

**ENTERTAINMENT LAW IN NIGERIA: THE NEED TO INCORPORATE  
IMAGE RIGHTS USAGE INTO NIGERIAN LAWS**

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**JULY 2021**

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**A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF  
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REQUIREMENTS FOR THE AWARD OF BACHELOR OF LAWS  
(LL.B) DEGREE OF THE UNIVERSITY OF BENIN, BENIN CITY.**

**JULY 2021**

## **CERTIFICATION**

I, **Aisha IDRIS**, with Matriculation Number LAW1504330, hereby certify that apart from references to other persons' works which have been duly acknowledged, the entire work is a product of my personal research, and this project has neither in whole nor in part been presented for another degree elsewhere.

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## **APPROVAL**

We certify that this project was written and completed by **Aisha IDRIS** with Matriculation number LAW1504330 in partial fulfilment of the requirements for the award of a bachelor of laws (LL.B) degree.

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## **DEDICATION**

In loving memory of my late father, Alhaji Idris Abdulkareem and my late best friend, Sarah Ofure Bello; two of the most important people in my life that left the earth a little too soon. I promised myself I was going to make you two proud. So, this is me taking baby steps.

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## **ABSTRACT**

Entertainment law is the field of law that deals with the legal and business issues in the entertainment industry (film, music, theatre, sports). It also involves the representation of artists and producers, the negotiation of contracts and the protection of individual property rights. Nigeria is home to a host of musicians, actors and sportsmen whose works are widely enjoyed by a diverse audience both locally and internationally. As these entertainers earn, they also pay tax to the Nigeria government. As at 2017, the entertainment industry was contributing N1.35 trillion to the country GDP.

The laws governing entertainment in Nigeria are solely based on intellectual property laws. This is inadequate because intellectual property is merely an aspect of entertainment law. There is therefore a need to have a comprehensive legal framework to regulate the entertainment industry. In addition, there is the specific problem of the absence of image rights usage protection within the existing legal framework in Nigeria. Image rights refer to the control over an image by the personality whose image is portrayed or by the image creator. It is a means employed by business owners to increase sales through the endorsement of popular entertainers. The legal issues arising from the unauthorized production, reproduction and use of these images may be closely related to intellectual property, trademarks, and copyright but it also cuts across other aspects of laws not governed by Nigerian laws, such as an entertainer's right of publicity. These rights need to be protected. Wrong usage of celebrity image rights can be detrimental to the owner's reputation and income. There is no such protection under Nigerian laws. This essay examines the issues arising from the absence of a comprehensive entertainment law framework and image rights usage and proposes the development of a comprehensive framework for entertainment law in Nigeria.

# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.1. Background

When the word "entertainment" is used, what immediately comes to mind is the dictionary definition of the word, which states that 'it is an event, performance or activity designed to entertain others. It is an act which gives its audience pleasure or delight.'<sup>1</sup> The entertainment industry includes the fields of theatre, film, fine art, dance, opera, music, literary publishing, television, radio and even sports.<sup>2</sup>

Entertainment law is the field of law that deals with the legal and business issues in the entertainment industry. It also involves the representation of artists and producers, the negotiation of contracts and the protection of intellectual property rights.<sup>3</sup> Entertainment law involves the application of contract, employment, and intellectual property law principles to the interactions that occur between members of the entertainment industry. Just as it is quite difficult to attempt a definition of the word 'law', the crux of this work is not to attempt an encompassing definition of entertainment law. For the purpose of this essay, entertainment law refers to the field of law that focuses on providing legal services to the entertainment industry and any field that falls under its ambit.

The laws governing entertainment in Nigeria are largely governed by intellectual property laws, viz: the Copyrights Act<sup>4</sup>, the Patents and Designs Act<sup>5</sup> and the Trademark Acts<sup>6</sup>. The Nigerian Copyright Act traces its origin from the first law on copyright enacted by the British Parliament in 1710 which was popularly referred to as the Statute of Anne and otherwise known as "An Act for the Encouragement of Learning, by Vesting the Copies of

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<sup>1</sup> Oxford Languages Online <<https://languages.oup.com/google-dictionary-en/>> accessed 7 February 2021.

<sup>2</sup> US Legal, 'Entertainment Industry Law and Legal definition' <<https://definitions.uslegal.com/e/entertainment-industry/>> accessed 18 January 2021.

<sup>3</sup> Bryan A Garner, *Black's Law Dictionary* (11th edition, Thomas Reuters, 2019).

<sup>4</sup> Cap C28 LFN 2004.

<sup>5</sup> Cap P2 LFN 2004.

<sup>6</sup> Cap T13 LFN 2004.

Printed Books in the Authors or Purchasers of such copies, during the Times therein mentioned."<sup>7</sup> The Act was designed originally to tackle the problem of plagiarism suffered by printers, publishers and booksellers during the 16th century. However, at the end of the 18th century and the beginning of the 19th century<sup>8</sup>, the scope of the Act was broadened to accommodate works outside literature.<sup>9</sup> Consequently the name of the Act was changed to the English Copyright Act.

In 1911, the English Copyright Act became applicable in Nigeria, thus being the first Copyright Act in the country.<sup>10</sup> Nigeria applied the Act until 1970 where it was replaced with the Copyright Act of 1970. This Act was inadequate and could not combat the increasing rate of piracy and copyright infringement.<sup>11</sup> The Act also lacked adequate penal sanctions and remedies to aggrieved parties.<sup>12</sup> These inadequacies gave rise to the Nigerian Copyright Act of 1988 which was amended in 1992, 1999 and finally codified in 2010.

The Nigerian Trademark Act can be traced back to the promulgation of the Trademarks Registration Act of 1875<sup>13</sup>. The current Nigerian Trademark Act was enacted in 1965, five years after the country's independence. The Act was based on the 1938 Trademark Act of the United Kingdom.<sup>14</sup> Patent Law in Nigeria was also influenced by British ordinances on Patent Law which gave rise to the Patent Rights (Limitation) Decree of 1968.<sup>15</sup> The Patent and Designs Act grants an inventor a temporary but exclusive right to the commercial exploitation of their invention.

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<sup>7</sup> The Avalon Project, 'The Statute of Anne', Yale Law School  
<[https://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](https://avalon.law.yale.edu/18th_century/anne_1710.asp)> accessed 7 February 2021.

<sup>8</sup> Ibid.

<sup>9</sup> Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (7th edition, Oxford University Press, 2013)85.

<sup>10</sup> By virtue of Section 25 of the Act.

<sup>11</sup> M J Umaru, Nature, Subsistence and Scope of Copyright in Nigeria. In: J O Asein & E S Nwauche, *A decade of Copyright in Nigeria*. Abuja: Nigerian Copyright Commission p 88-109.

<sup>12</sup> Ibid.

<sup>13</sup> by the British parliament, for Great Britain.

<sup>14</sup> Lara Kayode, 'Trademarks in Nigeria' (Issue 1, The Trademark Lawyer Magazine,2018) 33.

<sup>15</sup> The first domestic legislation on patents in Nigeria.

The common element between these laws is that they seek the protection of the intellectual property rights of creatives and entertainers. However, these laws seem not to include the protection of image rights of entertainers. This has led to the illegal exploitation of celebrity image rights by infringers. Due to the inexistence of laws on image rights, affected celebrities have had to resort to only threats of legal action and out of court settlements. An aspect that we would soon come to see, through the course of this essay as grossly insufficient.

## **1.2. Statement of Research Problem**

The laws governing entertainment law in Nigeria namely, the Copyrights Act, the Patent and Design Act and the Trademarks Act are solely based on intellectual property law. There is a need for a more encompassing framework for entertainment law in Nigeria. Also, there is little awareness about the legal issues arising from image rights usage of celebrities in Nigeria, neither is there any provision in Nigerian laws with regards to image rights. This has led to the illegal exploitation of these rights by infringers, leaving the affected celebrities with no remedy under the law. This essay examines these issues.

## **1.3. Aims and Objectives**

This essay examines entertainment law in Nigeria, the legal framework governing it, the challenges arising therefrom and the need to incorporate image right usage into Nigeria laws.

#### **1.4. Scope of Long Essay**

This essay examines entertainment law in Nigeria, the legal framework governing it, challenges the industry faces, especially image rights usage and measures to improve these challenges.

#### **1.5. Methodology**

The essay employs doctrinal/analytical method. It examines primary and secondary sources relevant to intellectual property law, entertainment law in Nigeria and image rights usage. The primary sources include international conventions, legislation, regulations and case law on intellectual property law, entertainment law and image usage rights. Secondary sources include textbooks, journal articles, and other internet-based materials on intellectual property law, entertainment law and image rights usage.

#### **1.6. Chapter Overview**

Chapter one provides a brief background on entertainment law in Nigeria. It explains the scope, methodology, aims and objective of the long essay. Chapter two examines the sources of entertainment law in Nigeria. It is broadly categorized into general laws/aspects such as film law, sports law, contract law which govern entertainment law in Nigeria and specific legislations such as the Copyrights Act, Trademarks Act, etc that regulate aspects of entertainment law in Nigeria. Chapter three examines image rights and intellectual property in Nigeria. It also examines the challenges facing image rights usage in Nigeria. Chapter four provides a comparison of what is obtainable in other image rights jurisdictions such as the United States of America and South Africa. Chapter five provides recommendations and a conclusion to the long essay.

## **1.7 Conclusion**

This chapter provided a basic introduction to the project topic. A brief introduction to entertainment law and its history with regards to the relevant laws on intellectual property and image rights usage were examined. The aims and objectives, research problem scope and methodology used were also briefly discussed. An overview of the content of the various chapters of this essay was also highlighted.

## **CHAPTER TWO**

### **AN OVERVIEW OF ENTERTAINMENT LAWS IN NIGERIA**

#### **2.1 Introduction**

Every major area of law has a set of rules and regulations that make up its legal framework. In Nigeria, there are no specific entertainment laws, as entertainment law cuts across a wide range of subjects such as contract law, corporate law, torts law, antitrust law, immigration law, securities law, tax law, employment and labour law, and intellectual property law. These related aspects and how they correlate with entertainment law are discussed below. The entertainment industry includes the fields of theatre, film, fine art, dance, opera, music, literary publishing, television, radio, and sports. These areas all have different branches of entertainment law governing them.

These may be broadly categorized as branches or related areas of law and specific legislations on intellectual property law that govern entertainment law in Nigeria. This chapter thus examines these laws regulating the entertainment industry, the functions of entertainment lawyers and the challenges facing the industry.

#### **2.2. Sources of Entertainment Law in Nigeria**

This section of the essay examines broadly the branches of entertainment law in Nigeria which provides a basis for the source of entertainment laws in Nigeria. This would be broadly categorized into general aspects of law and specific legislations that govern the entertainment industry in Nigeria.

### 2.2.1. *General Aspects of Entertainment Law*

#### *i. Film Law*

Film law is the subset of general entertainment law which governs the production of films.<sup>1</sup> A film is a motion picture<sup>2</sup> used to simulate experiences that communicate ideas, stories, perceptions, feelings, beauty or atmosphere through the use of moving images.<sup>3</sup> Film law regulates the whole process of making a movie, which includes option agreements<sup>4</sup> talent agreements<sup>5</sup>, production and post-production. It also regulates intellectual property especially relating to copyright and to a lesser extent, trademarks.

Film lawyers represent production companies, directors, screenwriters documentarians, composers, etc. in contractual affairs relating to the production and release of motion pictures.<sup>6</sup>

#### *ii. Music Law*

Music law is the law that regulates the music industry.<sup>7</sup> Music law governs the activities of musicians, record producers, and those working on behalf of recording companies.<sup>8</sup> It also oversees all the legal intricacies involved in making music, which include recording contracts, copyright issues, payment of royalties, compulsory cover licensing and more.<sup>9</sup> The music industry includes record labels, music publishers, merchandisers, the live events section, and performers/artists. Although it may seem simple, the industry involves a complicated legal network that only a professional can manoeuvre.

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<sup>1</sup> Amy E Mitchell, 'Music Film, Entertainment law' - Austin, Texas (2021) <<https://amyemitchell.com/learn/film-law/>> accessed 20 January 2021.

<sup>2</sup> Also called a movie or motion picture.

<sup>3</sup> Vocabulary Online Dictionary <<https://www.vocabulary.com/dictionary/film>> accessed 8 February 2021.

<sup>4</sup> A contractual agreement pertaining to film rights.

<sup>5</sup> The processes of selecting the cast and crew of a movie.

<sup>6</sup> Mitchell (n 1).

<sup>7</sup> Legal Career Path, 'What is Music Law?' <<https://legalcareerpath.com/music-law/>> accessed Jan 20,2021

<sup>8</sup> Hofstra University, Music Law Resource Guide <<https://healthlaw.hofstra.edu/music-law-resource-guide/>> accessed 20 January 2021.

<sup>9</sup> Ibid.

