

# ENFORCING PERSONALITY RIGHTS IN NIGERIA

20-03-18

News Letter Volume 3

## EDITOR'S NOTE

*"IP rights protection, especially copyright, is key to the economic development of any country, however should it supercede the protection of one's right to control the exploitation of one's image or personality and one's right to privacy?" Boma V. Enwesi, LLB, BL, LLM (E-commerce Law)*

*"Enforcing Right to Privacy or enforcing Copyright in a Photograph, Nigeria will need to decide"- Boma V. Enwesi, LLB, BL, LLM (E-commerce Law)*

Today we examine the concept of "Personality Rights" and argue that explicit laws are needed to protect this right in Nigeria.

As an Intellectual Property (IP) Law specialist firm, our attention is often drawn to legal issues that arise in the IP sector of the economy and one of the numerous issues that have arisen in recent times are suits being instituted by individuals who have had their photographs taken without their consent and in some cases used for commercial purposes, all without the consent of the individual whose image is on the photograph.

These suits have often been instituted, as suits seeking remedy for breach of the fundamental human right to private and family life as enshrined and protected in section 37 of the 1999 Constitution of the Federal Republic of Nigeria.

We are of the considered view however, that the provision of the above-mentioned section in the Nigerian Constitution is not wide enough to provide a remedy for unauthorized use of an individual's image in a photograph. This infringed image right is to our mind an infringement of a sub right, of the all-encompassing right known as "Personality Rights.

Section 37 provides that "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

It would take a very broad interpretation of this section 37, by the courts, for it to be said to be protecting the image or personality rights of an individual whose photograph was taken without consent and may also have been used for commercial purposes without the individual's consent.

We believe that an analysis of the concept of Personality Rights and its sub set, image rights, together with a study of how other jurisdictions have protected these rights will help support our argument that explicit laws protecting these rights are now required in Nigeria.

It is essential here to explain the slight difference between personality rights and image rights. Though most writers use the terms interchangeably, we are of the view that the distinction would be determined by the jurisdiction in which one seeks to enforce either right. Generally, however while the former refers to the rights as exercised by celebrities or famous persons, the latter refers to the same rights as exercised by the ordinary man.

Some legal writers have argued that the judicial decisions of other common law jurisdictions such as India and even decisions from the European courts could be used by Nigerian courts as persuasive authority to enforce personality rights or image rights. We are of the view however that a more decisive action needs to be taken by the Nigerian legislature, as the only common law enforceable in Nigeria as stated in section 32 of the Interpretation Act Cap 192 LFN 1990 is as follows; "Subject to the provisions of this section and except in so far as other provision is made by any Federal law, **the common law of England and the doctrines of**

equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.

Personality rights have been described by Zoya Nafis a legal writer, as “the right to control and profit from the commercial use of one's name, portrait, image, picture, likeness, etc., and it prevents unauthorized appropriation of the same for commercial purposes”.<sup>1</sup>

In India celebrities register their personality (name, photograph/image etc.) at the trademark registry and thereby gain exclusive rights to exploit their image. Any act creating a likelihood of association with the registered item of personality would amount to infringement of right to personality. However, the Indian courts do not use the same coinage in referring to these personality rights, rather they call it “right to publicity” (in rem) or “right to privacy” (in personam).

For instance, the Indian court in Titan Industries Ltd. Vs M/S Ramkumar Jewelers, CS(OS) 2662/2011 (Delhi High Court) observed that “When the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not commercialize their identity but that the right to control when, where and how their identity is used should vest with the famous personality. The right to control commercial use of human identity is the right to publicity.”

In America the “right to publicity” is a larger right which includes “celebrity rights”. It is another name for personality rights which is recognized and easily enforced in the US jurisdiction.

It is explicit law in some states in the US, that copyright ownership is no defense to a right-of-publicity claim when the copyright owner makes unauthorized commercial use of a person's identity apart from the copyrighted work.

If one instituted a suit against a photographer for unauthorized commercial use of one's picture in the US, one would easily win despite the fact that a photographer ordinarily would have copyright in the photographs. The laws protecting “right to publicity” are couched in such a way as to allow one control the commercial use of one's image.

It is worth mentioning here that a challenge has arisen in enforcing this right when it is breached on social media. On twitter and Instagram for example, hijacking of people's image and likeness by strangers to create new accounts and basically impersonate their victims, has become rampant. The perpetrators use these new accounts to solicit money from the victim's contacts on various social platforms. They also taint the victim's reputation by posting untoward statements and pictures. Identifying such perpetrators is a difficult task, and as such individuals and companies need to be on guard while using social media.

In the class action case against Facebook<sup>2</sup> which was eventually settled, certain Facebook users were given the chance to seek the enforcement of their right to publicity. These plaintiffs found out that their names and profile picture were used by Facebook in an array of newsfeeds viewed by their friends based on their “likes” of various branded products. They were able to show the court a direct relationship between the value of their endorsements of the branded products shown to their Facebook friends, and the commercial profit gained by

<sup>1</sup><http://www.mondaq.com/india/x/345080/Personality+Rights+Need+For+A+Clear+Legislaton>

<sup>2</sup>Fraleigh v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011)

Facebook, thereby leading to the court allowing them to continue their case and dismissing the defendant's motion to dismiss the suit.

