

## **COPYRIGHT IN IMAGE CAPTURING (PHOTOGRAPHY) AND RIGHT OF SUBSEQUENT USE: ADDRESSING THE CLASH OF RIGHTS THROUGH REFORM OF THE COPYRIGHT LAW**

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### **ABSTRACT**

This research explores copyright in photography and image capturing as between the photographer and the individual or subject captured in the photograph. The paper particularly examines the nature, scope and limits of rights that the photographer can exercise vis-a-vis the rights of the person in the photograph. Copyright law in most countries of the world generally assigns copyright ownership to the author of a photograph. The implication is that the photographer-author reserves a somewhat exclusive right to manage the photograph as she/he deems fit, and this right includes the rights to produce, reproduce, publish, commercialize, distribute, license and so on. The paper poses important questions as to whether copyright law takes cognizance of how this might impact the subject captured in the photograph, the issue of image rights and whether the photographer owes any duty or obligation to the subject and ultimately whether copyright law should attempt to balance these occasionally opposing rights. These questions become pertinent in the digital age, where photography has become everyone's favorite pastime, and photographs can be distributed and viewed on several online and offline platforms having almost unlimited global reach. Indeed, on such platforms, photographs are used in a variety of rapidly growing industries including modeling, advertisement, product endorsement, sponsorship, character merchandising, entertainment and other related industries. The paper advances the cause of balancing these rights and suggests that this should not be left to judicial evolution or private contract but should be made through the reform of copyright law.

**Key words:** Celebrity, Copyright, Digital Revolution, Photograph, Privacy, Publicity, Rights.

### **1. INTRODUCTION**

In the copyright law of most States in Africa and beyond, copyright in a photograph belongs to the photographer,

who generally exercises the basic rights of a recognized author/owner of the work. The right of the author/owner of a photograph includes the right to reproduce, distribute or commercialize the work. In the particular instance of photography or image capturing, not much is mentioned with respect to the image and the rights that such an individual or subject possesses or might claim. If the right of the photographer means that she/he can use the image without consulting the subject of the photograph or obtaining his/her permission, then a clash of interests or rights is inevitable in some cases at least, absent prior legal agreement. The focus here is directed at uses of the image which might be harmful, offensive or impact on other interests of the subject in one way or another. Privacy and image rights, considered generally or in the particular context of photography, transcends a simple discourse of copyright law. It might depend on what use the photograph is put to, following snapping/capturing, and extend into the realm of torts law, criminal law, constitutional law and so on. Hence, the paper attempts to narrow the issue to this context as much as is possible.

Copyright law envisages the possibility of a prior agreement between the photographer and the person at whose instance or for whose purpose or interest the photograph was taken, with respect to ownership and control of subsequent dealings with the photograph. This contract is usually made in the context of an employer/employee relationship or commissioned photographs, such as a portrait. This allowance, however, suffers two important limitations. First, the employer or the commissioner of the photograph might not necessarily be the subject captured in the photograph. Secondly, photographs can be taken and are very often taken outside of employment or commissioned arrangements; indeed, they can be taken without the knowledge or consent of the subject or, as the case may be, the person in control of the object of the photograph. Consequently, in the absence of clear and mandatory legal provisions in copyright law, the issue of rights or transfer of rights of ownership in photographs in the specific context under examination remains a grey area

that should be addressed through legal reform. This is imperative and urgent, considering the massive explosion of the entertainment, advertising and creative industries in the world, Africa inclusive, coupled with an unprecedented expansion and utilization of the digital environment, where this kind of conflict occurs or is expected to occur with increasing frequency. This paper thus throws a searchlight on this area with a view to advancing the law to balance the conflicting rights.

## 2. THE BASIC FOUNDATION OF COPYRIGHT LAW

The need to legally protect certain products of human creativity in the form of literary and artistic works has been recognized for well over a century now. The core areas recognized for protection have however increased from the first generation of rights such as patents, copyright, trademarks and designs, to the newer generation of rights such as geographical indications, confidential information, trade secrets, traditional knowledge, genetic and scientific resources as well as works created by or through the use of artificial intelligence. Some of these newer IP rights are accommodated under the well-known first-generation headings but have somehow managed to attract special attention while some others are accorded special recognition. Regardless of this perspective, the basic foundation for intellectual property protection is a recognition that 'everyone has the right to the protection

of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.<sup>1</sup> Protection of intellectual property is justified upon a fairly well articulated basis which largely centers on the concept of the entitlement of creators to the fruits of their efforts, balanced against benefits to the society at large.<sup>2</sup> Hence, a concept of authorship/ownership has developed by which entitlement to the benefit of the legal protection under copyright is determined. The field of IP is so vast however, that a meaningful and reasonable consideration of the current subject matter necessitates a focus, in this paper, on copyright law, and even at that, a narrow aspect of it.

Without necessarily taking the historical approach,<sup>3</sup> copyright may generally be described as the legal right given to creators of certain works resulting from their intellectual effort and made available for the enjoyment of the society. It may also be defined as the 'statutorily granted right exercisable by certain groups of persons on some designated works of art upon some terms and conditions specified by law for some period of time'.<sup>4</sup> Works in this context may be in area of arts and literature, music, films and so on.

