


Increasing the commercial value of image rights in Nigeria: legal possibilities

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1. Introduction

Image rights generally refer to the right to use and prevent unauthorized uses of one's image and other indicia of personality such as name, likeness, signature, voice and style.¹ They are sometimes referred to as publicity rights or personality rights in some jurisdictions.² Since this legal area often relates to the commercial exploitation of a person's own image or, it is sometimes considered as some form of personality merchandising.³ Particularly, image rights are gaining significance with the increasing importance and proliferation of visual and audio-visual contents through the aid of social media and the Internet. A phenomenon in this area is that of celebrities and other public figures commercializing their images and personalities through endorsement contracts or deals.

While some countries formally acknowledge image rights and protect them, no express protection is available, whether through legislation or case law, in Nigeria. The need for change is, however, apparent, also considering that some celebrities have been vocal about the unauthorized commercial uses of their images.⁴ Although these complaints have so far only been in the media and no court action has arisen as a consequence of them, the Nigerian legal system may provide some alternatives for the protection of image rights.

In this article, we discuss the increasing significance of image rights to Nigerian creative industries. The article examines various legal alternatives in the Nigerian legal system that can be explored in the protection of image rights, standing the lack of express recognition of such rights. While identifying the limitations of the existing legal alternatives, the article suggests recommendations to enhance the protection of image rights in Nigeria.

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This article

- There is an increasing commercial value attached to the images and other personality features of Nigerian celebrities as signified by the growing multimillion naira endorsement deals signed by Nigerian celebrities. The social media and Internet have particularly aided in this respect. At the same time, this has also led to more unauthorized uses of their images for advertisements and other commercial purposes. Unfortunately, the Nigerian legal jurisprudence is not well developed to protect image rights.
- In the absence of a single legal framework for the protection of image rights in this country, creative approaches are needed for the protection of one's own image on the basis of other legal mechanisms.
- The article examines the increasing significance of image rights to the Nigerian creative industries and various legal alternatives in the domestic legal system that can be explored in the protection of image rights; it suggests amendments to the existing laws in order to accommodate the protection of image rights.

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1 J Blum and T Ohta, 'Personality Disorder: Strategies for Protecting Celebrity Names and Images in the UK' (2014) 9(2) *JIPLP* 137.

2 *ibid.*

3 AO Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press and Bookshop Ltd 2015) 305.

4 K Ojewale and O Johnson, 'Image Rights: How Can I Control the Use of My Image?' *This Day* (Lagos, 4 October 2016) 7 <<http://www.acas-law.com/storage/app/public/publication/this-day-article-04.10.2016—kike-ojewale-and—oyindamola-johnson.pdf>> accessed on 2 September 2019.

2. Increasing importance of image rights to the Nigerian creative industries

Image rights are gaining more significance in the Nigerian entertainment industry. The widespread use of computers and mobile phones and the privatization/liberalization of the telecommunication industry have led to easier access of the people to the media and the Internet. The huge success and popularity of Nollywood, the Nigerian movie industry and the music industry are also giving impetus to the growth of brand ambassadorship and celebrity endorsements.⁵ The Nigerian telecommunication industry has also spearheaded the use of celebrities in advertisement. Many celebrities rely on endorsement deals as a major stream of revenue.⁶

In Nigeria, there seems to be some advancement in the understanding of the concept of image rights because people now ascribe value to the use of their images. However, whenever the news of endorsement filters into the public space, specifics of such endorsements are usually kept away from the public for several reasons.⁷ Only little details are available to the public and cannot be confirmed with official sources.⁸

Most of cases, which are unreported, are settled amicably between the parties. However, Jumia (a leading e-commerce site in Nigeria) used the image of Richard Mofe Damijo, a veteran actor, on its Instagram page, JumiaFashion, so that an average consumer would believe that the actor endorsed the services and products provided for sale on JumiaFashion.⁹ The actor got the e-commerce site to remove his image after it admitted that the image was used without permission. In *Temitope Akinyemi v The Sun Publishing Limited*,¹⁰ the Claimant had taken a picture of herself which was published in the *Daily Sun* newspaper as the 'SunGirl' and on the publisher's website but under an incorrect name and with an incorrect phone number. She sued *Daily Sun* for copyright infringement.