In the United Kingdom (UK) there is no explicit codified body of law that protects personality rights. Anyone who wants a remedy for the unauthorized use of his or her image may institute an action under passing off. However, such persons must prove to the court that they have significant good will or reputation. This doesn't give much protection to ordinary individuals and non-celebrities. Another factor that must be proven for such an action to succeed, is that the unauthorized use of his or her image was for commercial purposes.

Alternatively, one may bring this action in the UK by seeking a remedy for breach of confidence. For instance, in **Pollard v Photographic Company [1997] EMLR 444**, a photographer took a photograph of Mrs. Pollard placed the image on Christmas cards and sold the cards without her permission. The court ruled in favour of Mrs. Pollard but based on the law of breach of confidence. The court held inter alia that 'the photographer who uses the negatives to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands'.

Furthermore, this action may also be instituted in the UK by seeking a remedy for breach of one's fundamental right to private and family life which is in line with the European Convention, as UK courts are charged to interpret their laws in line with European Conventions (although UK's exit from the European Union may alter this practice).

Under this action the plaintiff need not prove notoriety, nor must he or she prove that the unauthorized use of the photograph was for commercial purposes, all that must be proven to the court is that there was a breach of the right to privacy. Note however that the action may fail if the unauthorized capture of the plaintiff's image occurred in a public place. Perhaps with time the protection of the right to privacy may develop into safeguarding of personality and image rights in the UK. Time will tell.

In Nigeria, neither personality rights, image rights, rights to publicity nor the tort of personality merchandizing have been provided for in any statute. Rather some have chosen to seek remedy for unauthorized use of their image under the Fundamental Human Right to private and family life pursuant to section 37 of the 1999 Constitution. We once again state that in this jurisdiction the photographer would have a defense that he owns copyright to such image/photograph and may do with it as he pleases. Explicit laws will help sort this ambiguity.

The Nigerian lawmakers would have to decide which trend to follow, that of protecting the individual's privacy, or the photographers copyright or the press' freedom of expression. As we have shown above, different jurisdictions have approached this issue in various ways. We need a clear and explicit approach to make justice certain.

The GOS Newsletter has been prepared for clients and professional colleagues as a general guide to the subject matter. It is not meant to substitute specialist legal advice about your specific circumstances.

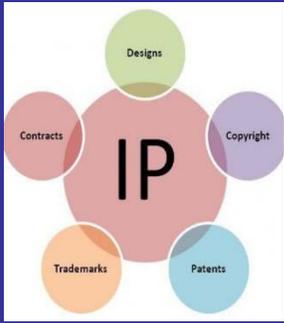
G.O Sodipo and Co disclaim any liability for the decisions you make based on this information.

Please let us know if you would like to discuss any issue in more detail;

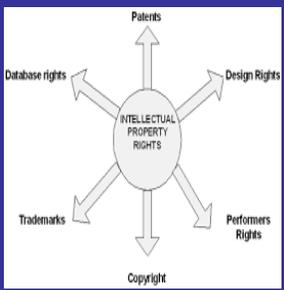
E-mail: [b.sodipo@gosodipo.com](mailto:b.sodipo@gosodipo.com), [bomaenwesi@gosodipo.com](mailto:bomaenwesi@gosodipo.com)

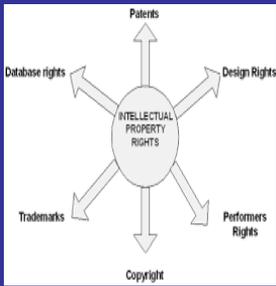
All Photo Credits: Google Search Engine.

Copyright © 2018 G.O Sodipo& Co, all rights reserved.



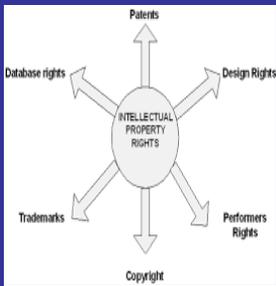
“Enforcing Right to Privacy or enforcing Copyright in a Photograph, Nigeria will need to decide”- BomaV.Enwesi,LLB,B L,LLM(E-commerce Law)

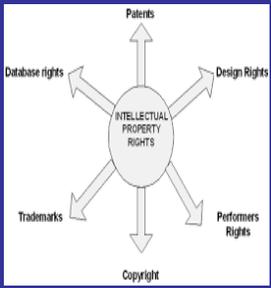




**G.O SODIPO & CO**  
Tel: 08023198641

E-mail:  
We're on the Web!  
[www.gosodipo.com](http://www.gosodipo.com)





**G.O SODIPO & CO**  
Tel: 08023198641

E-mail:  
We're on the Web!  
[www.gosodipo.com](http://www.gosodipo.com)