Copyright grants an exclusive right to authors to do or to authorize or control the doing of certain 'restricted acts' with respect to their protected works.<sup>5</sup> Before considering this however, it is worthy to note that there are certain categories of works recognized by the law as eligible for copyright protection, as well as conditions for

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<sup>1</sup> United Nations Universal Declaration of Human Rights, 1948, Art. 27 (2).

<sup>2</sup> For a robust and interactive discussion of justifications for Intellectual Property Rights (IPRs), see Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Texts, Cases and Materials*,

(Oxford University Press 2009) 4-13; A O Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press 2015) 8-14.

<sup>3</sup> There is however a reasonable measure of consensus among authors that copyright as it is known today evolved at the inception of the industrial era with the development of the printing press as a means of large-scale production of written materials as well as increase in literacy in the early societies. Extensions of copyright relevance beyond written or printed materials, for example musical, literary and artistic works and so on, naturally followed further social and technological developments. See generally W R Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (3<sup>rd</sup> ed Sweet and Maxwell 1996) 297-303; Tanya Aplin and Jennifer Davis (n 2) 41-44; A O Oyewunmi (n 2) 24; H Klopper, T Pistorius, B Rutherford, L Tong, P van der Spuy and A van der Merwe, *Law of Intellectual Property in South Africa* (LexisNexis 2011) xxii.

<sup>4</sup> A O Yusuff, 'Computer Technology and Copyright Eligibility under the Nigerian Copyright Law' (2005) 3 *Igbinedion U L J* 44.

<sup>5</sup> D Bainbridge, *Introduction to Computer Law*, (3<sup>rd</sup> ed Financial Times Pitman Publishing 1996) 12.

their eligibility. Under the Copyright Act of Nigeria,<sup>6</sup> for example, works are generally categorized as

- (a) Literary works;
- (b) Musical works;
- (c) Artistic works;
- (d) Cinematography films;
- (e) Sound recordings; and
- (f) Broadcasts.<sup>7</sup>

These categories might look definitive and restrictive but, as noted by Asein, each recognized work is broadly defined to embrace a wide range of creative efforts and materials.<sup>8</sup> Creative works falling within the Literary, Musical and Artistic categories must satisfy certain conditions to be protected.

According to s. 1 (2) (a) & (b) of the Nigerian Copyright Act<sup>9</sup>

‘A literary, musical or artistic work shall not be eligible for copyright unless

- (a) sufficient effort has been expended on making the work to give it an original character;
- (b) the work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device’.

The first of these conditions is usually referred to as the concept of ‘originality’ while the second is referred to as the concept of ‘fixation’. Originality in the copyright sense means that there is a direct creative link between the author’s mental conception and the work which emanates from his hand. Thus, the author must have expended some meaningful skill and sufficient effort in the process of making the final work to make it distinct

from any other similar work. It does not mean though, that the work must be entirely new, novel or spectacular but that it was independently created.<sup>10</sup> It is not very clear what degree of effort would be considered ‘sufficient’ as a basis for recognition of a work but it might be suggested that a minimum standard of personal involvement, use of skill, talent, judgment and distinct taste in the creation of the work would be necessary. In the words of Oyewunmi, ‘a low threshold of originality as required under the Act does not mean that commonplace factual information without any creative input in terms of a unique arrangement, style or order of presentation should be accorded protection’.<sup>11</sup>

With regard to the second condition, copyright does not subsist in a literary, musical or artistic work unless and until it is recorded in writing or made to exist in some other material form.<sup>12</sup> This requirement for ‘material embodiment’ is otherwise referred to as fixation and it further reinforces the general nature of copyright, namely that it does not protect ideas simpliciter, but the expression of those ideas in a more or less permanent form.<sup>13</sup> The work must be fixed in a medium where it can be seen, read, heard, or felt, being media that would not only aid the perception and attribution of the work, but also enable its reproduction, publication and communication to the public.

Given these background concepts, this paper will now address the primary focus of copyright in image capturing or photographs more specifically.

### 3. COPYRIGHT IN PHOTOGRAPH AND IMAGE CAPTURING: RIGHTS OF AUTHOR/OWNER

Photography is more ubiquitous now, than when it was developed over a century ago. Advances in information

<sup>6</sup> Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004 (As amended).

<sup>7</sup> Ibid s.1(1).

<sup>8</sup> J O Asein , *Nigerian Copyright Law and Practice* (2<sup>nd</sup> ed Books and Gavel Publishing 2012) 45. In this sense, computer program is generally recognized as Literary work while photographs, the subject of this paper, is recognized as Artistic work. See also, F O Babafemi , *Intellectual Property-The Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria* (1<sup>st</sup> ed Justinian Books 2007) 9-10.

<sup>9</sup> Copyright Act (n 6), which is consistent with international copyright law and copyright law of most countries of the world in this regard.

<sup>10</sup> A O Yusuff (n 4) 46-47. See also, J Asein (n 8) 75-78.

<sup>11</sup> A O Oyewunmi (n 2) 39. See also a detailed and well-articulated discussion of these issues in J Asein (n 8) 75-78.

<sup>12</sup> C Gringras , *The Laws of the Internet* (Butterworths 1997) 165.