3. Legal options for the protection of image rights in Nigeria

The Copyright Act 1988 (as amended)¹¹ provides for the protection of literary and artistic works.¹² Literary or artistic works include printed publications, paintings, drawings or photographs; any of which may involve the use of a person's image.¹³ Under the Act, ownership of rights is generally conferred on the creator or author of the work, although there can be certain exceptions.¹⁴ For photographs, the author is the person who took the photograph and not the subject of the photograph.¹⁵ Even when a work is commissioned by the person whose image is captured, by the provisions of section 10(2)(a) of the Act, the copyright is still conferred on the author unless there is an agreement to the contrary. This can lead to situations where persons seemingly have no control over the subsequent use and exploitation of their images. Consequently, the use of images or likeness of famous persons without their consent remains a common practice in Nigeria. However, where the image is created or photograph is taken by the person captured, authorship is deemed to vest with the person as the creator of the image or photograph. An example is 'selfies' whereby people take snapshots of themselves by themselves or make such videos using phones or other similar devices. Quite often, these are posted on the Internet and social networking sites. While Internet users could be allowed by the owners to freely copy, use and share such photographs, action for copyright infringement can be instituted particularly against those who use them for commercial purposes.

On the other hand, trade mark is primarily concerned with the use of marks to identify and 'distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists'.¹⁶ Arguably, the Act has the potential to be interpreted in a way that could provide for the protection of image rights. Significantly, sections 9(1) and 67 of the Trade Mark Act set forth a non-exhaustive list of

5 DT Abdurrahman and others, 'Celebrity-Brand Endorsement: A Study on Its Impacts on Generation Y-ers in Nigeria' (2018) 11 AJSR 415.

6 P Khatri, 'Celebrity Endorsement : A Strategic Promotion Perspective' (2006) 1(1) IMSJ 26, 27.

7 E Akinlabi, 'Globacom Endorsement Deals, Feeding Nigerian Artists since 2005' (2016) <<https://music.informationng.com/features/globe-celebrity-support-and-other-ngos-feeding-nigerian-artists-since-2005>> accessed 4 August 2019.

8 A Amodeni, 'Top 10 Nigerian Entertainers with the Biggest Endorsement Deals' <<https://www.legit.ng/841714-meet-top-10-nigerian-entertainers-biggest-endorsement-deals.html>> accessed 5 August 2019.

9 K Olapoju, 'The True Story Behind RMD's Legal Dispute with Jumia' (*TheCable*, 27 July 2016) <<https://www.thecable.ng/the-true-story-behind-rmds-legal-dispute-with-jumia>> accessed on 6 August 2019.

10 Suit No: FHC/WR/CS/87/16.

11 Cap C28, Laws of the Federation of Nigeria, 2004.

12 Copyright Act 1988 (as amended), s 1.

13 *ibid*, s 51.

14 *ibid*, s 11.

15 *ibid*, s 51.

