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PROTECTION OF IMAGE RIGHTS (PART 1)

ARTICLE SERIES

1.INTRODUCTION

Image rights are beginning to gain prominence with numerous instances of their exploitations and infringements. The provision of image rights enables the individual to protect, exploit and sue for the infringement on those rights. However, image rights, as previously misconceived, extends beyond photographs.

An image includes a physical likeness or representation of a person, animal, or thing, photographed, painted, sculptured, or otherwise made visible while image rights refers to the control over an image by the personality whose image is portrayed or by the image's creator.[1]

Image rights are the expression of a personality in the public domain.[2] Image rights concern the various rights an individual holds in his/her own persona (including name, photo and likeness, signature, personal brand, slogans or logos). [3]

Other rights that an individual can possess in his/her own persona include appearance, silhouette, feature, face expressions (verbal or facial), mannerisms, and the likes.

2. COMMERCIALISATION OF IMAGE RIGHTS

Image rights cover different perspectives beyond what is seen by a layman. For example, famous persons such as singers, actors, reality stars, models,

athletes and renowned authors develop valuable personalities.

Because these celebrities are famous, they can exploit the value reposed in their personalities by lending their faces or voices to a brand.

The brands increase their sales and profile due to the endorsements by these celebrities while the celebrities earn royalties in return. In fact, most of the times, the celebrities can earn more revenue than they make from their regular careers. For example in 2016, Kylie Jenner was reported to have signed a \$1,000,000 (One Million Dollars) deal to serve as a brand ambassador for Puma,[4] while Derrick Rose also got a \$260,000,000 (Two Hundred and Sixty Million Dollars) endorsement deal with Adidas.[5]

In Nigeria, a local singer, Iyanya was reported in 2016 to have had a \$350,000 (Three Hundred and Fifty Thousand Dollars) endorsement deal with Zinox computers.[6]

A recent example of commercialisation of image rights is Cardi B's application to trademark the two catch phrases, "Okrrr" and "Okrr" which she has become known for, to control the exploitation of the phrases for sale purposes.

[1]AAdetula, 'Image Rights and IP in Nigeria' (The Barcode, 2016) <<http://barcode.stillwaterslaw.com/1.1/2015/12/21/image-rights-and-ip-in-nigeria/>> accessed 2 August 2019.

[2]Intellectual Property Office, 'What are Image Rights' (Intellectual PropertyOffice, undated <<http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights>>accessed 2 August 2019.

[3]M Johnson, 'Image rights' (Rocket Lawyer, undated) <<https://www.rocketlawyer.co.uk/article/imagerights.rl>>accessed 2 August 2019.

[4]L Andrew, 'Celebrity Endorsement Deals withInsane Payouts' (Yahoo Finance, July 26, 2019) <<https://finance.yahoo.com/news/celebrity-endorsement-deals-insane-payouts-090030383.html>>accessed 7 August 2019.

[5]Noauthor 'The Biggest Endorsement Deals in History' (The Gentleman's Journal,undated) <<https://www.thegentlemansjournal.com/biggest-endorsement-deals-history/>> accessed 7August 2019.

[6]Deolu,'PHOTOS: Iyanya Signs \$350,000 Endorsement Deal With Zinox Computers'(Information Nigeria, August 27, 2013)<<https://www.informationng.com/2013/08/photos-iyanya-signs-350000-endorsement-deal-with-zinox-computers.html>>accessed 7 August 2019.

It is therefore natural for celebrities to protect these lucrative rights to their image and prevent the unauthorised usage of the images. This then brings to mind, the popular case of Robyn Rihanna Fenty & Ors. v. Arcadia Group Brands Limited (T/A TOPSHOP) & Anor[7] where Rihanna had sued for the unauthorised usage of her image from one of her music videos on t-shirts sold by Topshop which sold out in weeks.

A similar case occurred in Nigeria when a popular Nigerian actor, Richard Mofe Damijo (RMD), instituted an action against the online retail store, Jumia for their unauthorised use of his image on their social media platform.[8]

2.1 RECENT LEGAL ACTIONS

As celebrities are seeking to protect the rights vested in their images and instituting actions for their infringement, the image rights issue has taken another dimension. Recently, photograph agencies have taken legal actions against celebrities who post images without the agencies' permission.