<sup>13</sup> H Klopper . T Pistorius , et al (n 3 ) 164; J O Asein (n 8) 82-85.

and communication technology translated to camera-capability for most handheld and mobile gadgets and devices, such as phones, tablets, personal computers, wrist watches, pens, audio/video recorders and so on. The result is that it has turned everyone with such devices into photographers. It is therefore so easy now to take pictures and to use any of the available photoshop or photo-editing applications or software to modify the pictures and enhance their qualities as desired. It was not so in the beginning, where the aesthetic quality, appeal and distinctiveness of individual pictures were dependent on how dexterous or talented the photographer was. However, regardless of the quality of photographs, copyright law classifies photographs as artistic works and confers authorship on the person who took the photograph.<sup>14</sup> Authorship is hinged on the belief that she/he must have exercised judgment 'as to what to photograph, the arrangement of a scene, including positioning, lighting and other exercise of judgment, skill, or labour in taking the photograph'.<sup>15</sup> It is thus the creativity and arrangements involved which determines the assignment of copyright in the photograph. As Lloyd J reasoned in *Creation Records Limited v News Group Newspapers*:

It seems to me that ordinarily the creator of a photograph is the person who takes it. There may be cases where one person sets up the scene to be photographed (the position and angle of the camera and all necessary settings) and directs a second person to press the shutter at a moment chosen by the first, in which case it would be the first, not the second, who creates the photograph. There may also be cases of collaboration between the person behind the camera and one or more others in

which the actual photographer has greater input, although no complete control of the creation of the photograph, in which case it would be the first, not the second, who creates the photograph. There may also be cases of collaboration between the person behind the camera and one or more others in which the actual photographer has greater input, although no complete control of the creation of the photograph, in which case it may be a work of joint creation and joint authorship.<sup>16</sup>

The photographer owns copyright in the photograph as a consequence of being recognized as the author of it. However, an author is only the first owner of copyright as the author might choose to alienate any or all of the rights that are recognized as exclusive to the author. Besides, an author of a photograph might not be the owner or able to exercise ownership rights over it if the photograph was created in the course of an employment or if she/he was commissioned to take the photographs, provided that an agreement exists to this effect.<sup>17</sup> In this case, the employer or the commissioner owns copyright over the photograph, although the photographer may always be acknowledged as the author. Asein noted

It must be stressed that there is a clear difference between the author of a work and the owner with both having different legal consequences. Apart from the so-called moral rights, which are expressly reserved for the author, the economic benefits of copyright are reserved for the owner rather than the author *per se*.<sup>18</sup>

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<sup>14</sup> Copyright Act of Nigeria recognizes that artistic work includes, irrespective of artistic quality, photographs not comprised in a cinematograph film and further provides that author, in the case of a photographic work means the person who took the photograph. See s. 51 (1) Copyright Act, Cap C 28, Laws of the Federation of Nigeria 2004 (As amended). Similarly, s.1 (1) of the Copyright Act 98 of 1978 of South Africa provides that author, in

relation to a photograph is the person who is responsible for the composition of the photograph.

<sup>15</sup> A O Oyewunmi (n 2) 39.

<sup>16</sup> [1997] EMLR 444; [1997] EWHC Ch 370; See also a discussion of the case at <http://www.civil.law.cam.ac.uk> accessed on 1 June 2018.

<sup>17</sup> See s. 10 Copyright Act of Nigeria (n 6)

<sup>18</sup> J O Asein (n 8) 125.

Furthermore, as explained by Oyewunmi<sup>19</sup>

...copyright is deemed to be vested in the author of works made in the course of employment or pursuant to a commission, unless the case falls within the exceptions provided under the Act. Thus, a graphic artist who works full time as an employee for an advertising agency will own copyright in the drawings he makes for the firm's business purposes, unless he enters into a written contract which provides otherwise. Similarly, where an independent contractor/free lance writer is paid to do a write-up on another, or a free lance photographer, painter or artist is commissioned to take a photograph, paint a portrait or make a sculpture, as the case may be, ownership of the resulting works lie in the author/writer, photographer or artists respectively, and not in the person appearing in the work or the one who commissioned it.<sup>20</sup>

Generally, an author or owner of copyright exercises either or both of two broad rights, namely, right of exploitation/commercialisation and what is called moral rights. In Nigeria, an author of an artistic work has the exclusive right to do or authorize the doing of any of the following acts,

- (i) reproduce the work in any material form;
- (ii) publish the work;
- (iii) include the work in any cinematograph film;
- (iv) make an adaptation of the work.....<sup>21</sup>

<sup>19</sup> Op cit (n 2)

<sup>20</sup> Ibid 64; see also a detailed discussion of the general rule of ownership of copyright as well as ownership in the context of employee or commissioned works in Asein, (n 8) 125-132; Joe Walsh, 'who owns the copyright the photographer or the client' available online at: <http://www.own-it.org/news/who-owns-the-copyright-the-photographer-or-the-client> accessed 23 August 2016.

<sup>21</sup> Ibid s.6. See also *Peter Obe v. Grapevine Communications Ltd* (2003-2007) 5 I P L R 354.

<sup>22</sup> This was the experience of Tu Face Idibia, a music artiste, performer and award winner well-known in and outside Nigeria.

