

Image Rights How Can I Control the Use of My Image?

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What is in a Photograph?

"Not everybody trusts paintings but people believe photographs"
-Ansel Adams

Photographs are visual tools; you would agree that you are not likely to believe something exists unless you see it in person, or at least see a photograph of it.

Photographers hope to tell a story or convey some level of information or knowledge to the public. Photographers own what they capture on camera and that in itself is of great value.

What are Image Rights?

When a photographer takes a photograph of an individual, generally, the photographer still retains the copyright and the ownership of that photograph. Therefore, any reproduction of the photograph or image, must be subject to the permission of the photographer, otherwise, this would amount to an infringement of the photographer's copyright.

Copyright Law does not protect the subject matter of the photograph but instead states that the author and owner of the photograph is the copyright holder, that is, the photographer. However, the subject of the photograph is entitled to image rights or a right of publicity.

The term "image rights" is usually interchanged with the "right to publicity" or "publicity rights". Image rights give a person the right to prevent the unauthorized use of their name, likeness or other personal indicia, such as physical or style characteristics, signatures, nicknames or slogans associated with them.

For example, if Kelechi Amadi-Obi took a photograph of Olamide and the image was then used in a Pepsi advertisement, Kelechi Amadi-Obi would have the right to the photograph as the copyright holder but Olamide would own the rights to the use of his image.

The Power of the Celebrity

Celebrities attract a great deal of media coverage and over the years, they have discovered how much economic value subsists in their image. It comes as no surprise that celebrities and corporations would choose to exploit this status to help promote, advertise brands, services, products and create awareness of a product or service by way of an endorsement.

As such, a person (celebrity or otherwise) should have the right to control how and where their images are used especially in situations where their images are used to advertise products or services, which in turn generate income for the user.

Image Rights in Nigeria

There are no specific laws governing image rights in Nigeria. The reason being that image rights as defined above does not appear to fall within the definition or contemplation of the laws governing trademarks, patents, designs and copyrights in Nigeria.

The Constitution however provides for the right to privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. The argument, which arises from this protection, is whether this right to privacy equates to the enforcement of these image rights. Furthermore, are the courts willing to apply this right to privacy to a violation of an individual's image rights.

The right to privacy and family life does not quite extend to giving a celebrity control over the indiscreet taking and use of his or her photographs.

Judging by the influence that celebrities now wield and the success of the entertainment industry in recent years, in Nigeria, it is hoped that when the courts have the opportunity to rule on an image rights related matter, they will favourably extend the jurisprudence to ensure that these rights are enforced.

The case law in this area of Intellectual Property is largely undeveloped and as such it will be useful to explore the laws adopted in other jurisdictions to get a better understanding of the options available to celebrities with respect to image rights.

Image Rights in the United Kingdom

As in Nigeria, the UK has no codified law of privacy or image rights. The UK has had more success however, in the protection of an image by utilizing other intellectual property rights such as Trademark Registration and the Tort of Passing Off. In the case of *Irvine v Talksport Ltd*, the tort of passing off was used to provide some level of protection to the Claimant. In 1999, Eddie Irvine, a well-known Formula One driver brought a claim against Talksport, a company who had commenced a special campaign to mark the rebranding of their radio station. Talksport manipulated an image of Irvine to promote their campaign without his consent. Irvine was able to prove that this campaign implied that he endorsed Talksport and this was actionable under the tort of passing off. It was held that Irvine possessed a property right in his good will which he could protect from unlicensed appropriation consisting



of a false claim or suggestion of endorsement of a third party's goods and services.

For there to be a successful claim in the tort of passing off, three elements must be established before the courts: goodwill in the subject trademark or brand, a misrepresentation leading to confusion in the minds of the consumers and lastly, damage caused to the trademark or brand. Celebrities may find it difficult to prove that their brand has acquired a reputation amongst the general public and that a misrepresentation could lead to potential financial loss or damage to the repute of their mark. It should be noted that even if the tort of passing off is established, it does not amount to an image right, it however affords the celebrity some level of protection.

A recent example is the case between Rihanna and Topshop. In 2012, Topshop began selling a t-shirt with an image of Rihanna from one of her music videos, on it. These t-shirts sold out of the stores in weeks and Topshop made a significant profit on the sale of these t-shirts. The image had been taken by a photographer, who owned the copyright to the image. This photographer had issued a license to Topshop for the use of this image, however, Topshop had not been issued a license by Rihanna. The Courts held that the use of her image on a t-shirt amounted to passing off and was therefore unlawful by stating that:

"The mere sale by a trader of a t-shirt bearing an image of a famous person is not, without more, an act of passing off. However, the sale of this image of this person on this garment by this shop in these circumstances is a different matter. I find that Topshop's sale of this Rihanna t-shirt without her approval was an act of passing off."