Music lawyers are specialized attorneys who deal with legal issues surrounding the music industry, such as contract management, copyright claims, trademark disputes, artist representation, etc. It is usually the practice in Nigeria that Nigerian music artists do not employ the services of a music lawyer, at least not on time.<sup>10</sup> It is no wonder why so many artistes fall out with their record labels. If these artistes had employed the services of a lawyer while signing their recording contracts, some of them would not have had to stop producing music completely.<sup>11</sup>

### *iii. Sports Law*

Sports law, refers to the laws, regulations and judicial decisions that govern sports and athletes, it is not a single legal topic, as it cuts across a variety of legal principles, such as contract, torts, agency, constitutional law, labour law, trademark, sex discrimination, criminal law, and tax law.<sup>12</sup> Some of these laws depend on the status of the athlete, and differ according to the sport, and others vary for other reasons.<sup>13</sup>

The job of a sports lawyer is to act as both a lawyer and an agent, representing the legal and financial interest of their clients.<sup>14</sup> A sports lawyer also resolves contract and labour disputes, aids the negotiation of sponsorship deals and ultimately represent clients against criminal charges.<sup>15</sup> This includes lawsuits brought against them for breach of contract, harassment and other issues which may arise.<sup>16</sup> In some cases, a sports lawyer would have to serve as their client's spokesperson to the media, and assist clients with the creation of legal

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<sup>10</sup> Singer Cynthia Morgan had to stop producing music and posting on social media after her fallout with record label, Northside Inc. See Njideka Agbo, 'What's New', (The Guardian Online Newspaper, 31 May 2020) <<https://m.guardian.ng/tag/cynthia-morgan/>> accessed 8 February 2021.

<sup>11</sup> Ibid.

<sup>12</sup> Farlex Inc, *The Free Dictionary*, Sports Law <<https://legal-dictionary.thefreedictionary.com/sports+law>> accessed 21 January 2021.

<sup>13</sup> Ibid.

<sup>14</sup> Clients could be players, coaches, teams or sports clubs.

<sup>15</sup> Chegg Inc, 'Sports Lawyer, Career Match' <<https://www.careermatch.com/job-prep/career-insights/profiles/sports-lawyer>> accessed 21 January 2021.

<sup>16</sup> Ibid.

entities, which could be ventures outside the sports business.<sup>17</sup> When a sports-person's right has been abused or infringed upon, it is also the job of their lawyers to demand for justice through an out of court settlement or instituting legal action against the offending party.<sup>18</sup>

*iv. Contract Law*

A contract is an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties.<sup>19</sup> The principle of the law of contract are applied every day during the creation of entertainment contracts which could be between musicians and record labels, actors and movie production teams, athlete, and athletic clubs, etc.<sup>20</sup>The same principles are applied when there is a breach of an entertainment contract. It is also the guideline with which remedies are awarded to aggrieved parties.

*v. Corporate Law*

Corporate law refers to the laws, rules and regulations that pertain to corporations, including formation, ownership, operation and management.<sup>21</sup> Corporate law, unlike business law handles the big picture concerns of a corporation such as buying decisions, mergers and acquisitions and shareholders rights.<sup>22</sup> The Companies and Allied Matters Act [CAMA]<sup>23</sup> established the Corporate Affairs Commission (CAC), which is the regulatory body saddled with company incorporation, incorporated trustees and registration of business names and

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<sup>17</sup> such as charitable ventures.

<sup>18</sup> In 2002, A FIFA video game was banned from being sold in Germany because the manufacturers, EA Games, did not seek footballer, Oliver Kahn's permission before using his likeness in the said game. See Pinsent Masons, 'Football game banned over player's image rights' (Pinsent Masons, 30 April 2003) <<https://www.pinsentmasons.com/out-law/news/football-game-banned-over-players-image-rights>> accessed 8 February 2021.

<sup>19</sup> Sagay, *Nigerian Law of Contract* (3rd edition, Spectrum Books Limited, 2018) 1.

<sup>20</sup> In 2018, music artist, Davido signed an endorsement contract with Infinix Mobile. See Guardian Online Newspaper, 'What's New', (Guardian Life, 9 May 2018) <<https://m.guardian.ng/life/davido-bags-endorsement-deal-with-infinix/>> accessed 9 February 2021.

<sup>21</sup> Legal Career Path, 'What is Corporate law?' <<https://legalcareerpath.com/what-is-corporate-law/>> accessed 9 February 2021.

<sup>22</sup> Ibid.

<sup>23</sup> Cap C20 LFN 2004.

other activities stipulated by the Act.<sup>24</sup> The business and corporate aspects of the entertainment industry are mostly governed by this law. Corporate entities in the entertainment industry include record labels, football clubs, entertainment companies, etc.

*vi. Antitrust Law*

Antitrust law is also known as competition law.<sup>25</sup> It is the body of law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by companies.<sup>26</sup> These laws are intended to make sure that there is fair competition between businesses, for example by making rules to control monopolies.<sup>27</sup> In Nigeria, competition law is regulated by the Federal Competition and Consumer Protection Act [FCCPA].<sup>28</sup>

*vii. Tax Law*

Tax law refers to a body of rules under which a public authority has a claim on taxpayers, requiring them to transfer to the authority, part of their income or property.<sup>29</sup> The power to impose taxes is generally recognized as a right of governments.<sup>30</sup> In the entertainment industry, entertainers and entertainment companies are taxed based on their income. In Nigeria, there are two major legislative enactments governing taxation which are the Personal

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<sup>24</sup> Airende Uwa, 'The Law and Entertainment in Nigeria, Manifold Solicitors, 2018 <<https://www.manfieldsolicitors.com.2018/08/20/the-law-and-entertainment-in-nigeria/>> accessed 21 January 2021.

<sup>25</sup> The Lawyer Portal, 'What is Competition Law? A Guide' <<https://www.thelawyerportal.com/free-guides/areas-legal-practice/competition-law-guide/>> accessed 9 February 2021.

<sup>26</sup> Ibid.

<sup>27</sup> Cambridge Dictionary Online <<https://dictionary.cambridge.org/dictionary/english/competition-law>> accessed 21 January 2021.

<sup>28</sup> Signed into law by President Muhammadu Buhari in 2019.

<sup>29</sup> Charles E Mclure, *Britannica Tax Law*, <<https://www.britannica.com/topic/taxlaw>> accessed 22 January 2021.

<sup>30</sup> Ibid.

Income Tax Act [PITA] <sup>31</sup>and the Company Income Tax Act [CITA].<sup>32</sup> Evasion of tax is a criminal offence in Nigeria and is punishable under the relevant laws in Nigeria.<sup>33</sup>

*viii. Employment and Labour Law*

Employment and labour law is the law that governs the relationship between employer and employee. In the entertainment industry, employment relationships can be found between football clubs and players, record labels and musicians, actors and entertainment companies, movie producers and entertainment companies and so on. In Nigeria, labour and employment is regulated by the Nigerian Labour Act.<sup>34</sup>

*ix. Intellectual Property Law*

Intellectual property (IP) is a category of property that includes intangible creations of the human intellect.<sup>35</sup> The most popular types of intellectual property are copyrights, patents, trademarks, and trade secrets.<sup>36</sup> In the entertainment industry, it is illegal for one to make use of a work or idea belonging to another without requesting the necessary permissions and acquiring license where necessary. Failure to seek the necessary permissions could result in a lawsuit against the offending party. In Nigeria, intellectual property is governed by the Copyright Act, the Patent and Design Act and Trademarks Act.

***2.2.2. Specific Legislations on Entertainment Law***

These legislations which govern intellectual property law in Nigeria provide a basis for entertainment laws in Nigeria. The specific legislations include-

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<sup>31</sup> Cap P8 LFN 2004.

<sup>32</sup> Cap C21 LFN 2004 (as amended by the Company Income Tax (Amendment) Act, 2007).

<sup>33</sup> See Section 40 of the FIRS Act of 2007.

<sup>34</sup> Cap L1 LFN 2004.

<sup>35</sup> Oxford Dictionary of Law (6th edition, Oxford University Press, 2006) 280.

<sup>36</sup> Ibid.

1. The Copyrights Act<sup>37</sup>
2. The Trademarks Act<sup>38</sup>
3. The Patents and Designs Act<sup>39</sup>

*i. The Copyrights Act*

Copyright in an intellectual work is the exclusive right of the author of the original work to control or enable the doing of a setting specifically stated out in respect of the whole or a substantial part of the work; either in its original form or any other form recognizably derived from the original form but subject to certain statutory exceptions.<sup>40</sup> Copyright serves as an important aspect of entertainment law as it protects owners of entertainment works ranging from movie scripts, cinematography films, musical works, sound recordings and broadcasts from copyright infringement and piracy.<sup>41</sup>

Copyright law strives to balance two competing interests; the interest of authors in protecting their works from unauthorised copying and the interests of the public in having the greatest possible access to works of authorship.<sup>42</sup> Due to the prevalence of copyright infringement in the entertainment industry, it is not uncommon to find warnings or notices specifically put on entertainment works to ensure that the owners or authors of these works reap the fruit of their labour and maximize profits from their creativity. Piracy and copyright infringement are hindrances to this objective hence the Nigerian Copyright Act was enacted to curtail them.

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<sup>37</sup> Cap C28 LFN 2004.

<sup>38</sup> Cap T13 LFN 2004.

<sup>39</sup> Cap P2 LFN 2004.

<sup>40</sup> This definition was part of the judgement of the English case of *University of London Press v University Tutorial Press* (1916) 2 Ch 601.

<sup>41</sup> See Section 1(1)(a) - (f) of the Copyright Act.

<sup>42</sup> Deborah E Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents and Trade Secrets* (4th edition, Delmar, Cengage Learning, 2013) 213.

The existing Copyright Act is that of 1988<sup>43</sup> which has been amended twice, firstly in 1992 and secondly in 1999.<sup>44</sup>The coincidence of the oil boom and the end of the Nigerian Civil war created an upturn in the Nigerian entertainment industry.<sup>45</sup> With lots of money in circulation and people needing to get back their lives, people turned to entertainment because of the comfort it offered which led to the further development of the entertainment sector.<sup>46</sup> Soon enough, Nigerian artists and producers began to attract popularity and international recognition.<sup>47</sup>Amid all these development in the entertainment industry was a rising concern on the high level of piracy.

Under the extant Act, there are six categories of works eligible for copyright protection. These are literary works, artistic works, cinematography films, sound recording, films and broadcasts.<sup>48</sup> The first three categories of works form the core of copyright while the last three are by-products of the first three. A literary work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character and it must be fixed in a definite medium directly perceivable or perceivable with the aid of any device or machine.<sup>49</sup>

Under the Act, if the author of a work is a citizen or is domiciled in Nigeria or an organization/company incorporated in Nigeria, copyright would be conferred on the work. The second channel through which copyright is conferred is dependent on whether the work

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<sup>43</sup> Which was passed by the then military government as the Copyright Decree No. 47 of 1988.

<sup>44</sup> Tony Okoroji, *Copyright Neighbouring Rights & The New Millionaire (The Twists and Turns in Nigeria) (Tops Limited 2008)* 4.

<sup>45</sup> Ola Olukunle, 'Evolution and Future Trends of Copyright in Nigeria' <<https://ssrn.com/abstract=2619040>> accessed 7 April 2021.

<sup>46</sup> Ibid.

<sup>47</sup> A very good example would be the international recognition of Fela Anikulapo Ransome Kuti popularly known as Fela in the genre of Afro Beats from the 1970s till date. See Peter Culshaw, 'Fela Kuti: Africa's Bob Marley – or an African Handel?' (BBC Music, 18 August 2014) <<https://www.bbc.com/culture/article/20140818-fela-kuti-africas-bob-marley>> accessed 8 April 2021.

<sup>48</sup> See Section 1(1) (a) - (f) Copyright Act, Cap C20 LFN 2004.

<sup>49</sup> Ibid Section 1(2) (a) and (b).

was first published or released in Nigeria.<sup>50</sup> Also, when a work is made under the direction of the government, a state or an international body, copyright can be conferred on it.<sup>51</sup> The last channel through which copyright can be conferred is by reference to international organizations to which Nigeria is a party or signatory.<sup>52</sup>

A copyright owner has exclusive rights over their works.<sup>53</sup> This right enables the author to control the doing of certain actions which cannot be carried out without his consent or authorization. Carrying out these actions on such works without the necessary consent or authorization amounts to copyright infringement. Copyright infringement is governed by section 14 of the Act and is remediable by both civil and criminal litigation. A copyright owner whose rights have been infringed upon by any of the stipulations in Section 15 of the Act can enforce such rights against the offender in both civil and criminal litigation. These include damages, injunction and conversion<sup>54</sup> in a civil litigation and conviction or fine or both in a criminal action.<sup>55</sup> The fact that a criminal action has been instituted does not deprive the copyright owner of his right to institute a civil action against the same infringer.

With regards to image rights protection, the owner of a photograph may rely on the provisions of the Act to obtain copyright for that image. However, this protection seems to only be available to the photographer or creator of the image, rather than the person whose image is portrayed.<sup>56</sup> This will be substantiated upon in the next chapter.

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<sup>50</sup> Ibid Section 3.

<sup>51</sup> Ibid Section 4.