A photographer, deemed to be the owner of a photograph, can exercise all rights incidental to that status, including the right to reproduce, publish or exploit the work as she/he may deem fit. As such, the photographer may distribute, share, exhibit, commercially exploit, duplicate and make use of the photograph in any other professional respect. Oftentimes, controversies break out between the photographer and the subject of the photograph who might find out that the photographer is not only freely using, utilizing and commercially exploiting the photograph containing her/his details without permission but is also able to restrict or control the use to which the person could put her/his own image, and especially able to sue a person for reproducing his/her her image!<sup>22</sup> Oyewunmi noted that this default consequence, in the absence of a contrary and prior agreement, is definitely protective of the interest of authors but may 'run contrary to the reasonable expectations of members of the public who patronize creators, as they may find themselves being liable for infringing copyright in a work commissioned and paid for by them'.<sup>23</sup>

Copyright ownership in situations where a photographer takes a photograph of a person who is aware that her/his photograph was being taken, someone who posed for the photograph or commissioned it, as explained above, is to a large extent, clear. Copyright is vested in the photographer who is employed or commissioned to take the photograph, except where a prior contract or agreement exists to the contrary.<sup>24</sup> Where a contract exists, terms would normally specify what rights are accorded to the photographer, if any, after the work is

Tu Face got married with many celebrities in attendance as well as photographers, invited and uninvited. A particular photographer attended the wedding and took pictures, samples of which he sent to Tu Face who allegedly reproduced and shared the pictures without the consent or permission of the photographer. This irked the photographer who subsequently sued Tu Face and his wife for N120 million. It is not certain if they were able to reach an amicable settlement out of court or if the matter proceeded to trial. See R Oladimeji, 'Copyright: Photographer sues 2-Face, wife for N120m', *The Punch*, (Nigeria March 21 2016) 7.

<sup>23</sup> Oyewunmi (n 2) 64.

<sup>24</sup> See s. 10 (2) Copyright Act of Nigeria (n 6).

done and submitted. In this case, the person whose image was captured exercises all rights in the photograph. In many cases, however, no prior contract exists and the person whose image is taken is left dazed that another owns the copyright in her/his image and can exercise extensive liberties over the image. It has been suggested that in the case of employee or commissioned works (photographs) without a prior contract, a licence to use the work freely might be inferred on behalf of the employer or commissioner, in short, the person whose photograph was taken, or alternatively that such an employer or commissioner might be deemed to be the equitable owner of copyright in the work.<sup>25</sup> This runs contrary to the clear position and provisions of copyright law. It is quite uncertain if courts would generally be willing to adopt such a liberal attitude except as justice of a particular case require. Therefore, the general position still prevails, regardless of how unfair it might seem.

A different scenario however, is where a photographer takes the photograph of individuals in a public or a private place, without permission, or indeed the knowledge of the individual. A related case would be where the individual is aware but is indifferent to the fact that his/her photograph is being taken. It is also possible, in the case of a group photograph, that persons concerned have no choice and cannot object to being captured in the photograph. In all these scenarios, the general rule presumably still applies. The photographer owns copyright in the photograph, since the scenarios preclude the existence of any contract or agreement about the photographs.<sup>26</sup> The natural consequence is that the photographer in the exercise of right of ownership in the photographs, might publish, share, exploit, distribute or otherwise deal with the photographs in spite of the interest or rights of those captured.

The next segment of this paper examines the interests and rights of those whose photographs are taken by photographers, whether with their full knowledge and consent or otherwise, and limits that might be set to the exercise of rights of copyright owners in the photographs. Focus is specifically placed on privacy and publicity rights of individuals whose images or photographs are taken.

#### **4. PRIVACY, PUBLICITY AND OTHER RIGHTS OF SUBJECT OF THE PHOTOGRAPH**

In Nigeria, it is very common to attend social functions or festivities such as wedding ceremonies, funeral or burial programmes, conferment of chieftaincy or other titles of honour, high profile birthday bashes, house dedications, graduation ceremonies and so on, which are heavily photographed events. One could have been completely unaware of the time that the photographers took his/her pictures and would subsequently face the dilemma of accepting and paying for the unauthorized photographs or rejecting them and consequently leaving the image in the hands of complete strangers. One would have no inkling what it might subsequently be used for or where it would end up, and so naturally feel uncomfortable or concerned for any eventuality with respect to the photographs. Many such photographs have ended up published in newspapers as illustrations for how or how not to dress or behave while attending a public function. Besides, a person might accidentally be captured in a photograph or pose for a photograph that might be used by the photographer outside of the context it was taken or for commercial purposes. Furthermore, photographs could be taken in a purely private setting, possibly without permission to capture personal property such as the picture of a building, automobile, garden, animal/pet, among others. Strictly speaking, ownership of copyright in the photographs taken in all these cases will remain with the photographer. However, individuals involved

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<sup>25</sup> Oyewunmi (n 2) 65. The author cited in support of these positions, *Blair v. Osborne & Tomkins* [1971] 1 All ER 468 and *Pasterfield v. Denham* [1999] F S R 168.

