

# **UNDERSTANDING THE LAW IN UPHOLDING IMAGE RIGHTS: PERSPECTIVES FROM AROUND THE WORLD AND KENYA.**

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## 1. Introduction

Multiple elements form the concept of image rights. The increasing autonomy of one’s image from the person represented has been greatly facilitated and strengthened by the tremendous and previously unknown possibilities offered by technology, in terms of easy and rapid production and dissemination of the image.<sup>1</sup> New cultures and trends have emerged in the use of a person’s image in new communication spaces.<sup>2</sup> Internet use and social media have diversified the use of images, leading to increased concerns around and raising awareness of image rights. Image rights are now not only considered by celebrities, media personalities, and athletes, as was the norm. Commercialization of image use has expanded to the ordinary person, who may not necessarily have comprehensive visibility when compared to celebrities or public figures. This awareness has grown and has been predominantly tied to the right to privacy, especially where images are shared or used for commercial purposes without consent. Often, this goes unnoticed for long periods of time.<sup>3</sup>

With image-rights cases on the rise, this report offers an understanding of image rights in the digital space and the protections available from the different and overlapping areas of the law. This report addresses the existing legal frameworks and the areas of intersection of these laws with a keen perspective on the application of data protection laws as image rights relating to the constitutional right to privacy. This report highlights perspectives from different jurisdictions and from a Kenyan perspective, it will particularly focus on understanding image rights, the application of precedence in upholding image

rights, the policy gaps that exist in upholding these rights, and making recommendations as to policy formulation.

## 2. Understanding Image Rights

Image rights are referenced in different terminology and are subject to different legal treatments in different jurisdictions. In the European Union (EU), they are referred to as “personality rights,” whereas in the United States (US), they are more commonly known as “publicity rights.” Image rights are more commonly used in the United Kingdom (UK) and other common law jurisdictions.<sup>4</sup> By definition, image rights are an individual’s proprietary right to their personality to prevent unauthorised use of things like their likeness and even things like their signature or biometric data.<sup>5</sup> More broadly image rights refer to:

Access to the services of the personality for the purpose of filming, television (both live and recorded), broadcasting (both live and recorded), audio recording; motion pictures, video, and electronic pictures (including but not limited to the production of computer-generated images; still photographs; personal appearances; product endorsement and advertising in all media; as well as the right to use the personality’s name, likeness, autograph, story and accomplishments (including copyright and other intellectual property rights), for promotional or commercial purposes including, but without limitation, the personality’s actual or simulated likeness, voice, photograph, performances, personal characteristics, and other personal identification.<sup>6</sup>

<sup>1</sup>Tatiana Syonidun, ‘Image Right and Copyright Law in Europe: Divergences and Convergences.’(2014) *Laws*, 3(2), 181-207 <<https://www.mdpi.com/2075-471X/3/2/181>>.

<sup>2</sup>ibid

<sup>3</sup>JJ Shaw, Alex Kelham, and Rob Meredith, ‘Image Rights—Protection, Exploitation, and Taxation,’ (LexisNexis) <https://www.lexisnexis.co.uk/legal/guidance/image-rights-protection-exploitation-taxation>.

<sup>4</sup>Ian Blackshaw, ‘Understanding Sports Image Rights.’ (WIPO) <[https://www.wipo.int/ip-outreach/en/ipday/2019/understanding\\_sports\\_image\\_rights.html](https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html)>.

<sup>5</sup>Syonidun supra note 1 at 1

<sup>6</sup>ibid

Personality rights in the US are composed of two different categories; publicity rights and the right to privacy. This concept was first mentioned in 1890 by two authors, Brandies and Warren, in discussing the right to be left alone under the concept of the right to privacy.<sup>7</sup> The discussion advocated for damages to be granted for distress and anguish caused to a person whose dignity was harmed. From this, the right to publicity was derived, which granted an individual control over the commercial exploitation of his personality and hence a right of action against the misappropriation of their identity.<sup>8</sup>

This acknowledgment of a right to publicity, independent from a right to privacy, encompasses the right to own, protect, and commercially exploit one's publicity.<sup>9</sup> This right was more clearly defined by precedent in the case *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.*,<sup>10</sup> which for the first time affirmed that individuals (in this case, Major League Baseball players) possess a property right in their own images.<sup>11</sup> The exercise of publicity rights in the US, however, goes beyond the commercial exploitation and use of photographs. One's image,

more specifically, one's public image, is one's public persona, the impression one makes to the world.<sup>12</sup> Deeds, dress, gestures, speech, looks, and, in the digital age, online presence form elements of public image.<sup>13</sup>