<sup>52</sup> Ibid Section 5.

<sup>53</sup> Ibid Section 11, especially 11(2).

<sup>54</sup> Ibid Section 17(2).

<sup>55</sup> Ibid Section 20.

<sup>56</sup> Davidson Oтуру, 'Nigeria: Protection of Image Rights(Part 1)', (Mondaq, October 2019) <<https://www.mondaq.com/nigeria/intellectual-property/858520/protection-of-image-rights-part-1>> accessed 19 April 2021.

ii. *The Trademarks Act*

This is a diverse aspect of intellectual property law which encompasses several areas of law like passing off and character merchandising.<sup>57</sup> The main function of a trademark is to enable consumers to identify a product (whether a good or a service) of a particular company to distinguish it from other identical or similar products provided by competitors.<sup>58</sup>

Common instances of trademarks in the entertainment industry include entertainment company names, record label names, and pseudonyms. In recent times some entertainers have even had to trademark their legal names.<sup>59</sup> The current Nigerian Trademark Act was promulgated in 1965. The Act provides for the protection of all registered marks without prejudice to the unregistered rights under the common law of passing off.<sup>60</sup> The administration of trademarks is vested in the Registrar of trademarks acting under the supervision of the Ministry of Trade and Investments.<sup>61</sup> The Act provides for the register of trademarks which is to be kept under the control and management of the Registrar.<sup>62</sup> This register shall contain the records of all registered trademarks with the names and addresses of their proprietors.<sup>63</sup>

Under the Act a proprietor of a trademark is upon registration granted exclusive ownership of a trademark.<sup>64</sup> It should however be noted that actions cannot be made under the act for the infringement of unregistered trademarks.<sup>65</sup> Upon registration, a registered trademark shall be valid for a period of seven years but may be renewed for a subsequent

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<sup>57</sup> Bairnbridge I David, *Intellectual Property*, (6th edition, Pearson Education Limited,2007) 2.

<sup>58</sup> Ibid.

<sup>59</sup> Celebrities like Beyonce and Rihanna have their legal names registered as trademarks. See New York Trademark Lawyer, 'Celebrity Branding- Famous Names As Trademarks' <<https://www.google.com/amp/s/www.ny-trademark-lawyer.com/amp/celebrity-branding-famous-names-as-trademarks.html>> accessed 13 April 2021.

<sup>60</sup> Section 3, Trademarks Act Cap T13 LFN 2004

<sup>61</sup> Lara Kayode, 'Trademarks in Nigeria', (Issue 1, The Trademark Lawyer, 2018)33.

<sup>62</sup> Section 2, Trademarks Act.

<sup>63</sup> Ibid Section 2(2).

<sup>64</sup> Ibid Section 5(1).

<sup>65</sup> Ibid Section 3.

period of 14 years from time to time.<sup>66</sup> The Act does not limit or restrict the number of times a trademark can be renewed. The Act also provides that a registered trademark can be assignable and transmissible in respect of either all the goods of which it is registered or some of those goods.<sup>67</sup> That is to say that a proprietor can transfer ownership of a trademark to another. Other important provisions of the Act include the grounds for the removal of a trademark by the Registrar.<sup>68</sup> With regards to the use of trademarks for image rights protection, where a person's image is registered as a device at the Nigerian Trademarks Office, an unauthorised use of that device would be regarded as an infringement under the Nigerian Trade Marks Act.<sup>69</sup> This will be expanded on in the next chapter.

### *iii. The Patents and Designs Act*

A patent is a government authority or license conferring an exclusive right or title for a set period especially the sole right to exclude others from making using or selling an invention in the country. It is obtained without permission or concerns during the lifespan of the patent.<sup>70</sup> It is a right granted under the law to protect an invention or an improvement on a prior invention.<sup>71</sup> The origin of patents can be traced to confirming a form of monopoly on investors for the result of an intellectual discovery as an incentive to innovation or research.<sup>72</sup>

The entertainment industry is particularly concerned with the issue of patents because the most innovative novelists and script writers often come up with imaginations that eventually inspire real inventions. There are certain criteria to be fulfilled before an invention

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<sup>66</sup> Ibid Section 23(1).

<sup>67</sup> Ibid Section 26.

<sup>68</sup> Ibid Sections 9(2), 23(3) and 31.

<sup>69</sup> Ayokunle Adetula, '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 13 April 2021.

<sup>70</sup> Oxford Languages Online Dictionary <<https://languages.oup.com/google-dictionary-en/>> accessed 13 April 2021.

<sup>71</sup> Job O Odion and Nelson E O Ogba, *Essays on Intellectual Property Law: Copyright Trademarks Patents and Industrial Designs* (Ambik Press 2010) 94.

<sup>72</sup> Ibid.

is said to be patentable.<sup>73</sup> These requirements are: novelty, industrial application and exclusion from patentability. These requirements must be fulfilled in an action for patent infringement or before granting a patent protection for an invention.<sup>74</sup> For novelty to exist in an invention, the invention must be new and must have been an inventive step that is not obvious to someone with knowledge and experience in the subject.<sup>75</sup> In addition the invention must not have been known, used or made public.<sup>76</sup> The second criterion is that of industrial application and an invention cannot be patentable if it is not capable of being made or used in some kind of industry.<sup>77</sup>

The right to a patent in respect of an invention is vested in the statutory inventor, that is, the person who first files for a patent application in respect of the said invention.<sup>78</sup> This statutory inventor may not be the true inventor and in cases where he is not the true inventor is entitled to be named as such in the patent.<sup>79</sup> All applications are to be made to the registrar and all requirements needed for application are encapsulated in section 3 of the Act. The registrar is to examine these applications and subsequently grant or reject the application in accordance with the provisions of section 4. Upon successful registration of a patent, the patent holder has the right to preclude others from using the registered invention without prior consent. Should the registered patents be used by third parties without the holders consent, the holder has the right to bring legal action against such persons.<sup>80</sup> In appropriate circumstances the court may grant an injunction restraining the infringer from continuing the

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<sup>73</sup> Templars IP Newsletter, 'Patentability under the Nigerian Patents and Designs Act (PDA): An Introductory Analysis <<https://www.templars-law.com/wp-content/uploads/2015/05/Patentability-Under-the-Nigerian-Patent-Act.pdf>> accessed 13 April 2021.

<sup>74</sup> Ibid.

<sup>75</sup> Section 1(2) PDA, Cap P2 LFN 2004.

<sup>76</sup> Ibid Section 1(3).

<sup>77</sup> Ibid Section 1 (2)(c).

<sup>78</sup> Ibid Section 2(1).

<sup>79</sup> Ibid Section 2 (2).

<sup>80</sup> Isibor, 'Entertainment Law in Nigeria: A Torpid Step in the Right Direction', Academia Education 2019 <[https://www.academia.edu/40756061/ENTERTAINMENT\\_LAW\\_IN\\_NIGERIA\\_A\\_TORPID\\_STEP\\_IN\\_TH\\_E\\_RIGHT\\_DIRECTION\\_BY\\_Kelvin\\_Nnamdi\\_ISIBOR](https://www.academia.edu/40756061/ENTERTAINMENT_LAW_IN_NIGERIA_A_TORPID_STEP_IN_TH_E_RIGHT_DIRECTION_BY_Kelvin_Nnamdi_ISIBOR)> accessed 13 April 2021.

use of the invention and to make a claim for damages.<sup>81</sup> Patent law is of no use to the protection of image rights although it is quite important to the entertainment industry.

### **2.3. Functions of Entertainment Lawyers in Nigeria**

The Nigerian Film Industry (Nollywood) is globally recognized as the second largest film producer in the world,<sup>82</sup> second to Bollywood and more than Hollywood.<sup>83</sup> The industry is a significant part of the entertainment sector which contributed NGN239 billion to Nigeria's Gross Domestic Product (GDP) in 2016.<sup>84</sup> In the same vein, the Nigerian music industry has been making waves internationally as Nigerian songs are listened to almost everywhere in the world today.<sup>85</sup> Nigerian artistes are topping international charts and bagging international awards. This industry generated a revenue of 26 million dollars in 2014 which grew to 34 million U.S dollars in 2018. By 2023, the revenue is expected to amount to 44 million U.S dollars.<sup>86</sup> Between the first quarter of 2018 and that of 2019, the Arts, Entertainment and Recreational<sup>87</sup> sector's contribution to the country's GDP grew from 0.3% to 7.21 %.<sup>88</sup>

From these statistics, it is quite clear that the growth of this industry will be very favourable to the Nigerian Economy. This growth, however, has been impeded by factors which will be discussed in the next chapter of this essay. The industry, because of its

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<sup>81</sup> Ibid.

<sup>82</sup> Rebecca Moudio, 'Nigeria's Film Industry: a Potential Goldmine?', United Nations Africa Renewal Magazine 2013 <<https://www.un.org/africarenewal/magazine/may-2013/nigeria's-film-industry-potential-gold-mine>> accessed 9 February 2021.

<sup>83</sup> In terms of number of movies produced and not revenue.

<sup>84</sup> PwC Global Entertainment & Media Outlook <<https://www.pwc.com/ng/en/publications/spotlight-the-nigerian-film-industry.html>> accessed 22 January 2021.

<sup>85</sup> Nigerian artiste, Burna Boy's song 'Destiny' made it to the United States 46th Presidential inauguration playlist <<https://www.google.com/amp/s/amp.cnn.com/cnn/2021/01/20/africa/nigeria-burna-boy-biden-inauguration-intl/index.html>> accessed 9 February 2021.

<sup>86</sup> Statista, 'Music, industry revenue In Nigeria 2014 - 2018 <<https://www.statista.com/statistics/939157/nigeria-music-industry-revenue/>> accessed 22 January 2021.

<sup>87</sup> This is what the Nigerian Entertainment industry is called.

<sup>88</sup> Cited in National Bureau of Statistics, GDP Report, November 2019 p 93.

contractual and financial obligations, requires the aid of lawyers to function properly. Some of the functions of entertainment lawyers are<sup>89</sup>:

- i. Entertainment lawyers protect the creative rights of an artiste at the infancy stage of his/her career.
- ii. Drafting and reviewing of contracts to accurately reflect the expectations of the parties and complying with the nuances of the law.
- iii. They negotiate on behalf of the entertainer and offer legal advice to them to avoid legal problems.
- iv. At the infancy and early stages of an entertainer's career, a lawyer can teach the artistes how business deals are done and how to identify pitfalls in business deals.
- v. They act as counsels for established entertainers representing them during payment of tax, buying of properties and advising in cases of copyright infringement.
- vi. Entertainment lawyers help to resolve contract disputes through mediation, conciliation or arbitration.<sup>90</sup>
- vii. Media lawyers also advise individuals both in relation to protecting and exploiting their image and reaching a remedy, with appropriate compensation, where there has been an infringement of image rights by another party.<sup>91</sup>

## **2.4 Challenges Faced by the Entertainment Industry in Nigeria**

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<sup>89</sup> Peters Ifeoma, 'The Roles of Legal Practitioners in the Entertainment Industry', DNL Legal and Style Blog, 2017.

<sup>90</sup> Ibid.

<sup>91</sup> Farley Solicitors, 'Legal Advice on Image Rights', <<https://www.farleys.com/solicitors-for-you/media-and-entertainment-law/image-rights-solicitors/>> accessed 19 May 2021.

Nigeria is renowned for its creative talents. The country is home to several musicians, actors and sportsmen whose works are widely enjoyed by diverse audiences.<sup>92</sup> The entertainment industry is however confronted by several challenges. There is a specific problem of lack of comprehensive legislation regulating entertainment law in Nigeria. All works of entertainment result in intellectual property. This is the irrefutable link between entertainment and intellectual property law. However similar they may be, they are not the same. While intellectual property law deals with the rules for securing and enforcing legal rights to inventions, designs, and artistic works, entertainment law is the entirety of legal services devoted to the entertainment industry. Although entertainment law involves a great deal of intellectual property law, there is more.<sup>93</sup> Over the years lawyers have skilfully resorted to intellectual property law frameworks to cater for the legal obligations of their clients in the industry. This dependence on intellectual property law frameworks has created a misconception on the needlessness of specialized statutes for entertainment law.<sup>94</sup>

The second most prevalent issue in the entertainment industry in Nigeria is piracy.<sup>95</sup> Despite the existence of the laws mentioned in the preceding part of this chapter, piracy is still on the rise. The internet and technological gadgets have proven to be a haven for unauthorized reproduction and distribution of entertainment materials at no cost or fees not accounted to the owner(s) of such material.<sup>96</sup> From the internet sites where movies, songs and literary works are made available for free to the popular Alaba international market where pirated copies of original works are sold, the continued practice of piracy has occasioned

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<sup>92</sup> Ugwuoke T Valentine, 'An Overview of Entertainment Law in Nigeria: Prospects and Challenges', Academia Education 2018, <[https://www.academia.edu/36079977/AN\\_OVERVIEW\\_OF\\_ENTERTAINMENT\\_LAW\\_IN\\_NIGERIA\\_PROSPECTS\\_AND\\_CHALLENGES?auto=download&email\\_work\\_card=download-paper](https://www.academia.edu/36079977/AN_OVERVIEW_OF_ENTERTAINMENT_LAW_IN_NIGERIA_PROSPECTS_AND_CHALLENGES?auto=download&email_work_card=download-paper)> accessed 13 April 2021.