<sup>26</sup> It makes no difference to this situation if the photographer was an employee of or commissioned by some other person to take

the photograph as there would be no privity of contract with the individual whose image was captured by the photographer were there to be a prior contract between the photographer and the employer or the commissioner, as the case may be.

might claim privacy or publicity rights or generally, a right to control subsequent uses the photographer might make of the photographs.

A photographer might make use of the photograph in a manner that is harmful or offensive to the reasonable sense of dignity, honour, or reputation of the subject of the photograph. The photographer may for instance, lend the use of the picture, over which she/he owns copyright, to a cause morally objectionable or offensive to the conscience of the subject in the photograph, she/he might also put the photograph to a use that might expose her/him to public ridicule or opprobrium. Hence, the subject of the photograph would have a genuine concern and a justifiable interest in having some measure of control or restraint over how the picture is used. Consequently, a sort of moral right recognized in favour of the subject in such photographs seems appropriate.

Privacy right is generally considered as the right an individual has to be left alone, free from unwanted intrusion or access to his/her person or information.<sup>27</sup> It can be described as the state of reasonable desired in access or freedom from unwanted access. In this case, access means perceiving a person with one's senses (seeing, hearing, touching), obtaining physical proximity to him or her and or obtaining information about him or her.<sup>28</sup> Privacy also entails that information about an individual or an individual's activities should not be collected, disseminated or shared with any other person.<sup>29</sup> Consequently, it amounts to a breach or an invasion of an individual's privacy to take his/her picture, particularly without the individual's knowledge, consent and/or permission. It might be assumed that no individual

is entitled to a claim of privacy if that person is in a public place and consequently that it is not an invasion of privacy to take a picture of that individual in the public place. This might hold feebly as a general rule but whether a person is entitled to privacy in a public place or not depends on if that person has a reasonable expectation of privacy in the public place.<sup>30</sup> It might be okay to take the pictures in a public place and capture along with other persons and objects in the picture, people who come within the focus of the photographer's camera. It is a different issue however, if the photographer deliberately lines up a direct and clear shot of an unsuspecting or innocent person in the public place. The public character of a place is generally determined by its open accessibility to the entire community.<sup>31</sup> Thus, streets, public parks, playgrounds, public transit systems, areas where educational institutions are located and hospitals are usually classified as public places.<sup>32</sup> Access to such places could be free or based on the satisfaction of some conditions, payment of fees for example; it would still be a public place as long as anyone is at liberty to go to such a place. The implication is that, regardless of ownership rights in resulting photographs, photographers and photo-journalist must appreciate the limits of their liberties to take pictures of individuals in public places. It should not be subject to any debate however, that photographers cannot freely take or distribute pictures of things or persons in private residences and places.<sup>33</sup> This is more important because, in Nigeria as in most other countries, the right to privacy is basically constitutional while ownership right in photographs is statutory under the Copyright Act.<sup>34</sup> Hence, privacy right generally carries more weight. Where a photographer's capturing and

<sup>27</sup> Don R Pember, *Mass Media Law* (Mc GrawHill 2003-2004) 230-241.

<sup>28</sup> N A Moreham, 'Privacy in Public Places', *Cambridge Law Journal*, (2006) 65 (3), 617.

<sup>29</sup> *Ibid.*

<sup>30</sup> For a very detailed analysis and discussion of the concept of 'reasonable expectation of privacy' as well as claims of privacy in public places, see A O Yusuff, 'Legal Issues and Challenges in the Use of Security Cameras (CCTV) in Public Places: Lessons from Canada', (2011) *SLJIL*, 23, 33- 75.

<sup>31</sup> *Ibid.*

<sup>32</sup> See, 'Rules for use of Surveillance Camera in Public Places by Public Bodies in Quebec', available at:

[http://www.cai.gouv.qc.ca/06\\_documentation/01\\_pdf/new\\_rules\\_2004.pdf](http://www.cai.gouv.qc.ca/06_documentation/01_pdf/new_rules_2004.pdf) accessed 17 February 2007.

<sup>33</sup> Samuelson-Glushko, 'Copyright in Photographs' available online at: [https://cipic.ca/en/FAQ/Photography\\_Law](https://cipic.ca/en/FAQ/Photography_Law) accessed 23 August 2016.

<sup>34</sup> S. 37 of the 1999 Constitution of the Federal Republic of Nigeria provides that 'The **Privacy** of citizens, their homes, correspondence.....is hereby guaranteed and protected' (emphasis, mine); while s. 1 (3) of the same constitution states that 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.

distribution of an individual's photograph amounts to an improper use or causes some loss or damage to the individual, this might further give rise to a civil or possibly criminal remedy<sup>35</sup> against the photographer notwithstanding the photographer's copyright in the photograph.