For example, Kim Kardashian was sued in 2017 for copyright infringement when she posted one of her pictures where she was going to dinner at a Miami restaurant without permission from the photographer. The model, Gigi Hadid, was also sued in 2019 when she posted one of her images on her Instagram page without the photographer's permission.

Although the photographs being posted by the celebrities contain images of themselves, the photo agencies are claiming copyright to the photos and a breach of these rights by the celebrities.

2.2 DO IMAGE RIGHTS APPLY TO ONLY CELEBRITIES?

It is interesting to note that it is mostly celebrities who have instituted and won image rights cases.[9]

This is not to suggest that persons who are not celebrities have no image rights; however, the ability of a claimant to demonstrate he enjoys goodwill or considerable influence, are factors in image rights action.[10]

Therefore, in most cases, it is the celebrities that are able to establish these factors when they seek to enforce their image rights.

3. LEGAL PROTECTION OF IMAGE RIGHTS

While some states have specific laws on image rights, there is no comprehensive law providing for image rights in Nigeria. This implies that an individual may not be able to commercialise his image rights or may not be entitled to compensation if these rights are breached.

Consequently, the alternative is to examine other related laws that can be applied to protect the image rights of persons.

[7]Rihanna Fenty & Ors. v. Arcadia GroupBrands Limited (T/A TOPSHOP) & Anor [2013] EWHC 2310 (Ch).

[8]KOjewale and O Johnson 'Image Rights How Can I Control the Use of My Image?'(ACAS-LAW, 4 April, 2016) < <http://www.acas-law.com/storage/app/public/publication/this-day-article-04.10.2016---kike-ojewale-and--oyindamola-johnson.pdf>> accessed 7August 2019.

[9]IPrince-Alex, 'The Legal Regime for Enforcement of Image Rights – A NigerianQuestion By Prince-Alex Iwu' (Lawyard, 27, November2016) <<https://www.lawyard.ng/the-legal-regime-for-enforcement-of-image-rights-a-nigerian-question-by-prince-alex-iwu/>> accessed 7 August 2019.

[10]Ibid.

3.1 IMAGE RIGHTS AND THE RIGHT TO PRIVACY

In Nigeria, the law governing the right to privacy is the 1999 Constitution of the Federal Republic of Nigeria (as amended) ('the Constitution') which provides that the right to privacy of citizens is guaranteed and protected.[11] There are also decided cases protecting the citizen's right to privacy.[12]

However, according to the Black's Law Dictionary, 10th edition, 'privacy' is the quality, state, or condition of being free from public attention to intrusion into or interference with one's acts or decisions.

Although what denotes privacy was not defined or specified, it could be assumed that this also extends to image rights of an individual. A person may therefore sue for breach of the constitutional right to privacy if he can persuade the court to construe the constitutional right to privacy as a right not limited to the intrusion of one's private life but extending to the appropriation of a person's name or likeness for another's commercial benefit.[13]

3.2 IMAGE RIGHTS AND COPYRIGHT

There are laws governing intellectual property rights which ought to be considered while looking at image rights. One of them is the Copyright Act Chapter 28, Laws of the Federation of Nigeria, 2004 (Copyright Act). According to the Black's Law Dictionary, 9th Edition, copyright is a right granted to the author or originator of certain literary or artistic productions, whereby the creator is invested,

for a limited period, with the sole and exclusive privilege of multiplying copies of the literary or artistic works and publishing or selling them. Although, what constitutes 'work' is not defined under the Copyright Act, the Act provides that literary works, musical works, artistic works, cinematographic films, sound recordings and broadcasts are works that are eligible for copyright protection.[14]

However, literary, musical, or artistic works shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character and the work has been fixed in a definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.[15]

This means that these works cannot qualify for copyright just by virtue of their being made. Sufficient inputs must have been made to give them an original character and they must also have been put in a definitive form to qualify for the protection. Also, originality within this context does not connote inventiveness or novelty; it simply denotes that the work was not copied or plagiarised.