<sup>93</sup> These aspects of entertainment law were discussed under the general aspects of entertainment law in this chapter.

<sup>94</sup> Isibor (*n* 80).

<sup>95</sup> Airende (*n* 24).

<sup>96</sup> University of Delaware Intellectual Property Blogpost 2015 <<https://sites.udel.edu/cisc356/2015/04/12/piracy-helping-or-harming-the-world/>> accessed 17 April 2021.

great financial setback to the industry.<sup>97</sup> In the end, the creator of the work makes little or no profit compared to the initial amount invested in the project while the pirates make money selling these pirated copies. This development has affected Nigeria's foreign earnings in this emerging industry.<sup>98</sup> The Nigerian movie industry<sup>99</sup>, does not generate that much measurable revenue for Nigerian Entertainment and Media due to issues of piracy hampering official cinema owners and film vendors.<sup>100</sup> Despite the wide acknowledgement of Nollywood as one of the leading film producing industry, it is not listed as commanding any market share according to United Nations Conference on Trade and Development (UNCTAD) Statistics.<sup>101</sup> One factor that contributes to this is the failure of owners of entertainment works to register their works - an act which attracts grave consequences. For example, section 3 of the Trademarks Act provides for the effect of non- registration of a trademark. It presupposes that an unregistered trademark owner cannot institute a proceeding to prevent or recover damages on infringement save for passing off.

Thirdly, there appears to be issues arising from contracts signed by parties in the industry. Most often than not, this happens because the actors, actresses or artistes sign these contracts at a point where they are hungry for fame, which makes them vulnerable to the managers who seem to hold their future.<sup>102</sup> The agreements are usually drafted to exploit these upcoming artists/entertainers in the entertainment industry. This issue stems from the misconception that hiring a lawyer at the early stage of their careers is too expensive and unnecessary. They however fail to realize that the consequence of entering contracts that they

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<sup>97</sup> Curbing Piracy in Nigeria: Prospects and Challenges, <<https://nairaproject.com/projects/4914-curbing-piracy-in-nigerian-entertainment-industry-prospects-and-challenges.html>> accessed 17 April 2021.

<sup>98</sup> Ibid.

<sup>99</sup> Which is the second largest movie industry in the world in terms of movie production.

<sup>100</sup> Ibid.

<sup>101</sup> 32 UNCTAD, Creative Economy: A Feasible Development Option, Creative Economy Report 2010, UNCTAD/DITC/TAB/2010/3, available at <[http://www.intracen.org/uploadedFiles/intracenorg/Content/About\\_ITC/Where\\_are\\_we\\_working/Multicountry\\_programmes/CARIFORUM/ditctab20103\\_en.pdf](http://www.intracen.org/uploadedFiles/intracenorg/Content/About_ITC/Where_are_we_working/Multicountry_programmes/CARIFORUM/ditctab20103_en.pdf)> accessed 13 April 2021.

<sup>102</sup> Ugwuoke (n 92).

do not completely understand outweighs the cost of hiring a lawyer.<sup>103</sup> This is largely because once the contract is signed, parties are bound to the terms of the contract which could transcend to indirect slavery for the number of years the contract subsists.<sup>104</sup>

Another challenge would be the lack of access to financing of the entertainment industry. As the entertainment industry evolves, the industry is faced with the challenge of finances to execute its projects.<sup>105</sup> With the banks having limited knowledge of the workings in the industry, getting loans from them is difficult. Most entertainment companies merely rely on their savings and funds from the wealthy for production. However, the initiative of the Bank of Industry (BOI) to fund the industry through its loans called 'Nollyfunds' is commendable.<sup>106</sup>

The inadequacies and lack of enforcement of these laws governing intellectual property and entertainment law in Nigeria also affects the activities of the industry.<sup>107</sup> This is one of the reasons piracy is still at its peak in the country. The punishments for criminal infringement discussed above still do not serve as enough deterrents for the commission of the offence. A major reason for the stagnancy of entertainment law is failure in execution of the already existing laws. Since they are responsible for criminal prosecution, the executive arm of government is not blameless in this regard.<sup>108</sup> The various executive agencies in charge of enforcing these laws are besought with some structural and financial challenges. Corrupt practices by various officials, such as the taking of bribes also constitute challenges.<sup>109</sup>

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<sup>103</sup> Ibid.

<sup>104</sup> A typical example of such slavery contracts would be the one entered into between JoJo and Black ground record label where the label owned her voice and even physical appearance. This made the promising star disappear for over ten years while in legal battle with the label. See Danielle Long 'What Happened To JoJo? Singer Drops Bombshells About Life As A Teenage Pop Star' (IBT, 26 February 2020) <<https://www.ibtimes.com/what-happened-jojo-singer-drops-bombshells-about-life-teenage-pop-star-2929568>> accessed 17 April 2021.

<sup>105</sup> Ugwuoke (*n* 92)

<sup>106</sup> See Bank of Industry website available at <<https://www.boi.ng/boinollyfund/>> accessed 17 April 2021.

<sup>107</sup> Isibor (*n* 80)

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

Executive agencies such as the Nigerian Copyright Commission and the Nigerian police force are implored to prosecute more cases of copyright, trademark and patent infringements.<sup>110</sup>Such dedication in enforcing the criminal sanctions provided for by the various regulatory frameworks, will no doubt deter further infringements and reduce piracy.<sup>111</sup>

## **2.5 Conclusion**

This chapter examines a specific research problem of this essay which is the absence of specific and comprehensive legislation regulating entertainment law in Nigeria. Hence, professionals in the field have had to rely on broad range of laws from other areas of law that relate to aspects of entertainment, such as contract law, corporate law, torts law, antitrust law, immigration law, securities law, tax law, employment and labour law and intellectual property. The most important of these laws are the laws on intellectual property (the Copyrights Act, the Patents and Designs Act and the Trademarks Act) which were briefly discussed, laying a foundation for subsequent discussions in the next chapter which would solely be on image rights.

The inadequacies of these laws both in relation to the entertainment industry and image rights usage were examined briefly and would be substantiated upon in the succeeding chapter. The functions of entertainment lawyers were also itemized alongside the challenges surrounding the industry, which include piracy, inadequacies of law enforcement and lack of access to finance.

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

## CHAPTER THREE

### IMAGE RIGHTS AND INTELLECTUAL PROPERTY IN NIGERIA

#### 3.1 Introduction

Image rights are beginning to gain prominence with numerous instances of their exploitations and infringements. Laws which recognise image rights enables the individual to protect, exploit and sue for the infringement on those rights. In the previous chapter, the laws governing entertainment law in Nigeria were examined. There is a specific problem of absence of image rights protection within the existing legal framework in Nigeria. This chapter seeks to examine image rights protections to ascertain the context in which they are protected within the existing laws in Nigeria.

#### 3.2 Definition and Scope of Image Rights

An image is a visual representation of something.<sup>1</sup> It is the physical likeness or representation of a person, animal or thing, photographed, painted, sculpted or otherwise made visible.<sup>2</sup> Image rights refers to the control over an image by the personality whose image is portrayed or by the image creator.<sup>3</sup> The term generally refers to a loose bundle of enforceable rights a human being has over aspects of his personality. Protection of image rights is divided between protection based on privacy and protection based on unpermitted commercialization or appropriation of an individual's personality.<sup>4</sup> The former, which is more commonly referred to as the 'right to privacy', is provided for under the Constitution of the Federal Republic of Nigeria, 1999 and will be discussed in subsequent paragraphs of this chapter. The

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<sup>1</sup> Tech Target, 'Definition of Image', <<https://whatis.techtarget.com/definition/image>> accessed 19 April 2021.

<sup>2</sup> Dictionary.com, 'Definition of Image', <<https://www.dictionary.com/browse/image>> accessed 19 April 2021.

<sup>3</sup> Ayokunle Adetula, '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 19 April 2021.

<sup>4</sup> Personality in this context means name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, reputation etc. See Prince Alex Iwu, 'The Legal Regime for the Enforcement of Image Rights - A Nigerian Question', (Academia Education) <[https://www.academia.edu/12605016/THE\\_LEGAL\\_REGIME\\_FOR\\_ENFORCEMENT\\_OF\\_IMAGE\\_RIGHTS\\_A\\_NIGERIAN\\_QUESTION?email\\_work\\_card=view-paper](https://www.academia.edu/12605016/THE_LEGAL_REGIME_FOR_ENFORCEMENT_OF_IMAGE_RIGHTS_A_NIGERIAN_QUESTION?email_work_card=view-paper)> accessed 21 April 2021.

latter, which is the focus of this essay, is more commonly referred to as the 'right of publicity' and is merely gaining prominence in Nigeria.<sup>5</sup>

In recent times, the terms 'image rights' and 'right to publicity' have been used interchangeably and have come to mean the same thing. The right to publicity can be traced to the United States and some European countries.<sup>6</sup> Simply put, if a picture of X is taken, X's publicity rights refer to X's control over that image in the public domain. The norm is that the image may not be used for any purpose, especially for the gain of a third party, without the consent of the image owner or creator.<sup>7</sup> Anybody can have publicity or image rights, celebrity or non-celebrity, which in short, is the right to own, protect and commercially exploit one's identity.<sup>8</sup> However those who need it the most are those who have attained a marketable reputation, such as celebrities in the entertainment industry.<sup>9</sup> It is interesting to note that it is mostly celebrities who have instituted and won image rights cases. This is largely because the ability of a claimant to demonstrate that they enjoy goodwill or considerable influence, are factors in actions for image rights.<sup>10</sup> Therefore, in most cases, it is celebrities that can establish these factors when they seek to enforce their image rights.<sup>11</sup>

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<sup>5</sup> The term "right of publicity" was coined by Judge Jerome Frank in 1953 in the American case of *Haelan Laboratories, Inc. v. Topps Chewing Gum* available at <https://www.leagle.com/decision/citingcases/19531068202f2d8661807> accessed 19 April 2021.

<sup>6</sup> Ferrari Luca & Riberti Stella, 'Comparing How Image Rights Laws Apply To Sport In The US, UK And Europe' (LawinSport, December 2015) <<https://www.lawinsport.com/topics/item/comparing-how-image-rights-laws-apply-to-sport-in-the-us-uk-and-europe>> accessed 19 April 2021.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> The word 'celebrity' in the context used in this essay would include sportsmen and women, actors and actresses, singers, producers, public figures and even social media influencers.

<sup>10</sup> Davidson Oтуру, 'Nigeria: Protection of Image Rights(Part 1)', (Mondaq, October 2019) <<https://www.mondaq.com/nigeria/intellectual-property/858520/protection-of-image-rights-part-1>> accessed 19 April 2021.

<sup>11</sup> Ibid.

### 3.3 Commercialization of Image Rights

It is common practice for celebrities and entertainers to have two streams of income, namely performance income and “other” income.<sup>12</sup> Monies from the commercialization of image rights as well as ad hoc payments for personal appearances fall into the “other” category.<sup>13</sup> For the purpose of this essay, focus will be made solely on the commercialization of image rights and the different ways it can be done.

Commercialization refers to the process of managing or running something, principally for financial gain.<sup>14</sup> Commercialization of image rights therefore refers to the management of the publicity rights of an individual for the purpose of making a profit. The essence of commercialization of publicity or image rights is to help propel sales or visibility for a product or service. The association of a celebrity with a product or service is intended to suggest a link between them, in the hope of making the product or service desirable.<sup>15</sup> The concept has always been in existence but has become even a more lucrative business venture for celebrities. All one needs to have to be able to commercialize one's image rights is goodwill and the right amount of influence, depending on the product or service to be advertised.<sup>16</sup>

There are different ways a celebrity's image rights can be utilized, the most popular of which would be discussed below.

1. Sponsorships
2. Endorsement deals
3. Merchandising

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<sup>12</sup> David Evans 'Can You Protect Your Image Like Your Brand?' (WIPO Magazine, May 2015) <[https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0008.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0008.html)> accessed 27 April 2021.

<sup>13</sup> Ibid.

<sup>14</sup> Oxford Languages Online <<https://languages.oup.com>> accessed 27 April 2021.

<sup>15</sup> Lee J, Thorson E, 'The Impact of Celebrity-Product Incongruence on the Effectiveness of Product Endorsements' (Journal of Advertising Research, 2008)48.

<sup>16</sup> Ibid.

#### 4. Creation of an eponymous brand<sup>17</sup>

##### **3.3.1. Sponsorship**

Sponsorship refers to when a corporate brand pays a celebrity or provides the celebrity with products in exchange for being granted certain marketing rights to promote the brand's image generally.<sup>18</sup> It is a marketing tool used by businesses where a celebrity is paid for all the costs involved in a project in return for some recognition.<sup>19</sup> Sponsorship deals are quite common amongst YouTube and Instagram influencers. Sponsorship aims to be associated with events and projects that are linked to their target audience.<sup>20</sup> An example of a sponsorship deal can be when a sportswear brand pays a popular athlete to wear their products to increase their visibility to their target audience, which in this case would be sport lovers and enthusiasts.