Furthermore, individuals may also claim or be entitled to publicity right. This, more or less emerging right, is the right of any living person to forbid the use of her/his name, photograph, likeness or image for commercial purposes without his or her consent.<sup>36</sup> Privacy and publicity rights reflect separate and distinct interests from copyright interests. 'While copyright protects the copyright holder's property rights in the work or intellectual creation, privacy and publicity rights protect the interests of the person(s) who may be the subject(s) of the work or intellectual creation'.<sup>37</sup>

The issue in contention was clearly analysed thus:

The distinctions among privacy rights, publicity rights, and copyright are best illustrated by example, as follows: An advertiser wishes to use a photograph for a print advertisement. The advertiser approaches the photographer, who holds the copyright in the photograph, and negotiates a license to use the photograph. The advertiser also is required to determine the relationship between the photographer and the subject of the photograph. If no formal relationship (e.g., a release form signed by the subject) exists that permits the photographer to license the use of the photograph for all uses or otherwise waives the subject's, sitter's or model's rights, then the advertiser must seek permission from the subject of the photograph

because the subject has retained both privacy and publicity rights in the use of their likeness. The privacy right or interest of the subject is personal in character, that the subject and his/her likeness not be cast before the public eye without his/her consent, the right to be left alone. The publicity right of the subject is that their image may not be commercially exploited without his/her consent and potentially compensation.<sup>38</sup>

It is clear therefore, that a photographer must recognize that an individual who has been photographed might also be entitled to publicity rights, which make it imperative that the photographer refrain from exercising too much liberty with the photographs over which she/he claims copyright. The right of publicity, for instance, forbids anyone taking photographs of a performer in a live performance without prior authorization or permission, for that would be an illegal fixation of the performance which is tantamount to an infringement of the right of the performer.<sup>39</sup> In the words of Rich Stim,

The right of publicity grew out of the general principles of invasion of privacy that prohibit using a person's name or likeness to gain a benefit. Within the past few decades, the right of publicity has emerged as an independent type of claim that a person can make when his or her name or likeness is used for commercial purposes. Although the right of publicity is commonly associated with celebrities, every person, regardless of how famous, has a right to prevent unauthorized use of their name or image to sell products. This right also prohibits

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<sup>35</sup> Such remedies include civil damages for invasion of privacy, injunction from further invasion of privacy or dissemination of offending material, civil or criminal suit for defamation, demand for apology and/or retraction of the offending material.

<sup>36</sup> The Library of Congress (American Memory), 'Privacy and Publicity Rights' available at <https://memory.loc.gov/ammem/copothr.html> accessed 23 August 2016.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> The Copyright Act of Nigeria provides in s. 26 (1) that a performer shall have the exclusive right to control, among others, the 'recording' or the reproduction of his performance in 'any material form'. It is unarguable that taking still photographs of a performance is a reproduction in a material form. See also the case of *Zacchini v Scripps-Howard Broadcasting* 433 U.S. 562 (1977).



any implication that a person endorses a product (without the person's permission).<sup>40</sup>

A similar sentiment was expressed when Lynne M. J. Boisineau stated,

On the most basic level, the right of publicity is an individual's right to prevent others from commercially exploiting his or her identity without permission. Given the way that this area of law has been trending, that right is available to virtually everyone, not just to A-list celebrities. If you violate someone's right of publicity, you can be forced to take down the content in question and/or pay monetary damages to that individual.<sup>41</sup>

It can therefore be seen that right to privacy, publicity rights and the right to have one's reputation untainted act as restraints on the right of photographers in the use of photographs in which they have copyright ownership.<sup>42</sup> As a general rule, a photographer may always exercise the rights of an author and owner of the photograph under the copyright law, including the right to share, reproduce and commercially exploit the photograph. However, important limits are and should be set to regulate the

exercise of these rights in the contexts discussed above and given the prevailing astronomical growth in the modeling, advertisement, product endorsement, sponsorship, character merchandising and other related industries.<sup>43</sup> In its work on IPRs in the advertising industry, the World Intellectual Property Organization (WIPO) cautioned advertising agents and their corporate clients to note that a 'person's identity, such as his or her name, photograph, image, voice or signature may be protected by publicity or privacy rights'.<sup>44</sup> Furthermore, the unprecedented expansion and utilization of the digital environment, social media in particular, makes it imperative to note and address the inevitable clash of rights and interests between photographers and the people captured in their photographs.<sup>45</sup>

## 5. CLASH OF RIGHTS AND INTERESTS WITHIN AND OUTSIDE THE DIGITAL ENVIRONMENT

As demonstrated in the section above, in jurisdictions where such rights are recognized and enforced, celebrities have publicity rights and every other person equally has this right in addition to privacy rights and the right to the protection of personal information and reputation from defamation. Photography has been an

<sup>40</sup> Rich Stim, 'The Right of Publicity' available at <http://www.nolo.com/legal-encyclopedia/the-right-of-publicity.html> accessed 23 August 2016.

<sup>41</sup> Lynne M.J. Boisineau, 'Intellectual Property Law: The Right of Publicity and the Social Media Revolution', available at [http://www.americanbar.org/publications/gp\\_solo/2013/may\\_june/intellectual\\_property\\_law\\_right\\_publicity\\_and\\_social\\_media\\_revolution.html%22.html](http://www.americanbar.org/publications/gp_solo/2013/may_june/intellectual_property_law_right_publicity_and_social_media_revolution.html%22.html) accessed 23 August 2016.

<sup>42</sup> In setting out the differences between the right to privacy and publicity as causes of action under the appropriation tort, Pomeroy (n.27) 234 stated

The differences between the two are small but important. The right to privacy protects an individual from the embarrassment and humiliation that can accrue when a name or picture is used without consent for advertising or trade purposes....The right to publicity, on the other hand, protects individuals from the exploitation of their name or likeness for commercial purposes. In other words, someone is making money by using another individual's name or photo. The right to privacy protects a personal right; the right to be free from such humiliation or embarrassment. The right to publicity protects a property right; the economic value in a name or likeness.