16 Trade Marks Act 1965, Cap T13 (Laws of the Federation of Nigeria, 2004), ss 9(2) and 10(1).

signs which may serve as trade marks and this possibly encompasses certain distinctive characteristics or personal attributes that may be associated with well-known persons, particularly as regards their name, signature, expression (verbal or facial), image and so on.¹⁷ However, the challenge with regards to the registration of the images or similar indicia of personality lies in the fact that the provisions of sections 4, 34(1)(b) and 67 of the Act require that a mark be registered only in respect of particular goods or classes of goods and services. The merchandising value attached to the images of well-known persons is often rooted within their primary activities (as athletes or entertainers) rather than any specific goods or services with which they could be connected in the course of trade as contemplated within the Act. Particularly, as Oyewunmi pointed out, ‘most celebrities hardly directly engage in the production and marketing of merchandise with which their names or character are associated’.¹⁸ Rather, the exploitation of their image or distinctive characteristics is carried out by others (such as for advertisement purposes). This may be compounded by the provisions of section 34(3) of the Act which presumably forbids dealings in trade mark ‘primarily as a commodity in its own right’ (trademark trafficking). In this regard, Oyewunmi posits that registration carried out in anticipation of possible exploitation, whether through the grant of licences or registered user (and by extension other known means of trade mark exploitation), may not provide sufficient basis as to secure registration with regard to image or character merchandising under the Act.¹⁹ It is important to note that pursuant to section 9 of the Act, signs are generally registrable irrespective of whether they constitute distinct characteristics or personal attributes of the applicant. The only exception is the registration of signatures, for which registration is valid only if it is the signature of the applicant or some predecessor in title.²⁰ A critical issue in trade mark law is whether application for registration of a celebrity’s name by a third party can be opposed by a person whose name is popularly known. While section 13 of the Act seems to contemplate opposition or rejection of the registration of signs identical to already registered marks, it is not clear whether registration can be challenged by a celebrity or well-known person on the ground that the name, word(s) or image for which

registration is already well known in association with his or her personality, even though it is not registered as a trade mark or used in the course of trade. In this sense, the Registrar has the discretionary power to deny registration where such registration would tend to suggest that the goods to which the name is ascribed emanate from the owner of the name (and not the applicant).²¹ Arguably, section 11 of the Trade Marks Act could be interpreted in a manner as to protect well-known names or images that are unregistered at least in terms of ensuring that the goodwill or value associated with the name or image is not hijacked by preventing any person other than the owner from registering it.

The statutory provisions on trade marks are supplemented by the tort of passing off, making its potential role in the protection of image right a worthy subject of discussion.

Section 3 of the Trade Marks Act safeguards the right of a person to seek remedy against any person passing off his or her goods as goods originating from them. An action in passing off is available to registered and unregistered marks alike.²² This means that images or likeness of famous persons can potentially be protected by an action in passing off, as for instance has been the case in other jurisdictions (eg the UK). However, an action in passing off is traditionally in connection with trade or business, especially where a name, mark and even design of a good or business is misused within a common field of activity, inducing confusion or deception which leads members of the public to believe that the goods or services emanate from or are in some way connected to a person, thereby causing injury to the person’s own business as a trader.²³ It is doubtful whether an action for passing off by a famous person with regard to the protection of one’s own image could succeed where there are no prior or related trading activities by the famous person. In this regard, emerging trends in the UK as reflected in both *Irvine & Ors v Talksport Ltd*²⁴ and *Robyn Rihanna Fenty v Arcadia Group Brands Ltd (T/A Topshop)*²⁵ indicate a step forward towards some form of recognition of the economic value of the image of famous person which could be protected through an action in passing off. Whether or not the person has been engaged in similar or prior trading activities is irrelevant in so far as the public is led to believe that the relevant goods or

17 *ibid*, s 67.

18 Oyewunmi (n 3).

19 *ibid* 307–08.

20 Trade Marks Act 1965, s 9(1)(b).

21 Oyewunmi (n 3) 307.

22 See *Patkun Industries Ltd v Niger Shoes Manufacturing Co Ltd* (1988) 5 NWLR (Pt 93) 138 SC.

23 See *Niger Chemists Limited v Nigeria Chemists* (1961) ANLR 180 SC; *Ayman Enterprises Ltd v Akuma Industries Ltd* (2003) 12 NWLR (Pt 836) 22 SC; *Ferodo Ltd v Ibeto Ind Ltd* (2004) 5 NWLR (Pt 866) 317 SC; *Omnia (Nig) v Dyktrade Ltd* (2007) 15 NWLR (Pt 1058) 576 SC.

24 *Irvine v Talksport Ltd* [2001] 1 WLR 2355.

25 *Fenty & Ors v Arcadia Group Brands Ltd & Anor* [2015] EWCA Civ 3 (22 January 2015).

services are endorsed by or emanate from the person. Although these are not Nigerian cases, they could in similar circumstances serve as persuasive authorities also for courts in this country.