##### **3.3.2. Endorsement Deals**

Endorsement deals are a form of advertising that uses famous personalities or celebrities who command a high degree of recognition, trust, respect, or awareness amongst people.<sup>21</sup> An endorsement arrangement goes one step further than a sponsorship. It involves the personal recommendation by the celebrity of products made by the sponsoring brand, or at least a close association between the celebrity and those products.<sup>22</sup> Such advertising usually involves the celebrities lending their names or images to promote a product or service and it has proven to be more effective than ordinary advertising because of the ability for people to

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<sup>17</sup> Steve Austin Nwabueze, 'The Right to Use the Images of Athletes for Commercial Purposes- Gold mine or Undermined?', (May 23 2020) <<https://www.mondaq.com/nigeria/contracts-and-commercial-law/939396/the-right-to-use-images-of-athletes-for-commercial-purposes-gold-mine-or-undermined>> accessed 30 April 2021.

<sup>18</sup> Ibid.

<sup>19</sup> Daniel Paronetto, 'What is the Difference Between Sponsorship and Endorsement Deals?' (Quora, May 2015) <<https://www.quora.com/What-is-the-difference-between-sponsorship-and-endorsement>> accessed 30 April 2021.

<sup>20</sup> Ibid.

<sup>21</sup> The Economic Times Magazine, 'Definition other Endorsements'

<<https://www.google.com/amp/s/m.economictimes.com/definition/endorsements/amp>> accessed 30 April 2021.

<sup>22</sup> Ibid.

connect with the celebrity whose image is being used.<sup>23</sup> For instance, the mobile phone company, Tecno Nigeria, signed an endorsement deal with popular singer, Wizkid.<sup>24</sup> The singer is employed by the company and is seen in advertising videos, brandishing a Tecno phone and recommending same to viewers. Endorsement deals are usually paid long-term contracts between the celebrity and the marketers where the celebrity is usually tagged their 'brand ambassador'.<sup>25</sup> However it is not uncommon to find non-profit organizations making use of celebrities' influence to reach a wider audience, especially when it comes to fundraising.<sup>26</sup>

### ***3.3.3. Merchandising***

Merchandising arrangements operate by monetizing the celebrity's own image rights and status, by applying it to the celebrity's 'personal' range of products.<sup>27</sup> Generally merchandising requires considerable investment of resources into protecting and growing the celebrity's own image and 'brand', including investment in a trademark portfolio.<sup>28</sup> While endorsement is about the product, with the celebrity used as a marketing tool, merchandising is more about the celebrity behind the image, and the sale of a range of products under that celebrity's name and image.

### ***3.3.4. Creation of an Eponymous Brand***

Less popular, but important to this discussion is the creation of an eponymous brand. This is the acquisition of image rights outright and it is at the more difficult end of

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<sup>23</sup> Nwabueze (*n* 17).

<sup>24</sup> Olabimpe O, 'Wizkid Bags The Biggest Ever Mobile Endorsement As He Signs With Tecno Mobile' <<https://tooxclusive.com/wizkid-bags-the-biggest-ever-mobile-endorsement-as-he-signs-with-tecno-mobile/>> accessed 1 May 2021.

<sup>25</sup> Paronetto, (*n* 19).

<sup>26</sup> Dominguez R, Herrero A.; Salmones M, 'Communication using celebrities in the non-profit sector: determinants of its effectiveness', (*International Journal of Advertising*, 2013) 32.

<sup>27</sup> Nwabueze (*n* 17).

<sup>28</sup> *Ibid.*

commercialization of image rights because sponsorship, endorsements and merchandising are more straightforward.<sup>29</sup> When an eponymous brand is created, difficult conceptual issues arise. There are questions as to whether an individual's name or image can be bought, and whether an individual's image can ever be truly separated from that person. Under an assignment, rights are transferred so that they are owned by the buyer, and therefore they are no longer owned by the seller. This cannot be the same under acquisition of image rights outright because the said celebrity would have to make use of their name.<sup>30</sup> Examples of eponymous brands are mostly designer brands like Hugo Boss, Giorgio Armani, Calvin Klein, etc.

When commercializing one's image rights, personalities are advised to consult a lawyer so as to be precise about what aspect or their image rights they are commercializing.<sup>31</sup> It has already been established that image rights are just an umbrella term that include even nicknames, voices and signature of the personality involved, hence ambiguity should not be encouraged in image rights contracts.<sup>32</sup> In the next part of this chapter, the existing framework governing image rights in Nigeria will be discussed.

### **3.4 Image Rights in Nigeria and Relevant Laws**

Image rights are an emerging area of law in Nigeria and as such there is no comprehensive framework governing it. However, this should not mean that an individual cannot enforce their image rights if infringed upon. This section examines the Constitution of the Federal

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<sup>29</sup> Michelle Blunt and Sabrina Tozzi, 'Commercialising Image Rights: Reaching for the Stars, (Lexology) <<https://www.lexology.com/library/detail.aspx?g=168e4f8c-2dfa-49d5-ada9-82e61b2d511e>> accessed 30 April 2021.

<sup>30</sup> Ibid.

<sup>31</sup> Edward Canty and Matthew Bennett, 'In brief: sponsorship and image rights of professional athletes in United Kingdom', (Lexology Library, 28 August 2020) <<https://www.lexology.com/library/detail.aspx?g=82dafcf4-74a7-489a-8a7f-60f2a42ca303>> accessed 30 April 2021.

<sup>32</sup> Blunt and Tozzi (*n* 29).

Republic of Nigeria 1999 (as amended) as regards the protection of the right of privacy along with the Copyright and Trademarks Acts with regards to protection of the right to publicity.

### ***3.4.1 Image Rights under the Nigerian Constitution***

Privacy is the right of an individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.<sup>33</sup> The right to privacy in entertainment law refers to a celebrity's right to not be exploited.<sup>34</sup> For instance, a celebrity might sue a company that uses an image of them taken when they were merely performing routine acts like going to the grocery store or the pharmacy.<sup>35</sup> If the grocery store then tries to use that image in its advertising as an implied endorsement by the celebrity, then the store may be subject to legal action. This is to be distinguished from the right to publicity which is an individual's ability to commercialize their likeness and protect it from being used for profit without their permission or appropriate compensation.<sup>36</sup> These two rights as discussed earlier are the two types of image rights.

In Nigeria, the right to privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is governed by section 37 of the Constitution 1999 as amended. It is however not clear how the courts will apply the right to privacy in enforcing the image right of a person. There is no judicial precedent in Nigeria on this point. This then begs the question as to whether a celebrity can rely on this provision to enforce their privacy rights when it is infringed upon. What is obtainable in Nigeria is mostly resort to threats of legal action and out of court settlements between the celebrity and the infringer. An example is the dispute between Richard Mofe Damijo (RMD) and Jumia where he (RMD)

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<sup>33</sup> E. S Nwauche, 'The Right to Privacy In Nigeria' Review of Nigerian Law and Practice Vol. 1(1) 2007.

<sup>34</sup> Jeff Williams, 'What Are Image and Personality Rights?' (Williams IP Law, 2019)

<<https://www.google.com/amp/s/txpatentattorney.com/blog/what-are-image-and-personality-rights/amp/>> accessed 15 May 2021.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

threatened Jumia, an ecommerce site, with a lawsuit for using his image on a fashion page as an advertorial in a way that suggests endorsement of the products by RMD.<sup>37</sup> None of these claims and threats have culminated in a court action.<sup>38</sup>

It is a general principle of law in Nigeria that where the laws or case laws in Nigeria makes no provision on an aspect of law, recourse could be made to foreign decisions which will be of persuasive effect.<sup>39</sup> The best foreign jurisdiction to lean towards in this case would be that of Britain, given our colonial history. Sadly, even in Britain, there is no law or tort of privacy. The logic behind this exclusion is that it is thought that legislation could result in considerable restraint on free speech and result in unprecedented litigations.<sup>40</sup> This logic was supported by Lord Denning MR in the case of *Woodward v Hutchinson*,<sup>41</sup> a case involving a breach of privacy bothering on publication of private information. The learned judge held that

“in these cases of confidential information, it is a question of balancing the private interest in maintaining the confidence against the public interest in knowing the truth”.

With respect to whether a celebrity or public figure could rely on the right of privacy, the British court in this same case held that:

Those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light <sup>42</sup>

Hence it is safe to say that a celebrity may not be able to enforce their image rights based on the right to privacy in Britain. However, while there is jurisprudence on the point in Britain, there is no judicial decision on the subject matter in Nigeria. Hence, it is suggested

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<sup>37</sup> Christian Aniukwu, 'The Legal Framework For Image Rights In Nigeria', (The Nigerian lawyer, August 2019) <<https://thenigerialawyer.com/brief-overview-of-the-legal-framework-for-image-rights-in-nigeria-by-christian-aniukwu/>> accessed 16 May 2021.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Iwu (*n* 4).

<sup>41</sup> [1977] 2 All ER 751.

<sup>42</sup> Ibid.

that if such a case should ever find itself being litigated in Nigerian courts the judges should look towards other jurisdictions such as the United States and other European jurisdictions for context if not guidance.<sup>43</sup> This is because the concept of image rights is more developed in those jurisdictions and would give Nigeria a chance to incorporate image rights usage into her laws. The position of the law in the United States and a few African countries would be discussed in the next chapter.

### ***3.4.2 Image Rights under the Nigerian Trademarks Act***

Adetula is of the view that image rights can be protected by the Nigerian Trademark Act.<sup>44</sup> This is of course when the image is registered as a device under the Nigerian Trademark Office. Where such registration is successful, an unauthorized use of that device would be regarded as an infringement under the Act.<sup>45</sup> This opinion however may not be quite correct taking into consideration, the provisions of Section 9 of the Act. The section provides that in order for a trademark to be registrable in Part A of the register, it must contain or consist of at least one of the following essential particulars:

- a) The name of a company, individual or firm, represented in a special or particular manner;
- b) The signature of the applicant for registration or some predecessor in his business;
- c) An invented word or invented words;
- d) A word or words having no direct reference to the character or quality of the good, and not being according to its ordinary signification a geographical name or surname;
- e) Any other distinctive mark

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<sup>43</sup> Iwu (n 4).

<sup>44</sup> Adetula (n 3).

<sup>45</sup> Ibid.

Provided that a name, signature or word or words other than such fall within paragraphs (a) to (d) of this section, shall not be registrable under paragraph (e) of this section, except upon evidence of its distinctiveness.

From the above it is quite clear that the Act did not make express provision for the inclusion of images as registrable trademarks. There is also yet to be a court decision, interpreting the meaning of the section 9 to include images. Hence, it is suggested that images are yet to be trademarked in Nigeria. However, with respect to image rights, one may want to lean towards the definition of image rights in the case of *Proactive Sports Management Ltd v. Wayne Rooney & Ors*<sup>46</sup> where it was stated that,

Image Rights means the right for any commercial or promotional purpose to use the Player's name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number (as may be allocated to the Player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and/or any other representation and/or right of association and/or any other right or quasi-right anywhere in the World of the Player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights."<sup>47</sup>

Since image rights include names and signatures as defined in the extant case, a celebrity may be able to seek protection from undue exploitation of their image rights if their names, signatures or other distinctive marks are registered with the Nigerian Trademark Office.<sup>48</sup> Fortunately, a few notable Nigerian celebrities have set the pace by trademarking their names.<sup>49</sup> Hopefully, other celebrities will follow in these footsteps to give themselves some protection from infringers who would want to illicitly use their names. In summary, while there is no certainty that an image as a part of image right can be registered under the

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<sup>46</sup> [2010] EWHC 1807 (QB).

<sup>47</sup> Ibid.

<sup>48</sup> See Section 9 of the Trademarks Act.

<sup>49</sup> Popular Nollywood Actress, Omotola Jalade-Ekeinde is one of such celebrities who has trademarked their names. See Temi Joshua, '6 Celebrities Who have Trademarked their Names, Nicknames' (The Daily Page, February 2021) <<https://www.google.com/amp/s/thedailypage.ng/6-celebrities-who-have-trademarked-their-names-nicknames/%3famp>> accessed 21 May 2021.

Nigerian Trademark Act, it is quite clear that other aspects of a celebrity's personality rights may be protected by the Act, provided such devices are duly registered.

### ***3.4.3 Image Rights under the Nigerian Copyright Act***

As discussed in the previous chapter, the Copyright Act makes provisions for the protection of some artistic or literary works, especially when considerable effort has been put into making the work to give it an original character.<sup>50</sup> The question may be asked, whether image rights can be protected by the Act? The Act does not make any express provisions for image right per se but under Section 51 of the Act, artistic work has 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. Hence, it is suggested that photographs and images should qualify as a 'work' under the Nigerian Copyright Act.

