women entrepreneurs experience IP differently. I have argued that if the IP system is to meet its mandate of rewarding innovation and entrepreneurship, then it must address the specific problems that specific peoples experience in specific places. One gender responsive way of achieving this is by rethinking categories used in women's entrepreneurship analysis and not categorizing women entrepreneurs into a "homogenous group with unified problems that can be addressed"<sup>1077</sup> through gender-responsive IP law. The analysis in chapter five for instance revealed how women entrepreneurs who are CEOs in the cosmetics industry are calling for stronger IP protection while their counterparts, who operate micro businesses are either unaware of IP protection

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<sup>1076</sup> Among women entrepreneurs in Nigeria there is already wide use of cell phones even in rural areas. Mobile platforms and applications should be adapted to address the unique socio-cultural and economic needs of this population making it easier for them to navigate and operate IT. The absence of adequate power supply, however, remains a problem, even if a temporary one, that undermines the use of technology among women entrepreneurs in Nigeria.

<sup>1077</sup> Vossenber, "Beyond the Critique", *supra* note 39 at 13.

mechanisms or facing challenges in acquiring them. Again, women entrepreneurs at different levels of education face different kinds of challenges unique to them, as seen in the Nigerian case study. Women entrepreneurs should therefore not be lumped into one category as this is not useful in understanding the different realities they live in and how that affects their entrepreneurship, or utilization of IP appropriation mechanisms. While women's entrepreneurship can be stimulated through policies and programmes designed specifically for entrepreneurship promotion, without a nuanced understanding (and categorization) of women's entrepreneurship, such initiatives cannot identify the relevant support, beyond financial assistance, necessary for women entrepreneurs to scale up.<sup>1078</sup>

In addition, it is important to collect sex-disaggregated IP data. This will help to better monitor developments in women's entrepreneurship with the aim of supporting them, given the significant contributions they are making to the economy. This is not the case in Nigeria. The trademark Office in Nigeria for instance, does not indicate whether a trademark is registered by a male or female. This implies that some Nigerian women may not factor in World Intellectual Property Indicator (WIPI) reports. The WIPI is said to be an important tool which helps understand the landscape to see where innovation is happening around the world, and reports the growth of women inventors in the world and helps policy makers and others plan for the future.<sup>1079</sup> Yet some

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<sup>1078</sup> Iwara, "Small-Enterprise Capital Mobilization and Marketing In Rural Areas", *Supra* note 773.

<sup>1079</sup> note 966.

Nigerian women entrepreneurs who are innovating daily may not be a part of that landscape. There is therefore the need to change policies or enforce existing policies about collecting sex- disaggregated IP data in Nigeria if women entrepreneurs are to be part of the IP landscape.

#### 4 *Collaborative Intellectual Property.*

This research has revealed the high level of collaboration in the informal sector. Entrepreneurs in the informal sector as argued in this research are not so concerned about excluding others from the protected knowledge because that would not align with “underlying social, cultural and economic objectives present in the settings in which the knowledge is being deployed.”<sup>1080</sup> Rather entrepreneurs in the informal sector such as women producing cosmetics in Nigeria, the Igbos as found in the IAS and the participants in the South African study discussed in chapter four, are concerned about knowledge protection principally as it relates “to their perception of strong competition and their fear that they will lose market share if new competitors get established in the same geographical area in which they operate. operate.”<sup>1081</sup> To guard against this loss of their market share, these manufacturers use some type of mechanism, either formal or informal, to protect their knowledge.

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<sup>1080</sup> de Beer et al, *supra* note 193 at 378.

<sup>1081</sup> Kraemer-Mbula, *supra* note 186 at 176.

Consequently, they choose who to share their knowledge with to preserve their knowledge on one hand and expand the use of the knowledge on the other hand. This has been aptly described as “co-opetition.”<sup>1082</sup> Co-opetition is a way of thinking that combines competition and cooperation. The IAS demonstrates this concept and offers a good example of how cooperation and sharing can be used to leverage a competitor’s strength to thrive together. It is argued that

traditional [First World] collaborations fail because deep down, stakeholders assume their success must come at others’ expense, which is clearly a zero-sum game. The way forward is co-opetition, in which entities in the same industries act with what everyone recognizes as partial congruence of interests.<sup>1083</sup>

This research has shown how such partial congruence of interests already exists in the informal sector. It is recommended that IP stakeholders return to the drawing boards to reimagine how the current IP regime can be creatively expanded to benefit from these semi-formal and informal mechanisms of IP appropriation in a collaborative and sustaining manner. Such collaborative IP will produce a win/win result where producers of knowledge and users of knowledge (including “valorizers”) will benefit (financially and psychologically) from knowledge produced.

As admitted at the beginning of this thesis, it is impossible to proffer a onetime solution to the problems that this research has exposed. However, an intersectional analysis of IP laws and women’s entrepreneurship in the informal sector of a Third World country such as this, has drawn

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<sup>1082</sup> Nalebuff & Brandenburger, “Co-opetition”, *supra* note 745.

<sup>1083</sup> Marquis Cabrera, “Use Co-opetition to Build New Lines of Revenue” *Harvard Business Review* (10 February 2014), online: <<https://hbr.org/2014/02/use-co-opetition-to-build-new-lines-of-revenue>>.

attention to the need for “homegrown solutions—ones based on the realities of their own circumstances, be they natural resources, geographic location, or culture.”<sup>1084</sup> In Nigeria particularly, future discourse, legal reform and policy recommendation on IP laws must take cognisance of its unique environment, “its past failures as well as the structural and governance gaps that have hindered”<sup>1085</sup> women’s development. Nigeria cannot afford to ignore the reality that almost half of its population are women, and that Nigeria has the highest number of women entrepreneurs in the world.<sup>1086</sup> Reforms in Nigeria’s IP laws must therefore adopt a gender-sensitive approach to identifying what aspects of IP laws are negatively impacting women; take gender-responsive measures to remove policies that inhibit the growth of women’s businesses; and provide gender transformative incentives in the IP regime.

Today, like most of her counterparts in other Third World countries, Nigeria stands at a crossroad in her “path towards negotiating her place in an increasingly globalised IP order.”<sup>1087</sup> This research, like the various literature I have explored here, is a reminder that those who were flung to the margins, who were either imagined to have no voices or portrayed as lacking language and articulateness altogether,<sup>1088</sup> do have a voice. A voice loud and articulate enough to be heard from the margins. It is crucial that Nigeria does not bow to the pressure to keep cloning national laws based on parameters set by the First World’s conceptualizations of IP protection that have not been very relevant to the Nigerian economy in the past. This is the time to speak out loud and

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<sup>1084</sup> Isenberg, *supra* note 169 at 4.

<sup>1085</sup> Lawal-Arowolo & Ola, *supra* note 774 at 4.

<sup>1086</sup> The Global Entrepreneurship Monitor <<https://harambeetoday.org/images/PDFS/GEM2013Report.pdf>>

<sup>1087</sup> de Beer et al, *supra* note 193 at 393.

<sup>1088</sup> Enloe, *supra* note 142.

renegotiate an IP regime “for” the people of Nigeria in every sense. Nigerian leaders must generate the “resources and access to be “heard” when and where it matters.”<sup>1089</sup>

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<sup>1089</sup> Cynthia Enloe, *supra* note 903 at 20.

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