In addition, it is important to note that, a person's image or character may also be protected by means of non-proprietary mechanisms, such as the tort of defamation and the right of privacy. Defamation- and privacy-based actions concern the 'dignity' aspect of one's own personality. Particularly, they focus on the 'propriety' of disclosure, especially where they lead to reputational harm.²⁶ In relation to the protection of a famous person's image, it is argued that misrepresentation through publication or unauthorized use of a person's image that is damaging to the person's reputation could be redressed through an action for defamation.²⁷ Similarly, unauthorized publication or use of a person's image could also be interpreted as a breach of privacy or confidence.²⁸

All this said, the legal mechanisms reviewed above suffer from limitations, and that is particularly so with regard to defamation and privacy. The discussions on image rights increasingly revolve around the possible economic or commodity value of the image or likeness associated with a person. This is opposed to questions concerning the propriety of disclosure often addressed in actions for defamation and privacy. Where the image or likeness of a person is legitimately obtained but used for unauthorized commercial exploitation without invading the person's privacy or defaming his or her character, an action in defamation or right of privacy will play a limited role, if any at all.

Furthermore, some sort of protection in the online space can be explored through the provisions of section 22(2) of the Cybercrimes (Prohibition, Prevention, etc) Act 2015 which criminalizes the unauthorized use of a person's own 'electronic signature, password or any other unique identification feature' for fraudulent or dishonest purposes, especially on the Internet. Section 22(3) makes it an offence for any person to fraudulently impersonate another entity or person, living or dead, with the intent to gain advantage for themselves or another person, or cause disadvantage to the entity or person being impersonated or another person. It can be argued that making use of a person's own image or other indicia of personality without the consent of the owner amounts to fraudulent impersonation as it gives the public the impression that the subject matter of the

image is connected or has endorsed the product. This can be detrimental to the person whose image was used such as loss of endorsement opportunity. This law is, however, limited to the online environment and entails criminal prosecution.

4. Recommendations and conclusion

Having a formal framework for protection has the benefit of ensuring clarity and also favouring the enhanced protection of, say, those who routinely engage in the licensing of the use of their own image.

Limitations are inherent to the legal tools currently available. As far as copyright is concerned, Nigerian law should be amended so to include a provision similar to that of UK Copyright law (Copyright, Patents and Designs Act (CPDA)), so that there would be a right to privacy in commissioned photographs and films. Section 85 CDPA provides that: 'A person who, for private and domestic purposes, commissions the taking of a photograph ... has, where copyright subsists in the resulting work, the right not to have copies of the work issued to the public, the work exhibited or shown in public, or the work [communicated to the public]'. In the case of Nigeria, the scope could be broadened so as to protect not only the privacy of persons who commission the taking of pictures or are subjects of photographs but also their right to a commercial exploitation thereof.

The Nigerian trade mark law could also be modified so as to specifically encompass personality merchandising and image rights protection. Therefore, section 34(3) of the Act which prohibits dealing in trademarks 'primarily as a commodity in its own right' should be repealed. The provision has outlived its usefulness. Its removal from the Nigerian Trade Mark Act would make it possible for well-known persons to register their name or any of their other distinctive characteristics for commercial exploitation or protection, irrespective of whether the name or any other mark is at the time of registration connected with any good/groups of goods or used in the course of trade.

In addition to the statutory modifications, Nigerian courts could also be proactive in the interpretation of the existing IP laws and principles generally, but more specifically with regard to passing off suits relating to personality merchandising. Courts could be persuaded by the *Irvine* and *Fenty* cases to expand the scope of passing off to situations where consumers would be led

26 D Aodunaike, 'Personality Merchandising in Nigeria: Prospects and Challenges' (2016) 55 JLP 69, 72.

27 *ibid.*

28 *ibid.*

into believing that certain goods or services are endorsed by or emanate from a celebrity or a well-known person.

In addition to all this, also self-standing image rights protection could be adopted. This could also serve as a

welcome departure from the age-long tradition of reliance on foreign decisions in Nigeria. It would also provide greater certainty in the law and could serve to target specific issues facing the use of another person's image, likeness, voice, etc.