In France, image rights have been recognized since 1853, the first instance arose from the case of the famous actor Rachel, whose image was taken lying on her deathbed.<sup>14</sup> The case ignited the very first considerations for the right to privacy and with it, the dichotomy between the right to privacy and image rights encompassing aspects that deal with protecting one's human dignity and the commodity aspects of a person's image.<sup>15</sup>

Image rights have become a tool to assert control over one's public image, regardless of whether one is a celebrity, public figure, or private individual. Image rights' dual nature protects two underlying interests: dignitarian/autonomy interests and economic interests. Dignitarian interests refer to giving a person control over their image. In this context, it refers to respect for their dignity and

<sup>7</sup> Alix C. Heugas, 'Protecting Image Rights in the Face of Digitalization: The United States and European Analysis.' (2021) JWIP 24(5-6) <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12194>>.

<sup>8</sup> *ibid.*

<sup>9</sup> Samantha Barbas, 'Law of Image: Privacy and Publicity in America.' (Stanford University Press, 2015). <<https://www.sup.org/books/title/?id=22622>>.

<sup>10</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) US Court of Appeals for the Second Circuit <<https://law.justia.com/cases/federal/appellate-courts/F2/202/866/216744/>>.

<sup>11</sup> 112 F.Supp. 904 – *Haelan Laboratories v. Topps Chewing Gum. Co.*, United States, United States District Court E. D. New York. <<https://www.leagle.com/decision/19531068202f2d8661807>>.

<sup>12</sup> Samantha Barbas, 'Law of Image: Privacy and Publicity in America' (Stanford University Press, 2015). <<https://www.sup.org/books/title/?id=22622>>.

<sup>13</sup> *ibid.*

<sup>14</sup> Marnie Elizabeth Bethel, 'Rachel, the Circulation of the Image, and the Death of Tragedy.' (University of Texas, 2012) <<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=f47792e2f11ba1d-fac5c7fa57e9a749525cffe43>>

<sup>15</sup> Elisabeth Logeais and Jean-Baptiste Schroeder, *The French Right of Image: An Amiguous Concept Protecting the Human Persona*, (1998). 18 Loy. L.A. Ent. L. Rev. 511. <<https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1366&context=elr>>

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autonomy.<sup>16</sup> This relates to the freedom to live and exercise control over their persona. Images play a big role in upholding this interest. Economic interests ensure that benefits accrue to the individual whose image is being used to generate value while preventing others from profiting through unauthorised or deceptive use of that person's image.<sup>17</sup>

The European Court of Human Rights (ECHR) in the case of *Von Hannover vs. Germany*, noted that 'a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers.'<sup>18</sup> The right to the protection of one's image is therefore one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof.<sup>19</sup> Consent becomes a clear component of exercising and enforcing image rights.

In this particular case, the applicant, Princess Hannover, applied for an injunction preventing the further publication of a series of two photographs relating to her private life that appeared in German magazines.<sup>20</sup> Her initial complaint was before the German Federal Court, which rejected her application and held that there was no violation specifically of Article 8 of the European Convention on Human Rights<sup>21</sup> on the right to respect for



private life. The Court in particular noted that the German courts had carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for private lives.<sup>22</sup>

The ECHR overturned the decision of the German Federal Courts and held that there had been a violation of Princess Hannover's right to respect for private life. It found that the German courts had not struck a fair balance between the interests at stake. It observed that, while the general public might have a right to information, including, in special circumstances, on the private lives of public figures, they did not have such a right in this instance. The ECHR determined that the general public had no legitimate interest in knowing the applicant's whereabouts or general behaviour in her private life, even if she appeared in places that were not always described as secluded and were well known to the public. Even if such a public interest existed, just as there existed a commercial interest for the magazines to publish the photographs and articles, those interests had, in the Court's view, to yield to the applicant's right to effective protection of her private life. Hence everyone, including people known to the public, had to have a "legitimate

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<sup>16</sup>Gilbert Pablo, 'The Dignitarian Approach as a Program', *Human Dignity and Human Rights* (Oxford, 2018; online edn, Oxford Academic, 20 Dec. 2018) <<https://academic.oup.com/book/10854/chapter-abstract/159056589?redirectedFrom=fulltext>>

<sup>17</sup>Frederick Mostert and Sheyna Cruz, 'Image Rights in the Digital Universe.' *Journal of Intellectual Property Law & Practice*, 2022, Vol. 17, No. 7) <<https://academic.oup.com/jiplp/article/17/7/551/6609034>>.