The right to have one's reputation untainted is enforced through the tort law of defamation.

<sup>43</sup> With respect to character merchandising and publicity rights see a very detailed and cross jurisdictional analysis and discussions in Tanya Aplin and Jennifer Davis (n 2) 339-379. For robust judicial decisions on the nature and implications of the right of privacy and publicity see also the following cases- *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.* 202 F. 2d 866 (2<sup>nd</sup> Cir. 1953); *Eastwood v. Super. Ct. (National Enquirer, Inc.)*, 149 Cal. App. 3d 409, 417 (1983); *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp.2d 823, 837 (1998); *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362, 374-75 (2000). The core principle established by the courts in these cases is that it is actionable against a person or entity to create false and misleading impression that a celebrity or another person is associated with or endorsing a product or service.

<sup>44</sup> World Intellectual Property Organization, *Managing Intellectual Property in the Advertising Industry*, Creative Industries-Booklet No. 5, 34-38.

<sup>45</sup> Writing on information revolution and the digital explosion, E Lederman, *Infocrime- Protecting Information Through Criminal Law*, (Edward Elgar Publishing 2016) 13ff stated

Never before has there been such an immense quantity of accumulated information expressed in an assortment of regular and electronic communicative messages, including writings, electronic data, recordings, photographs and drawings covering a wide range of issues and fields. Nor has there ever been such a surge in the production, storage, processing and distribution of that information.

enduring preoccupation through the ages; as a distinctive profession and as a hobby. There have been meteoric advances in information and communication technology (ICT). There have also been notable innovation and developments in digital and internet compatible devices.<sup>46</sup> Consequently, most mobile/electronic devices now come with cameras with the capability to capture and store images and sounds. Furthermore, nearly all social media platforms have buttons or icons which one can hit to 'send', 'forward', 'copy' and/or 'share' content, whether still images (photographs), sounds or videos. The result of this trend is the creation of enhanced opportunities to take photographs and have them used and distributed far beyond the imagination and reach of the photographer.

Yet, there is potentially a lot of financial value or commercial worth in photographs, whether of ordinary, everyday people or of celebrities.<sup>47</sup> In Nigeria today, the entertainment sector, especially the movie and music industries have grown into a multi-billion naira sector. Artistes, performers, actors, actresses, 'On-Air Personalities' and other celebrities earn significant sums of money from service and product endorsements, sponsorship and advertisements. Many of them are appointed as brand 'ambassadors' by big companies and multinationals, such as the telecommunication giants; MTN, Globacom, Etisalat (Now, 9-Mobile); Banks and Finance Houses; Automobile companies; and many others. More often than not, the appointments are made under contracts which exclude the use of the image or

association of the particular individual with any other brand, whether in a competitive business or not. It is then easy to imagine what financial disaster could befall a celebrity or other individual if a photographer would take a photograph, share it and have it deliberately or fortuitously associated with a contract infringing product or service. The exercise of the right of the photographer to share and deal with the photograph of which she/he is the author or owner will thus spell doom for the interest of the person photographed.

Contracts between the photographer and the photographed person, specifying the scope of rights and entitlements of both parties can go a long way to preempt, prevent and resolve potential conflicts. For example, a photo release<sup>48</sup> agreement signed prior to or during the course of taking the photograph will cede control or ownership of the photograph to the individual photographed, while a model or celebrity photo release contract<sup>49</sup> will enable a photographed person to use and clearly specify the parameters of such use a photographer might make of the photograph. The position of the law where a photograph was taken under a contract of employment or while commissioned is quite clear and largely settled. It is in instances where the signing of a prior contract between the photographer and the subject of the photograph is impossible or was never even considered, that copyright law is required to clarify ownership.

This paper has largely proceeded, before now, on the assumption that 'photographers' are basically

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<sup>46</sup> Africa, particularly Nigeria, have been drawn into the mainstream of this developments and her residents, regardless of the level of education or literacy, are taking full advantage to participate and enjoy all that the ICT and internet systems have to offer. See A O Yusuff, 'Employing Legal and Policy measures to tackle electronic Infringement of Copyright in Nigeria', (2008) 6 *Igbinedion U L J*, 124-125.

<sup>47</sup> A couple of years ago in Nigeria, a young woman hawking bread on a street in Lagos, accidentally walked into a photo-shoot by a Photographer and her team. The young woman, Olajumoke Orisaguna, was thus captured among the pictures taken by the photographer contracted for the photo-shoot, who promptly saw the modeling potential of the young woman. Subsequently, she was invited and became an instant hit when the photographer arranged for her to model. Within a very short time, Olajumoke Orisaguna became a celebrity and started

earning big money beyond her wildest imagination and far from what she could possibly earn in decades of hawking bread. See 'Olajumoke Orisaguna-Biography' available at [https://en.wikipedia.org/wiki/Olajumoke\\_Orisaguna](https://en.wikipedia.org/wiki/Olajumoke_Orisaguna) accessed 30 May 2018; See also 'Former Bread Seller Olajumoke Orisaguna Goes back to her root to give back for the new year' available at <https://www.informationng.com/2018/01/former-bread-seller-olajumoke-orisaguna-goes-back-root-give-back-new-year.html> accessed 30 May 2018.