3.2.1 ARE IMAGE RIGHTS QUALIFIED FOR COPYRIGHT PROTECTION?

Notwithstanding that there are no express provisions on image rights, artistic works and cinematographic films are eligible for copyright protection. Furthermore, artistic work has

[11]1999 constitution of the Federal Republic of Nigeria (as amended), S 37.

[12] See Okafor & Ors v. Ntoka & Ors(2017) LPELR-42794(CA), Federal Republic of Nigeria V. Joseph Daniel (2011)LPELR-4152(CA).

[13] No author, 'Image Rights: Charting New Paths' (Olaniwun Ajayi LP, 27 February,2015) <<https://www.olaniwunajayi.net/wp-content/uploads/2016/03/EL-image-rights-newletter.pdf>> accessed 2 August 2019.

[14]Copyright Act Cap 28 Laws of the Federation of Nigeria, 2004 (Copy Right Act). S 1 (1).

[15]Ibid.S 1 (2).

been described to include, irrespective of artistic quality, paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; works of sculpture; photographs not comprised in a cinematographic film; and works of artistic craftsmanship.[16]

These provisions will therefore apply to a person's personality reproduced in a photograph, painting, sculpture, and the likes.

It may therefore be safe to say that a person's image rights may be eligible for copyright protection by virtue of the provisions above. Also, these works are eligible for protection once they are in a fixed medium and do not need to be registered first.

3.2.2 WHO OWNS THE COPYRIGHT?

Since it has been stated that some image rights are eligible for copyright protection, the next issue is to determine who owns the copyright. The legal actions that the photo agencies have taken against the celebrities who posted their own photographs without the agencies permissions have been mentioned earlier.

Although it is the images of the celebrities that are in the photographs, the photo agencies bring actions against them for copyright infringement. The Copyright Act provides that the owner of a copyright has exclusive control over his works.[17]

It further provides that that the owner of an artistic work has the exclusive right to control the reproduction, publication and the inclusion of the work in any cinematograph film.

This therefore indicates that any individual who intends to use an artistic work must have the consent of the owner of the copyright. Thus, any person who uses the work of another without due authorisation of the owner of the copyright has infringed the owner's copyright.

It is therefore important to determine who this "owner" is. [18] Generally, ownership to an artistic work would vest in the author of the work.[19] "Author" in the case of photographic work, means the person who took the photograph.[20]

However, the law further provides that where the author of the work was commissioned to carry out the work[21] or it was created during the course of the author's employment, the ownership shall not vest in the author of the work.

Rather, the person who commissioned the work or the employer of the author[22] would be considered to be the owner of the work except there was a contrary agreement that stated otherwise.

The inference that can be drawn from this is that if a client commissioned a photographer to take his picture, the client would be deemed to own the copyright to the work and not the photographer. Conversely, where an employee is engaged by his employer and he has the responsibility of taking pictures as a photographer, the rights to that work would vest in the employer and not in the photographer.

In addition, it should be noted that the creation of an artistic work usually involves many people. Thus, when this is the case, it is assumed that the ownership is equally shared among the co-owners.[23]

Therefore, in order for someone to use this work, the person would have to seek for permission from all the co-owners.

[17]Ibid. S 6.

[18]Ibid.S. 6(1) (b) (i) to (iv).

[19]Ibid.S 10 (10).

[20]Ibid. S 51 (1).

[21]Ibid.S 10(2) (a).

[22]Ibid.S 10 (2) (b).

[23]Ibid.S 11(6).

3.2.3. CLOSING

From the foregoing, it may be stated that image rights are entitled to copyright protection even without their prior registration.

Consequently, a celebrity/photographer may be able to enforce the rights under this heading, if he is the owner of the copyright. However, it is uncertain if a person can obtain much compensation in Nigerian courts as the case law on image rights is underdeveloped in Nigeria.

It may however be advisable to register an image that is a word mark at the Nigerian Trademarks Office. When this is done, an unauthorised use of the word mark would be regarded as an infringement under the Nigerian Trademarks Act.[24]

For example, “David Beckham” and “Victoria Beckham” are registered trademarks which mean that their names are protected and cannot be used to sell goods or services. [25]

[24]Ibid.(note no i).

25]Supra,note 3.



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