<sup>18</sup>*Von Hannover vs. Germany* [2004] EMLR 379; (2005) 40 EHRR 1 < <https://www.5rb.com/wp-content/uploads/2013/10/von-Hannover-v-Germany-ECHR-24-June-2004.pdf>> .

<sup>19</sup>*ibid.*

<sup>20</sup>Logeais and Schroeder *supra* n15 at pg 3

<sup>21</sup>European Convention on Human Rights 1950/2010 (EC) [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

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<sup>22</sup>*ibid*

expectation" that his or her private life would be protected. This landmark case was significantly important in establishing image rights within the context of the right to privacy.<sup>23</sup>

### 3. Protection of Image Rights

Image rights encompass individual rights against the state, individual rights against the media, individual rights against a commercial enterprise, and individual rights against another.<sup>24</sup> The law on image rights is not clearly defined, this is the case in many jurisdictions, Kenya included. As a result, image rights derive protection from multiple legal remedies that are either contractual or constitutional.<sup>25</sup> This overlap of protections derives from intellectual property law, human rights law, and data protection law. Protection of image rights also varies from jurisdiction to jurisdiction. Additionally, the extent to which an individual may control or restrict the use of his or her image varies between different areas of the law.<sup>26</sup> This is discussed within the context of Kenyan law and precedence as established under common law.

Under the Constitution of Kenya, image rights are protected and derived from fundamental human rights such as the right to privacy, the right to dignity, and the right to property.<sup>27</sup> This was distinctly discussed in the case of *Ann Njoki Kumena v KTDA Agency Limited*,<sup>28</sup> where the court determined that the claimant's right to privacy, dignity, and property was infringed by the defendant's use of the claimant's photograph in a marketing brochure

without consent.

Traditionally, and commonly used in the UK, passing off has been used as a more suitable basis for the protection of image rights, as it protects the commercial value of one's reputation or image.<sup>29</sup> One can therefore claim a cause of action under the tort of 'passing off' where the name or image often of a famous person is used without consent for commercial benefits, i.e., an advertisement. A successful claim under passing off requires a demonstration of:-<sup>30</sup>

- ◆ Reputation or goodwill from the public;
- ◆ The use or intention by a third party to use the image(s) in a manner that is likely to mislead the public to believe that the goods/services are offered or endorsed by the celebrity; and
- ◆ The harm caused or likely to be caused to the celebrity i.e. monetary loss as a result of the misrepresentation.

Various cases have been successful in the establishment of these parameters, including the case of *Reckitt & Colman Products Ltd. v Borden Inc*,<sup>31</sup> where it became apparent that, where each of the factors above can be established, the court is likely to grant the aggrieved party an injunction preventing further use by the defendant of their image and grant an award for damages and recovery of legal costs. Further, in the case of *Irvine v Talksport Ltd*,<sup>32</sup> the claimant, a renowned F1 driver, recovered damages for the use of his name and image for a radio station marketing campaign

<sup>23</sup> *Alix C. Heugas*, supra n 8 at pg2 .

<sup>24</sup> Lydia Mendola, 'Image Rights and Their Clash with Copyright Law' (Mondaq, November 2020) <https://www.mondaq.com/unitedstates/copyright/1009206/image-rights-and-their-clash-with-copyright-law-new-challenges-and-new-horizons>.

<sup>25</sup> Tatiana Syonidun, 'Image Right and Copyright Law in Europe: Divergences and Convergences' (2014) *Laws*, 3(2), 181-207 <<https://www.mdpi.com/2075-471X/3/2/181>>.

<sup>26</sup> *ibid*

<sup>27</sup> The Constitution of Kenya 2010, Articles 28, 31 and 40.

<sup>28</sup> [2019] eKLR. <http://kenyalaw.org/caselaw/cases/view/169509/>.