Irrespective of the fact that an image may be capable of being copyrighted, there is also a problem of who owns the copyright between the photographer and the person whose image is portrayed in the photograph.<sup>51</sup> The Copyright Act provides that the owner of a copyright has exclusive control over his works.<sup>52</sup> It further provides 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.<sup>53</sup> This therefore indicates that any individual who intends to use an artistic work must have the consent of the owner of the copyright. Any other person who makes use of the copyrighted work/image without obtaining consent would be liable for infringement.<sup>54</sup>

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<sup>50</sup> See Section 1 Copyright Act.

<sup>51</sup> Oturu (*n* 10).

<sup>52</sup> Section 11 Copyright Act.

<sup>53</sup> Ibid Section 10(10).

<sup>54</sup> Ibid Section 15.

Therefore, it is important to this discussion to determine who owns the copyright in an image. Generally, ownership to an artistic work would vest in the author of the work.<sup>55</sup> "Author" in the case of photographic work, means the person who took the photograph.<sup>56</sup> The law further provides that where the author of the work was commissioned to carry out the work or it was created during the course of the author's employment, the ownership shall vest first in the author of the work unless there is an agreement between the parties that states otherwise.<sup>57</sup> This means unless there is an express agreement between the photographer and the person photographed stating otherwise, ownership of the copyright in the photograph would belong to the photographer. Instructive to this argument is the British case of *Rihanna v Topshop*<sup>58</sup> where the plaintiff, a famous pop star and style icon, issued proceedings against the defendant, a well-known high street fashion retailer, for selling a t-shirt bearing her image. The image had been photographed by an independent photographer during the video shoot for a single from her album. The defendant had a license from the photographer but no license from the plaintiff. The court held in favour of the plaintiff.

In comparing the position of the law in Nigeria to what is obtainable in Britain, it would seem that the latter is more favourable to the celebrity. This is because if this case was litigated in Nigeria, the defendant may have won, being that permission had been gotten from the photographer. It would be injustice not to allow a celebrity to succeed in an action for image rights infringement merely because the copyright of an image where the same celebrity was portrayed belonged to another person. From the analysis above, the Copyright Act does not do much to protect image rights. In fact, it poses a problem to the celebrity and a defence to the defendant who sought permission from the photographer.

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<sup>55</sup> Ibid Section 10 (2)(a).

<sup>56</sup> Section 10 (2)(b)

<sup>57</sup> Oturu (*n* 10).

<sup>58</sup> [2013] EWHC 2310 (Ch).

### 3.5 Challenges of Image Rights in Nigeria

The many challenges facing image rights in Nigeria have been discussed in chapter two. The first of which is the absence of an existing framework which can be relied upon to enforce image rights violations in Nigeria. Perhaps this is the reason why there is a dearth of judicial decisions on the subject matter. How can one enforce a right which is non-existent under the laws? Over the years, both celebrities and their legal teams have had to resort to mere threats of legal action or at best, out of court settlements whenever there is a violation of the celebrities' image rights.<sup>59</sup> There is no structure in place for the protection of this important right.

In more developed jurisdictions around the world, such as the United States of America and Europe, tax from the image rights of public figures is a major source of revenue to the government. The commercialization of image rights is a very lucrative business.<sup>60</sup> Cristiano Ronaldo – the world's highest paid athlete – was recently accused of tax evasion stemming from his image rights.<sup>61</sup> His fellow soccer star Lionel Messi, was recently convicted of tax fraud and fined up to €2m centred on image rights.<sup>62</sup>

The problem in Nigeria can be exemplified thus: a celebrity has the required goodwill and influence to increase sales for a particular business brand. The owner of this business brand knowing fully well that he cannot afford that celebrity goes ahead to use images of that celebrity on advertisements and posters. The celebrity upon finding out that his images have been used against his consent seeks legal action against the business brand. This celebrity may not be able to enforce his rights under any known Nigerian law. Therefore, these cases never go to court and either stop at threats of legal action or out of court settlements. If

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<sup>59</sup> Aniukwu (*n* 37).

<sup>60</sup> Kelvin King & Raymond Weisner, 'Image Rights: Valuable Intellectual Property' (IP Watchdog, May 2018) <<https://www.ipwatchdog.com/2018/05/04/image-rights-valuable-intellectual-property/id=96506/>> accessed 22 May 2021.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

eventually the parties are forced to go to court, the best that can happen is that the celebrity will either rely on the torts of passing off or defamation which may sometimes prove inadequate.<sup>63</sup> What makes the situation even worse is that image rights are not recognized in British laws either.

For a celebrity to enforce image rights using the tort of passing off, the celebrity would have to satisfy the court that:

- a. at the time of the acts complained of he had a significant reputation or goodwill and
- b. the actions of the defendant gave rise to a false message which would be understood by a not insignificant section of his market that his goods had been endorsed, recommended or approved of by the claimant.

These tests were laid down by the courts in the British case of *Irvine v. Talksport*.<sup>64</sup> Talksport, a radio station, had a doctored image of Edmund Irvine, a Formula One driver, such that he appeared to be holding a radio to his ear. The radio carried the words "Talk Radio" on it. The court held that Edmund Irvine succeeded in his case of passing off against Talksport.

In situations where the violation of image rights not only exploited the celebrity but caused damage to his career, he may be able to sustain an action for defamation. In the case of *Tolley v J S Fry and Sons Limited*,<sup>65</sup> an amateur golfer brought an action against a company on the basis that the advert gave the impression that he was a professional golfer

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<sup>63</sup> *Iwu* (n 4).

<sup>64</sup> *Edmund Irvine & Tidswell Ltd v Talksport Ltd* [2002] EWHC 367.

<sup>65</sup> 1 All ER Rep 131.

which could lead to his being asked to resign his membership of his golf club, and in those circumstances the advert was defamatory. The action succeeded in favour of the plaintiff.

It is apparent that the two torts may be extended in the cases like the above scenarios. What is however not settled is that these torts are remedies for an individual, whose personality has been appropriated without prior permission.<sup>66</sup> There may be instances where the celebrity's case fails to satisfy the tests laid down in the above-mentioned torts. In such instances, would the culprit be allowed to go free? The answer should be in the negative, hence why there needs to be a framework which recognizes image rights usage.

### **3.6 Conclusion**

Image rights are a special type of property rights. As property rights, a person's right to his image has four distinctive elements: the right to use his personality as he wishes, the right to earn income from all attributes of his personality, the right to transfer the income earned from attributes of his personality to others, and the right to sue on unpermitted use of aspects of his personality as a property right.<sup>67</sup> It has been established that there is no comprehensive legal framework governing this right in Nigeria. Sadly, there is also little or no framework in England, save for the reliance on the torts of passing off and defamation which may prove inadequate in some circumstances.<sup>68</sup>

Nigeria has constitutionally guaranteed the right to privacy of all individuals; hence it is assumed that should a case ever be litigated on a matter involving the breach of privacy of a celebrity, the courts would protect such individual from unpermitted exploitation. The closest laws to image rights protection in Nigeria are the Trademark and Copyrights Act. The Trademarks Act lacks express provisions for the protection of images but however makes for

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<sup>66</sup> Iwu (*n* 4).

<sup>67</sup> Ibid.

<sup>68</sup> Iwu (*n* 4).

the protection of other aspects of an individual's personality such as names, nicknames and signatures. This is grossly inadequate. The Copyright Act poses an even bigger problem for celebrities' image rights because it grants the photographer the ownership of the image, thereby empowering defendants to plead the defence of having sought permission from the copyright owner. In the next chapter, the situation in Nigeria will be compared to that of the United States and South Africa, so as to suggest an ideal framework for image rights in Nigeria.

## CHAPTER FOUR

### A COMPARATIVE ANALYSIS OF IMAGE RIGHTS

#### 4.1 Introduction

In the previous chapter, the inadequacies of the legal framework governing image rights in Nigeria were examined. This problem is somehow linked to the lack of recognition of the concept of image rights under English laws. It was therefore suggested in the previous chapter that Nigeria should look towards other developed jurisdictions such as the United States for guidance. This chapter examines the relevant laws protecting image rights in the United States of America and South Africa with the aim of providing a solution to the Nigerian problem.

#### 4.2 Image Rights in the United States

In the United States, the right of publicity arises from the concept of privacy which is guaranteed by the Fourth Amendment.<sup>1</sup> The privacy doctrine traces its origin from the 1890 Harvard Law Review article titled 'The Right to Privacy', written by Samuel Warren and Louis Brandeis.<sup>2</sup> This article first articulated the notion that an individual might have some protectible interests in his image.<sup>3</sup> It was after the publication of this article that the right transformed into the right to be left alone. Seventy years later, a famous American scientist, William Prosser expanded the scope of the right to include the unreasonable intrusions upon another's seclusion, public disclosure of private facts, publicity placing another in a false

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<sup>1</sup> The American Constitution Center <<https://constitutioncenter.org/interactive-constitution/amendment/amendment-iv>> accessed 27 May 2021.

<sup>2</sup> Kateryna Moskalenko, 'The Right of People in the USA, the EU and Ukraine' (International Comparative Jurisprudence Journal, 2015) 114  
<<https://www.google.com/url?sa=t&source=web&rct=j&url=https://core.ac.uk/download/pdf/82637893.pdf&ved=2ahUKEwj3po689erwAhVRhP0HHaDVBOs4ChAWMAF6BAGEEAI&usg=AOvVaw1cCHTyfA9x0Y1c9MxeiGVg>> accessed 27 May 2021.

<sup>3</sup> Ibid.

light, and the appropriation for the defendant's advantage of the plaintiff's name or likeness.<sup>4</sup> In Nigeria, on the other hand, there has been no recognition of image rights as a proprietary right although the right to privacy is enshrined by Section 37 of the Constitution of the Federal Republic of Nigeria.

The modern-day American right of publicity grew out of Prosser's appropriation tort.<sup>5</sup> Perhaps, Nigerian jurisprudence may lean towards developing a right of publicity from the already constitutionally guaranteed right to privacy. In the United States today, the right of publicity is understood as the right of a celebrity to use, control, and forbid the illegal usage of their identity, including the celebrity's name, likeness, and voice, as well as other aspects of their personality.<sup>6</sup> Normally, the right of publicity is owned by famous athletes, singers, actors, politicians, and other famous persons who are followed and admired by the public. This does not mean that others cannot rely upon the law in appropriate circumstances. In the subsequent section of this essay, the right of publicity under federal and a few state laws will be looked at alongside its limitations under the American Constitution.

#### ***4.2.1 The Right of Publicity in the United States***

It has already been established that the right of publicity is the equivalent of image rights in America. The two terms are most times used interchangeably.<sup>7</sup> The United States has a federal system of government and as such, most issues on tort law, such as invasion of privacy and the right of publicity are governed by state law.<sup>8</sup> The first state to recognize the

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> David Jacoby, 'Image Rights, Rights of Privacy – Opportunities and Limitation: A Legal Overview from a United States Perspective' (SchiffHardin LLP, September 2015) 2  
<[https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.schiffhardin.com/Templates/Media/files/archive/binary/jacoby-image\\_rights.pdf&ved=2ahUKEwj-792v9OrwAhXVQeUKHT2vAhQQFjANegQIHxAC&usq=A0vVaw1knFZtRbHeqMSHn9MUuyiZ](https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.schiffhardin.com/Templates/Media/files/archive/binary/jacoby-image_rights.pdf&ved=2ahUKEwj-792v9OrwAhXVQeUKHT2vAhQQFjANegQIHxAC&usq=A0vVaw1knFZtRbHeqMSHn9MUuyiZ)> accessed 27 May 2021.

protection of one's name and likeness was New York, in 1903 enacting what are now Sections 50 and 51 of the New York Civil Rights Act.<sup>9</sup> The term 'right of publicity' was first introduced in the famous *Haelan Laboratories, Inc. v. Topps Chewing Gum Inc.*<sup>10</sup> case in 1953. The court explained that the right of publicity was independent from the right to privacy. The court noted that,

this right might be called a "right of publicity". For it is common knowledge that many prominent persons... far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.<sup>11</sup>

Some American states have developed the legal framework regulating the right of publicity, while in some states it is still protected as a common law right.<sup>12</sup> Currently, at least 18 states have enacted statutes, protecting the right of publicity. These include California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.<sup>13</sup> This is quite contrary to the case the situation in Nigeria where the right is not recognized by federal law nor by state law or even common law. It should be noted that there is no uniform approach between these American states regarding the understanding of the right of publicity, its post-mortem availability,<sup>14</sup> and transferability.<sup>15</sup> The scope of protection under the right of publicity may vary from state to state. This essay examines the right of publicity in two state

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<sup>9</sup> Ibid.

<sup>10</sup> Cited as 202 F.2d 866 (2d Cir.), 346 U.S. 816 (1953), available at <<https://www.leagle.com/decision/citingcases/19531068202f2d8661807>> accessed 19 April 2021.

<sup>11</sup> Ibid.

<sup>12</sup> Moskalenko (*n* 2).

<sup>13</sup> Ibid.

