

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.

#\h' k@=u' @' @' ° 8- '# huyk@'8' h=\u\ 8k° h=' ° ° V) ·  
k@=u'\ 7'oy" o-j y-Vu'yo- ° °)) k-oo@'8' u=-' #K (

#

M : Celebrity, Copyright, Digital Revolution,  
Photograph, Privacy, Publicity, Rights.

@uk\ ) y#u@V'

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



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.

#A h' k@=u' @' h=\ u\ 8k° ou \ ú A ú

<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, *Vigilia #op ight La a d Pa tie* (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, *I telle tual Pope t -The La a d Pa tie of #op ight, T ade a ks, Pate tsa dI dust ial Desig si Vigilia* (1<sup>st</sup> ed Justinian Books 2007) 9-10.

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.



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 p







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>

#O o- \ 7 k@=uo \* V) @u-k-uo ‡ @=@ \* V) \ yuo@ - u=- ) @@ O-V†@ \ VU -Vu

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, Pember (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- *Haela La o ato ies, I . . Topps #he i g Gu , I . .* 202 F. 2d 866 (2<sup>nd</sup> Cir. 1953); *East ood . Supe . #t Vatio al E ui e, I . .* 149 Cal. App. 3d 409, 417 (1983); *Ui haels . I te et E te tai e t G oup, I . .* 5 F. Supp.2d 823, 837 (1998); *KV" E te p ises . U at the s* 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 crea

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

---

<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 an c u p

professionals, people who make photography their

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