<sup>29</sup> Emmanuel K Oke, 'Image Rights and Passing Off: Should Reputation be Enough for Celebrities to Succeed in English courts?', *Journal of Intellectual Property Law & Practice*, Volume 15, Issue 1, January 2020, Pages 49–54, <https://doi.org/10.1093/jiplp/jpz143>

<sup>30</sup> JJ Shaw, Alex Kelham, and Rob Meredith, 'Image Rights—Protection, Exploitation, and Taxation,' (LexisNexis) <https://www.lexisnexis.co.uk/legal/guidance/image-rights-protection-exploitation-taxation>

<sup>31</sup> *Reckitt & Colman Products Ltd. v. Borden Inc* [1990] 1 All E.R. 873, <https://www.casemine.com/judgement/uk/5a8ff85f-60d03e7f57ebee7c>.

<sup>32</sup> [2003] EWCA Civ 423.

**Overall, owing to technological advancements, the two most common and distinguishable forms of protection for image rights are; intellectual property rights and data privacy laws.**

without his consent. The driver claimed that consumers and recipients would likely assume his endorsement of the station, which was not the case. Similarly, in the case of *Fenty v Arcadia Group Brands Ltd*,<sup>33</sup> the claimant, a famous singer, succeeded in a claim of passing off against a fashion brand store that used her image on a t-shirt without her permission, despite the store having a license from a third party to use the particular image, which ruled out a copyright claim. In the judgment, the High Court recognised that merchandise may be created to simply ‘celebrate’ a person and didn’t automatically indicate that the goods to which the name/image is applied were endorsed by or originated from the celebrity. However, the High Court also acknowledged that consumers are used to celebrity-endorsed merchandise. Based on the particular facts and owing to the singer’s previous association with the store, the court found that a sufficient proportion of consumers would believe that the singer authorised the t-shirt. The claim for passing off succeeded and was upheld on appeal.<sup>34</sup>

Overall, owing to technological advancements, the two most common and distinguishable forms of protection for image rights are; intellectual property

rights and data privacy laws. These disciplines reflect the double-pronged nature of image rights as they relate to the right not to be commercially exploited as well as the preservation of the right to privacy, particularly in the consideration of images as personal data. Researchers have noted that “the fact that intellectual property and privacy law are centrally concerned with the regulation of information suggests that methods adopted in one area can offer insights into the other.”<sup>35</sup> It is in this vein that this report discusses the distinctive applications of intellectual property and data privacy in the protection of image rights.

**3.1 Intellectual Property and Image Rights in the EU, UK, and USA**

Intellectual Property (IP) is one method of protecting image rights. Names, brands, or logos are protected through trademark registration, whereas photos, images, film, video, audio, or illustrations are protected under copyright.<sup>36</sup> In jurisdictions more advanced in the protection of image rights, i.e. the United States, Europe, and the UK, guided by precedents, trademarks have emerged as one of the ways in which image rights can be protected under IP.<sup>37</sup> Celebrities often make use of trademarks as a way to establish their ownership over a particular good or service and to safeguard against any unauthorised use or imitation of that good or service.<sup>38</sup> A key element of a trademark is distinctiveness.<sup>39</sup> The context within which a trademark has been utilised by celebrities

<sup>35</sup> Megan Richardson, ‘Intellectual Property and Privacy Law,’ in Irene Calboli, and Maria Lilla Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (Oxford, 2021; online edn, Oxford Academic, 23 Sept. 2021) <https://academic.oup.com/book/41122/chapter/350439531>

<sup>36</sup>Quality Oracle Group, “Understanding Image Rights in Intellectual Property,” <https://www.qualityoracle.com/understanding-image-rights-in-intellectual-property/>.

<sup>37</sup> “Protecting Image Rights through Trademarks.” (AI Law, 2022) <https://ai-law.co.uk/protecting-image-rights-through-trademarking#:~:text=Trademarking%20is%20one%20of%20the,trademark%2C%20it%20must%20be%20distinctive.>

<sup>38</sup>ibid.

<sup>39</sup>This is also made clear under the [Trademark Act, Cap 506](#), Section 12

<sup>33</sup>[2013] EWHC 2310 (Ch).