<sup>14</sup> Post Mortem availability of image rights refer to the publicity rights of a dead person.

<sup>15</sup> Transferability of image rights is a question of whether the ownership of the right can be assigned or transferred to another person.

laws of the United States of America viz: the California and New York laws, which are the most popular image rights laws in the United States.

#### ***4.2.2 State Laws on the Rights of Publicity in the United States of America***

##### *i. The California Civil Code*

In California, the right of publicity is protected by both common law and statutory law. The California Civil Code is a collection of statutes for the State of California. The code is made up of statutes which govern the general obligations and rights of persons within the jurisdiction of the State of California.<sup>16</sup> The California Civil Code section 3344,<sup>17</sup> is titled 'Unauthorized commercial use of name, voice, signature, photograph or likeness,' and it states that:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>18</sup>

Going by the provisions of the above section, to prove that there has been a violation of an individual's right of publicity, this individual must satisfy the court that the defendant knowingly used his identity for some advantage (whether commercial or not) without his consent, resulting in injury to him. The injury in question could be to the individual's image, name or brand.<sup>19</sup> It should also be noted that the right of publicity under California laws

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<sup>16</sup>California Legislative Information

<<https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CIV>> accessed 28 May 2021.

<sup>17</sup> Cited as CAL. Civ. Code § 3344(West Supp. 1994) available

at<[https://www.google.com/url?sa=t&source=web&rct=j&url=https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml%3FflawCode%3DCIV%26sectionNum%3D3344.&ved=2ahUKEwibw\\_SK4ZzxAhXuQUEAHetJD3EQFjACegQIBhAC&usq=AOvVaw2V8UyjPULh9rQyUk76trL\\_](https://www.google.com/url?sa=t&source=web&rct=j&url=https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml%3FflawCode%3DCIV%26sectionNum%3D3344.&ved=2ahUKEwibw_SK4ZzxAhXuQUEAHetJD3EQFjACegQIBhAC&usq=AOvVaw2V8UyjPULh9rQyUk76trL_)> accessed 27 May 2021.

<sup>18</sup> Ibid.

<sup>19</sup> Stephen M Lobbin, 'The Right(s) of Publicity in California: Is Three Really Greater Than One?' (Vol. 2:157, UCLA Entertainment Law Review,1995)164

extends not only to celebrities but regular individuals as well.<sup>20</sup> These regular individuals can prove that they suffered at least some form of “mental anguish” caused by seeing their identity used without prior permission to promote a product or service.<sup>21</sup>

The protection of publicity rights under this law is not absolute, the exemptions are found in subsection (d), which states that any use "in connection with any news, public affairs, or sports broadcast or account, or any political campaign" is exempted.<sup>22</sup> This therefore means that if the defendant can plead that the use of the plaintiff's image was in connection with any news, public affairs, or sports broadcast or account, or any political campaign, he would not be held liable. Usually, the onus is on the plaintiff to prove that the usage in question was commercial and does not fall into the exempted categories. If the plaintiff does not discharge that burden satisfactorily to the court, his case may fail.<sup>23</sup>

The California Civil Code also extends the right of publicity to dead persons through Section 990 of the Act.<sup>24</sup> The same five aspects of persona are protected under section 990- name, voice, signature, photograph, and likeness. The nature of an infringing use, that is, a commercial use of persona, is also defined the same way as in section 3344. Section 990, however, contains provisions for determining who among the heirs of an individual may maintain a right of publicity after his or her death, and requires that any licensee or successor register a claim to the rights prior to the unauthorized use.<sup>25</sup> The statute also establishes that the right of publicity expires fifty years after the death of the individual.<sup>26</sup> It should be noted that in addition to the exceptions listed in Section 3344, Section 990 also exempts the

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> See Section 3344(d) of the California Civil Code.

<sup>23</sup> *New Kids on the Block v. News America Publishing, Inc.* 745 F. Supp. 1540, 1546 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992) available at

<https://www.google.com/url?sa=t&source=web&rct=j&url=https://law.justia.com/cases/federal/district-courts/FSupp/745/1540/1612234/&ved=2ahUKewi86LOf4pzxAhVEhlwKHfBzA1sQFjABegQIBRAC&usg=AOvVaw0eR0x1jukOkE5MYfddKtM> accessed 27 May 2021.

<sup>24</sup> Cited as CAL. Civ. Code § 990(West Supp. 1994).

<sup>25</sup> Ibid, paragraphs (d) - (f).

<sup>26</sup> Ibid, paragraph g.

commercial appropriation of the deceased's personality in a play, book, magazine, newspaper, musical composition, film, radio or television program.<sup>27</sup>

*ii. The New York Civil Rights Law*

The State of New York was the very first state to recognize the right of publicity in the United States. However, some states, such as California have surpassed it in terms of the scope of protection guaranteed. Unlike California, there is no common law right of privacy in New York.<sup>28</sup> Any relief for violations of privacy rights must be sought under Sections 50 and 51 of New York's Civil Rights Law.<sup>29</sup> These sections apply when any person, firm or corporation uses any living person's name, portrait, picture or voice, for advertising or trade, without written consent, or in the case of a minor of his or her parent or guardian, within the state of New York. Section 51 creates a private right to sue for an injunction and damages, including exemplary damages if a defendant acts knowingly in violation of the statute.

The right of privacy in New York is not without limits. Due to the potential conflict with the right of freedom of speech and free press, the statute does not generally apply to reports of newsworthy events or matters of public interest, or to works of artistic expression, such as art, books, music, plays and movies.<sup>30</sup> In addition, there is no right of publicity of deceased persons unlike what is obtainable in California.<sup>31</sup> In New York, only natural living persons can initiate an action for violation of the right of publicity. This means that a dead person or a corporation cannot make a claim under the right of publicity.<sup>32</sup> Thus, a person's right of privacy is non-transferrable, non-assignable and is extinguished upon the person's death. A deceased person's estate cannot sue for misappropriation of his name, likeness, or

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<sup>27</sup> Ibid, paragraph n.

<sup>28</sup> Donovan Rodriques, 'New York Right Of Privacy Has Its Limits' (Rodriques Law, August 2018) <<https://rodriqueslaw.com/blog/new-york-right-privacy-has-its-limits/>> accessed 29 May 2021.

<sup>29</sup> Cited as N.Y. Civ. Rights Law §§ 50-51(Consol. 1982 & Supp. 1994).

<sup>30</sup> Rodriques (*n* 28).

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

voice, nor can a corporation, loan out company or licensing company sue for violation of the right of privacy.<sup>33</sup>

#### ***4.2.3. The Lanham Act and the Right of Publicity***

The Lanham Act<sup>34</sup> is the equivalent of Nigeria's Trademark Act in the United States. It is the only Federal law that in some way protects image rights or the right of publicity.<sup>35</sup> Celebrities can resort to two options when it comes to publicity rights in the USA; first, the Lanham Act of 1946, and second, the state laws on publicity rights. Due to the disparity between the state laws, certain acts of misappropriation of publicity rights may be unenforceable in some state courts.<sup>36</sup> In such instances, the plaintiff can rely on the Lanham Act. The Lanham Act protects consumers from misrepresentations or deceptions and protects trademark owners from the misperception that they are associated with or are endorsing a product.<sup>37</sup> In addition, the Act also provides for the protection of certain unregistered marks.<sup>38</sup>

It provides for a civil action against a person who uses any word, term, name, symbol or device or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which can cause confusion or mistake or deceive as to the affiliation, connection, or association of him with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.<sup>39</sup> This means that, civil actions will be taken up against any person who intends to mislead people by portraying his association or affiliation with any other person. People affected by such misuse can file either a claim of false endorsement or a

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<sup>33</sup> Ibid.

<sup>34</sup> Codified at 15 U.S.C. §1051 et seq.

<sup>35</sup> 'Publicity Rights and Its Scope in Intellectual Property Laws', (LexOrbis, March 2020).

<sup>36</sup> <https://www.lexorbis.com/publicity-rights-and-its-scope-in-intellectual-property-laws/> accessed 29 May 2021.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Section 43, Lanham Act.

<sup>40</sup> Ibid.

claim of infringement of an unregistered mark.<sup>40</sup> Although the Lanham Act's primary purpose is to protect consumers, a broad interpretation of the Act helps celebrities protect their publicity rights through it. Thus, in the case of *Waits v. Frito-Lay Inc.*,<sup>41</sup> the plaintiff was successfully able to argue that the defendants had used an imitation of his voice in a Tom Waits parody song.

Nigeria has a Trademarks Act which sadly does not offer as much protection to image rights usage as the Lanham Act. From the previous chapter, it was shown that the only remedy that a celebrity can get under Nigerian law is to either register their names under the Trademarks Act or sue under the tort of passing off whenever their image rights are infringed upon.<sup>42</sup> There are also no known state laws protecting image rights in Nigeria. Nigeria has a lot to gain by leaning towards the development of the right of publicity in the United States.

#### ***4.2.4 The First Amendment and the Right of Publicity***

Human rights are not absolute and therefore are subject to reasonable restrictions. The First Amendment to the American Constitution guarantees freedoms concerning religion, expression, assembly, and the right to petition.<sup>43</sup> It guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely.<sup>44</sup> The right of publicity is typically described as the inherent right of every human being to control the commercial use of his or her identity.<sup>45</sup> Arguably, a celebrity's most valuable asset

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<sup>40</sup> Ibid.

<sup>41</sup> 978 F.2d 1093.

<sup>42</sup> Prince Alex Iwu, 'The Legal Regime for the Enforcement of Image Rights - A Nigerian Question', (Academia Education) <[https://www.academia.edu/12605016/THE\\_LEGAL\\_REGIME\\_FOR\\_ENFORCEMENT\\_OF\\_IMAGE\\_RIGHTS\\_A\\_NIGERIAN\\_QUESTION?email\\_work\\_card=view-paper](https://www.academia.edu/12605016/THE_LEGAL_REGIME_FOR_ENFORCEMENT_OF_IMAGE_RIGHTS_A_NIGERIAN_QUESTION?email_work_card=view-paper)> accessed 21 April 2021.

<sup>43</sup> Cornell Law School, 'First Amendment' <[https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment)> accessed 29 May 2021.

<sup>44</sup> Ibid.

<sup>45</sup> Erika T Olander, 'Stop the Presses! First Amendment Limitations of Professional Athletes' Publicity Rights' (12 Marquette Sports Law, 2002) Available at: <<http://scholarship.law.marquette.edu/sportslaw/vol12/iss2/10>> accessed 30 May 2021.

is himself. Publicity rights allow the celebrity to profit from the development of his persona. However, the First Amendment may, in certain situations, allow the media to infringe upon those rights by the uncompensated use of the celebrity's persona.<sup>46</sup> Defendants in such suits routinely assert that the right of publicity curtails their freedom of expression by restricting their ability to use representations of real persons in their works. This has caused disarray in American courts regarding how to address the conflict between the right to publicity and the right to free speech.<sup>47</sup>

Essentially, the First Amendment will not take precedence over publicity rights in cases of image rights infringement, but will prevail over publicity rights when the image is used in the context of news reporting, commentary, entertainment or works of fiction and nonfiction.<sup>48</sup> Courts have attempted to distinguish cases along these theoretical approaches by balancing the property interest of publicity rights against the interests of the First Amendment.<sup>49</sup> In a bid to achieve this the American courts use some 'balancing' tests, which include the transformative use test, the Rogers test, the predominant use test and the newsworthiness exemption.<sup>50</sup> Thus far, the Supreme Court has not yet articulated a preferred method of analysis, leaving lower courts to fashion their own tests to resolve conflicts between the rights of publicity and free speech<sup>51</sup> This has resulted in the creation of so many tests which cannot be discussed in the course of this work as a result of brevity.

It should however be noted that there are some exceptions where a celebrity's right of publicity will be protected even when the use is newsworthy. This was the line of judgement

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Daniel Gervais and Martin L Holmes, 'Fame, Property & Identity: The Purpose and Scope of the Right of Publicity', (25 Fordham Education, 2014). Available at: <<https://ir.lawnet.fordham.edu/iplj/vol25/iss1/4>> accessed 30 May 2021.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

in the case of *Zacchini v. Scripps-Howard Broad Co*<sup>52</sup> where a reporter filmed a performer's entire "human cannonball act" without permission and the footage was broadcast by a television station. In a narrow holding, the Court emphasized that while the performer's right of publicity would not prevent the reporting of facts regarding the performance, the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.<sup>53</sup> Despite all this, there has been no settled position in American jurisprudence on where the line between the right of publicity and the First Amendment should be drawn.

### 4.3 Image Rights in South Africa

Image rights are protected in South Africa under the common law.<sup>54</sup> An individual's identity is infringed where a person's image is used or appropriated without his or her permission for advertising purposes, creating the false impression that such person has consented to such conduct or supports the advertised product, service or business.<sup>55</sup> The South African law of tort is essentially based on three remedies: the Actio legis Aquiliae or Aquilian action, with which damages for financial loss is claimed; the Actio Iniuriarum, with which compensation is generally claimed for intentional conduct which results in injury to a person or personality; and the Action for Pain and Suffering, with which compensation is claimed for negligence which results in impairment of the physical and mental integrity of an individual<sup>56</sup>. Claims for infringement of image rights usually fall under the Actio Iniuriarum.