It was further stated that the law does not recognize image rights and "there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image"; as such, celebrities must rely on the passing off to prevent the unauthorised use of their images.

This case was particularly fundamental to the development of UK Case Law in this area as prior to this case, the general principle was that the mere placing of a celebrity's image on merchandise without their permission did not constitute an infringement of their rights. Following this ruling, celebrities now have more options to enforce their rights.

Image Rights in the United States

Image Rights are referred to as "The Right of Publicity" or "Publicity Rights" in the United States; this right provides individuals with the exclusive right over the use and exploitation of their image. Unlike Nigeria and the UK, the US is arguably the trail blazer for the development of image rights. The US has developed the right to publicity to assist celebrities in the commercialisation of their image. It is also argued that the right of publicity is a property right which can be assigned and licensed. This right of publicity gives every individual control over any commercial use of his or her name, image, likeness, or some other identifying aspect of identity. The extent of this right however, varies from state to state within the US. In states without a specific statute relating to the right of publicity, one can still rely on common law for enforcement of these rights.

The Lanham (Trademark) Act is the primary federal trademark statute in the US that prohibits trademark infringement, trademark dilution and false advertising. The Act also covers the use of marks that could lead consumers to make a false association between a product and a person without his or her consent. A very interesting case in the US on the right to publicity was the case between Basketball legend, Michael Jordan and a grocery store chain, Jewel Osco. After Michael Jordan was inducted into the Basketball Hall of fame in September 2009, the sports magazine,

Sports Illustrated published a special issue to congratulate the basketball star on this achievement. Additionally, Jewel Osco ran an advertisement in the same issue of the magazine congratulating Jordan. Michael Jordan argued that the grocery chain had used his image without his consent as a form of advertising for commercial gain. The Courts rejected Jordan's arguments and ruled that the advert was merely a commercial transaction and non-commercial speech.

The Appellate Court however, disagreed with this argument by stating that although the advertisement was not telling consumers to purchase any particular items, it was promoting its brand and enhancing the brand in the minds of consumers, by exploiting the goodwill and reputation of Michael Jordan at this high point in his career. Jewel Osco therefore faces millions of dollars in damages.

Nigeria in Focus

Recently, the Nigerian actor, Richard Mofe-Damijo (popularly known as RMD) sought to bring an action against the online retail store, Jumia, claiming the unauthorized use of his image on their social media platform, without his permission. RMD has claimed that this unauthorized use of his image is a direct violation of his image rights and in turn this could send a message to the public that he is affiliated with the Jumia brand.

We could liken this to the Michael Jordan case mentioned above, where one party has used another's image in a form of advertisement. Jumia has argued however, that the image was already in the public domain and it is not an infringement of the actor's copyright.

Jumia may be correct in the sense that the copyright and ownership of the image belongs to the photographer. However, RMD should still possess the right to decide where and how his image is used. More so, this advertisement by Jumia is a form of commercialisation of the actor's image as the general public is likely to associate RMD with the brand and such an association should ideally earn RMD some income.

To succeed in a claim against Jumia, RMD's best option would be a claim in the tort of passing off. For his claim to be actionable in passing off, he must establish the three elements (goodwill, misrepresentation and damages). These elements will be difficult to establish and prove in the court. It would be interesting however, to see how the courts will rule in this case; it could potentially be a defining case in the development of image rights in Nigeria.

Conclusion

The right to have control over one's image is a right that celebrities as well as other individuals, should enjoy. The absence of statutes and case law on image rights, leaves individuals at the mercy of corporations and organizations nationwide. More so, celebrities cannot be properly compensated in the event that these corporations and organizations use their images for commercial gain. The tort of passing off is able to offer some level of protection, but this is largely insufficient and offers very little comfort to the claimant.

With the growing entertainment industry in Nigeria, the need for these laws has become even more apparent and it would be useful for the Nigerian Courts to adopt the US system of protection of image rights to create some sort of relief for individuals who are the most vulnerable. In addition, the lawmakers may consider providing wider protection to vulnerable individuals by enforcing the right to publicity across other jurisdictions in West Africa, or Africa at large. We hope that in the coming years, the Nigerian Courts will take a more progressive approach towards the enforcement of image rights.

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