<sup>48</sup> See Photo Release Form, available at <http://www.studiobinder.com/blog/photo-release-form-template/> accessed 23 August 2016.

<sup>49</sup> See Model Release Form, available at <http://www.studiobinder.com/blog/model-release-form-template/> accessed 23 August 2016.

professionals, people who make photography their vocation and derive their living from it. Another loose assumption is that the photographs under discussion are of living persons. It is however worthy of note that the discourse is equally relevant to, and more particularly affects amateur photographers, freelance photographers, those who pursue photography as a hobby, everyday users of phones and other mobile or handheld devices with camera capability, and even kids playing with cameras.<sup>50</sup> The discourse is also applicable to pictures of objects and things (whether or not in the care or custody of identifiable individuals), with which prior contracts are inconceivable.<sup>51</sup> Professional photographers are expected to be fairly familiar with copyright and other legal rules affecting their work and so might not be so much at a loss as to what legal rules obtain in specific instances. This expectation is less likely where other categories of 'photographers' are concerned. Iconic pictures can be taken quite accidentally and by persons who know little or nothing about rules of photography, including rules as to how to take the best photographs and rules as to legal implications and applicable principles.<sup>52</sup> All these instances have been the key focus of this paper and precisely the reasons reform or additional copyright rules with respect to photographs are imperative.

## 6. CONCLUSION

The foundation of copyright is a balancing of rights - a balance of the right of the copyright owner and the right of society to access and enjoy the benefit of advances in the arts, science and technology. Copyright has equally,

over time, been stretched to accommodate new methods of creative expression and other cases deemed deserving of protection as intellectual or industrial property. This balancing role and equitable flexibility of copyright should come into play in handling the clash of rights between photographers and people captured in their photographs. Several cases have been decided, especially in North America where rights to privacy as well as publicity rights are recognized. The cases do not seem to establish clear and predictable directions in resolving cases involving clashes between copyright, privacy and publicity rights. In any case, issues are still arising and developing in this area; more people will take to photography whether as a hobby or as a profession. At the same time, the expectation is that the entertainment, advertisement and creative industries would continue to explode in Africa similar to other parts of the world, having photography and image capturing at its center, coupled with unprecedented expansion and utilization of digital platforms, including the social media. It is thus imperative that copyright law should adapt to the prevailing realities of the century and attempt to balance these competing but not necessarily opposing rights and claims. Over time, copyright law had demonstrated the ability to adapt and accommodate changing templates of creativity. In the current situation, the balancing act should not be left to judicial evolution.

One of the situations that should attract reform attention is the extant provision of copyright law relating to copyright ownership of photographs in the absence of a prior written contract. The current position is that the photographer is the author and possibly the owner of

<sup>50</sup> It is indeed possible for an animal to take photographs as was the case when in 2011 'Naruto', a rare macaque monkey, shot a 'selfie' where it appears to be smiling when it picked up a British photographer, David Slater's camera. See Samuel Osbourne, 'Monkey selfie Case: Photographer wins two year legal fight against Peta over the image copyright' available at <https://www.independent.co.uk/news/world/americas/monkey-selfie-david-slater-photographer-peta-copyright-image-camera-wildlife-personalities-macaques-a7941806.html> accessed 30 May 2018. See also 'Monkey who snapped viral selfie Doesn't own copyright, Rules US Court' available at <https://www.ndtv.com/offbeat/us-court-rules-monkey-naruto-doesnt-own-selfie-peta-cries-discrimination-1842394> accessed 30 May 2018.

<sup>51</sup> For example, a Californian jury ordered a beverage company to pay the sum of \$710,000 to a cat over the unlawful use of its identity. The owner of the cat, Tabatha Bundesen filed and won the lawsuit on its behalf. See 'Cat wins \$710,000 in Copyright lawsuit' available at <http://punchng/cat-wins-710000-in-copyright-lawsuit> accessed 5th February 2018.

<sup>52</sup> In the matter of Naruto selfie photograph, (n.50) controversy broke out as to who would be the author of the photograph taken by the monkey. A San Francisco court, in agreement with the US Copyright office, determined that human authorship is a requirement for copyright protection and therefore Naruto cannot own photographs it took!

copyright in the photograph she/he took, but the question is whether there can be a room for shared rights between the photographer and the individual captured in the photograph.<sup>53</sup> This is comparable to and can be an extension of the existing rule of copyright ownership in employee or commissioned photographs. Thus, it could be provided that where there is no prior contract between a photographer and the person captured in the photograph, the author/photographer is obligated to obtain the permission of the person before sharing the photograph and where the photographer chooses to commercialise/exploit the photograph, she/he would be obliged to share part of the proceeds with the photographed person. If this is made a general provision of the copyright law, it then becomes immaterial that there was no prior contract between the parties. The result would be less conflict in this still growing area.

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<sup>53</sup> Wherever this sense is created in this paper at this stage, it should be taken to include persons in charge or in custody of the objects or things captured in the photograph.

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