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<sup>52</sup> 433 U.S. 562, 564 (1977) available at <https://www.google.com/url?sa=t&source=web&rct=j&url=https://supreme.justia.com/cases/federal/us/433/562/&ved=2ahUKEwi2ktTM5ZzxAhUGBsAKHdtMBkIQFjAOegQIIxAC&usg=AOvVaw0nPWtGruLdLsoox5gB-0SQ> accessed 30 May 2021.

<sup>53</sup> Ibid.

<sup>54</sup> Steve Cornelius, 'Image Rights in South Africa' ( The International Sports Law Journal, 2008) [https://www.academia.edu/11380578/Image\\_Rights\\_in\\_South\\_Africa?email\\_work\\_card=view-paper](https://www.academia.edu/11380578/Image_Rights_in_South_Africa?email_work_card=view-paper) accessed 31 May 2021.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

The first case on image rights came up before the courts in South Africa is *Van Zyl v African Theatres Ltd*.<sup>57</sup> This case dealt with a claim for damages because the defendant wrongly advertised in a local newspaper that the plaintiff, a famous singer, would appear at the defendant's theatre. While the claim failed because the plaintiff failed in proving actual damage, it is significant that neither the court nor counsel for the defendant questioned the basis for the claim, namely the unauthorized publication of the plaintiff's name.<sup>58</sup> The trial judge expressly stated that the plaintiff would probably have succeeded had he, from a factual point of view, followed a different approach and satisfied the burden of proof.<sup>59</sup> In *O'Keeffe v Argus Printing and Publishing Co Ltd*<sup>60</sup> the subject matter was again put under the microscope. In this case the plaintiff succeeded with a claim where the respondent, without the plaintiff's consent used a photograph of the plaintiff aiming a pistol in an advertisement for an arms dealer.

From the above, it can be deduced that even in the absence of express legislative provisions on the subject matter, the concept of image rights is not alien to South African Courts. This is further supported by the recognition of an individual's right to identity which is guaranteed by the South African Constitution.<sup>61</sup> In addition, the South African Revenue Service (SARS) published the 'Draft Guide on the Taxation of Professional Sports Clubs and Players' in 2016 which recognized image rights as a source of taxable income. The Draft Guide provides that:

South African sports players are, like their overseas counterparts, enjoying the benefit of being able to exploit other commercial opportunities such as image licensing agreements, celebrity endorsements and appearance fees. Image licensing agreements involve the commercial exploitation of a player's image, such as the use of the player's name, photograph, reputation, voice,

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<sup>57</sup> 1931 CPD 61.

<sup>58</sup> *Cornelius* (n 54)

<sup>59</sup> *Ibid.*

<sup>60</sup> 1954 3 SA 244 (C).

<sup>61</sup> Section 8(2) of the Constitution of South Africa 1996.

signature, initials or nickname. Image rights are the legal rights associated with using the image of a sportsperson in marketing or promotional activities. Image rights payments refer to the payments that a player receives from an enterprise that uses such player's image for advertising purposes.<sup>62</sup>

As a result of this, income gotten from image rights usage is taxed in South Africa. As in the case of *SARS v Kotze*<sup>63</sup> where the Tax Court was called upon to decide whether a payment made to a famous golfer for the right to use his name, likeness and biographical material for promotional purposes was of a revenue or capital nature. The court held that:

The appellant by allowing his name and reputation to be used did not dispose of such assets and continued to possess them after the tournament and after he received the agreed consideration for allowing them to be used for publicizing the Tournament. In our opinion there can be no doubt that the payment was not of a capital nature and was the type of income that a professional golfer would expect to earn for participating in a golf tournament that traded on the reputation of the participants. Accordingly, the monies received formed part of his "gross income" as defined in s 1 of the (Income Tax) Act.<sup>64</sup>

By virtue of this tax guide, any form of commercialization of image rights is taxable.<sup>65</sup> This includes sponsorship and endorsement contracts. It must however be noted that South African laws do not support the sale of image rights outright which in other words equates to the creation of an eponymous brand.<sup>66</sup>

The concept of image rights usage in Nigeria has not gained as much recognition as it has done in South Africa. Persons whose image rights are infringed upon barely have a method of seeking redress due to the inexistence of laws on the subject matter. It is unknown

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<sup>62</sup> South African Revenue Service (SARS), 'Draft Guide on the Taxation of Professional Sports Clubs and Players' 29.

<sup>63</sup> 64 SATC 455.

<sup>64</sup> Ibid.

<sup>65</sup> R Cloete, 'The Taxation of Image Rights: A Comparative Analysis' (De Jure, 2012) available at <<https://www.google.com/url?sa=t&source=web&rct=j&url=http://www.saflii.org/za/journals/DEJURE/2012/34.pdf&ved=2ahUKEwiE5cZr6PbwAhURahQKHb9bCNwQFjAAegQIAxAC&usg=AOvVaw1xiPhBJQAA0p8MU7XGAVXV>> accessed 30 May 2021.

<sup>66</sup> Ibid.

and highly improbable that income gotten from the commercialization of image rights in Nigeria is taxed in Nigeria. Nigeria needs to do more regarding these aspects.

#### **4.4 Conclusion**

This chapter establishes that the concept of image rights, which traces its origin from the right of privacy, is highly developed in the United States. Not only is the right recognized by federal and state laws, but it is also recognized by common law. Sadly, this is not the case in Nigeria as there is no recognition of the right under common law or any known Federal or state legislation. A bigger problem can be traced to the fact that there have been no judicial decisions on the subject matter in Nigerian courts. Meanwhile, the right of publicity is so developed in the United States that the only limitation on the right is when it infringes on the right to free speech and freedom of press and even in some of these circumstances, the right will be allowed to prevail.<sup>67</sup> In California, the right is transferable and it even extends to dead persons. In Nigeria, living persons are not guaranteed of the protection of their image, talk more of dead persons. The right of publicity in the United States is worthy of emulation and Nigeria has a lot to learn from there.

The concept of image rights in South Africa is also worthy of emulation even though it is not as developed as that of the United States. This is because it is only regulated by common law and case law but has not necessarily been codified into law. The closest South Africa came to the codification of image rights was through the publishing of the Draft Guide on the Taxation of Professional Sports Clubs and Players,<sup>68</sup> which is merely a tax guide and not a law. Regardless of this, what is important is that the right is recognized and persons whose image rights are infringed upon have a remedy in court. One cannot say the same for Nigeria because no image rights case has ever been successfully taken to court, perhaps due

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<sup>67</sup> See the judgment of the court in *Zacchini v. Scripps-Howard Broad Co.* Cited in (*n* 52)

<sup>68</sup> Cloete (*n* 65).

to the non-existence of any framework whatsoever governing image rights. It is also worthy of mention that income gotten from the commercialization of image rights is a source of tax in South Africa. This is not the case in Nigeria and should therefore be examined.

Nigeria has a lot to learn from the United States and South Africa. In the next chapter, recommendations to the research problem will be given, considering the findings of this chapter and the preceding chapters.

## CHAPTER FIVE

### SUMMARY, RECOMMENDATIONS AND CONCLUSION

#### 5.1 Summary

The aim of this essay was to emphasise the need for entertainment laws in Nigeria, especially those pertaining to image rights usage. Due to the inherent inadequacies, there is a need to review the existing framework for entertainment laws and incorporate image rights usage into Nigerian laws. This section provides a summary of the findings of this essay.

Chapter one introduced entertainment laws in Nigeria and its history with regards to the relevant laws on intellectual property. The aims and objectives, research problem, scope and methodology used were also discussed.

In chapter two, the specific research problem of this essay which is the absence of a specific and comprehensive legislation regulating entertainment law in Nigeria was examined. This problem showed the reason professionals in the field rely on a broad range of laws such as contract law, corporate law, torts law, antitrust law, immigration law, securities law, tax law, employment, and labour law and most importantly, laws on intellectual property<sup>1</sup> as the basis for resolving entertainment law related issues. The most related of these intellectual property laws are the Copyrights Act, the Patents and Designs Act and the Trademarks Act which were briefly discussed. This laid the foundation for subsequent discussions in chapter three on image rights. The inadequacies of these laws governing the entertainment industry were also examined. These inadequacies include the lack of a comprehensive legislation regulating entertainment, piracy of entertainment works, lack of access to financing and lack

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<sup>1</sup> Airende Uwa, 'The Law and Entertainment in Nigeria, Manifold Solicitors, 2018 <<https://www.manfieldsolicitors.com.2018/08/20/the-law-and-entertainment-in-nigeria/>> accessed 21 January 2021.

of proper enforcement of the laws in the existing legal framework.<sup>2</sup> In addition, the functions of entertainment lawyers were also itemized.

In chapter three, the crux of this essay; image rights and the adequacies of protection under Nigerian laws or otherwise, were examined. Firstly, it was revealed that Section 37 of the Constitution of the Federal Republic of Nigeria offers some form of protection to the right of privacy under image rights even though no case has ever been litigated in that regard. It was also revealed that images as an aspect of image rights are yet to be registrable under the Nigerian Trademark Act but other aspects of a personality such as names, nicknames and signatures could be trademarked.<sup>3</sup> The Copyright Act was also seen to constitute a problem to the person whose image is portrayed because the law on the subject matter grants ownership of an image to a photographer rather than the person photographed.<sup>4</sup> Altogether, the findings of chapter three prove that more needs to be done regarding the protection of this right in the Nigerian legal system especially as the only remedy to those whose names are not registered under the Trademarks Act only have the torts of passing off and defamation to rely upon.<sup>5</sup>

In chapter four, a comparative analysis was done which examined image rights protection in the United States of America, South Africa. While it was concluded that the United States had a highly developed system of protection of image rights, the essay found that South Africa recognised the concept of image rights protection.

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<sup>2</sup> Section 2.4, Chapter 2.

<sup>3</sup> See Section 3.4.2, Chapter 3.

<sup>4</sup> Ibid, subsection 3.4.3.

<sup>5</sup> Ibid, paragraph 3, section 3.5.

## 5.2 Recommendations

With regards to the inadequacy of the existing laws to regulate the entertainment industry in Nigeria, there is a need for law reforms which would accommodate and handle the different areas of the entertainment industry. For example, there should be laws on entertainment contracts, preventing undue exploitation of upcoming artistes by record labels and movie production companies. There is also, a need to review the criminal sanctions for piracy as the current Copyright Act does not serve as enough deterrent for copyright infringement. Beyond law reform however, there should be institutional support to combat the various challenges facing the entertainment industry such as piracy.<sup>6</sup> Perhaps a special task force could be set up to arrest and prosecute any persons found guilty of copyright infringement. This can only be done after proper sensitization, bearing in mind that most of the persons guilty of the act in Nigeria are mostly illiterates who have no knowledge of the criminal implications of their actions.

There are a few decided cases relating to the entertainment industry in Nigeria. Thus, the role of the judiciary is especially important. A deeper appreciation and adjudication of entertainment cases will go a long way in helping the industry achieve its goals. This however cannot be achieved if aggrieved persons do not resort to the court to remedy their grievances. In addition, the issue of lack of image rights laws can be gradually put to an end when infringing parties take such matters to court. There is no wrong without a remedy. It would be unheard of for such cases to be turned away by the courts; rather new laws on the subject matter would be created therein. These laws which are, the pronouncements of the court would serve as case law and precedents for subsequent cases. Soon enough there would be a common law of image rights usage which in turn could be codified into law by the

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<sup>6</sup> Isibor, 'Entertainment Law in Nigeria: A Torpid Step in the Right Direction', Academia Education 2019 <[https://www.academia.edu/40756061/ENTERTAINMENT\\_LAW\\_IN\\_NIGERIA\\_A\\_TORPID\\_STEP\\_IN\\_THE\\_RIGHT\\_DIRECTION\\_BY\\_Kelvin\\_Nnamdi\\_ISIBOR](https://www.academia.edu/40756061/ENTERTAINMENT_LAW_IN_NIGERIA_A_TORPID_STEP_IN_THE_RIGHT_DIRECTION_BY_Kelvin_Nnamdi_ISIBOR)> accessed 13 April 2021.

legislature in Nigeria. There is therefore a responsibility on the lawyers representing celebrities to encourage them to seek redress in court rather than opt for threats and out of court settlements. This would be for the benefit of others whose image rights may be infringed upon later.

### **5.3 Conclusion**

This essay confirmed that the existing legal framework on entertainment law and more specifically, the emerging area of image rights law in Nigeria is grossly inadequate. This essay compared the Nigerian framework with that of the United States of America and South Africa which employ more adequate frameworks. It is recommended that Nigeria should draw insights and practical experiences from these jurisdictions.<sup>7</sup> However, with a combined effort of key stakeholders in the entertainment industry, entertainment lawyers, the judiciary and other arms of government, the framework can be improved on.

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<sup>7</sup> Ibid.

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