<sup>34</sup>[2015] EWCA Civ 3, [2015] All ER (D) 157 (Jan).

for protection is specific to the products owned, created, or offered. A trademark is registered under a specific classification (goods or services), the protection will be specific to the use of the product under that specific class. For example, 2 celebrities can register a brand 'Drip' under 2 separate classes; one for water/drinks; and another for clothing/textile. Each celebrity could have protection over their separate trademarks, provided they meet all other requirements for trademarks. The purpose of trademarks is to, (1) distinguish one good/service from another, and (2) safeguard one's customers from being misled or confused by another business. If the businesses are completely different, there wouldn't be a likelihood of confusion. Further examples of this derive from the registration of trademarks on specific products owned, created, or offered by that celebrity that contains the celebrity's name, or from creating a catchphrase or name synonymous with the celebrity.<sup>40</sup>

Ideally, it is not possible to register a photograph or true likeness of a person alone. A successful application of a trademark requires the sign in question to be distinctive. The distinctiveness enables consumers to distinguish the goods and services in question from the goods and services of other companies without any risk of confusion.<sup>41</sup> Theoretically, this protection could also extend to image rights. This theory was put to the test in the EU, where the European Union Intellectual Property Office (EUIPO) had to decide whether a person's image could be used as a valid trademark.<sup>42</sup>

The case of *Rozanne Verduin Holding*,<sup>43</sup> arose when the applicant Rozanne, a Dutch model, applied to register her image under the European Union Trademark System (EUTM) for services under classes 35—services of mannequins and photographic

models for publicity or sales promotion— and 41—services of models and mannequins for recreational purposes. The application was denied because the sign, her headshot, lacked distinctive character.<sup>44</sup> The model appealed the matter, which was heard by the EUIPO Board of Appeal.<sup>45</sup> One of the key arguments in the appeal was that the image satisfied the requirements for a distinctive character because the human brain is programmed to recognize faces, as one is likely to recognise people in the street whom they have seen before. Further, the sign or image in question has a distinctive character because of the model's fame and success in Europe. This shows that the model's image acquired distinctiveness through prolonged and intensive use.<sup>46</sup>

The EUIPO Refusal Division<sup>47</sup> in turn argued that:

Although a photograph of a person's face is a unique representation, there is no special element or striking feature that confers distinctiveness on the sign." Uniqueness and distinctiveness are two different concepts, according to the division. "It is true that every face is unique, but this does not mean that it can be taken as an indication of the commercial origin of goods or services.

The Appeals Board in consideration of the key components noted that:

There is no doubt that the depiction of the face of a certain person, with its unique external features, can serve as a distinction from other people, however, this does not detract from the fact that there are many true-to-life images of faces imaginable. Each

<sup>40</sup>ibid.

<sup>41</sup>'Can you Protect your Image as a Trademark.'  
<https://www.novagraaf.com/en/insights/can-you-protect-your-image-trademark>

<sup>42</sup> ibid.

<sup>43</sup>B.V (2021) R 378/2021-4.

<sup>44</sup>'Can you Protect your Image as a Trademark.'  
<https://www.novagraaf.com/en/insights/can-you-protect-your-image-trademark>

<sup>45</sup>hereinafter referred to as the Appeals Board.

<sup>46</sup>'Can you Protect your Image as a Trademark.'  
<https://www.novagraaf.com/en/insights/can-you-protect-your-image-trademark>.

<sup>47</sup>Hereinafter referred to as the Refusal Division.

of these will be a unique representation, regardless of the existence of possible doubles. With regard to possible doubles, the Board considered that this argument can be used in every trademark application. How many words, patterns, or pictures of animals exist? In this case, the relevant public will perceive the portrait as a means of identification of the services, with which the sign fulfils the essential function of a trademark.

The Appeals Board annulled the Refusal Division’s earlier decision, setting a precedent for the registration of an image as a trademark.<sup>48</sup>

In line with this, Guernsey in the UK implemented the world’s first image rights registry in 2012.<sup>49</sup> The registry makes it possible to codify personality and image rights into a fully functioning form by registering them.<sup>50</sup> Image rights can now be accurately recorded in relation to a particular personality. The registration process is guided by, The Image Rights (Bailiwick of Guernsey) Regulations 2012, 55 and the Image Rights (Registration) (Bailiwick of Guernsey) Regulations 2015, 122.<sup>51</sup> The regulations enable a person or persons to register their personalities and the rights that subsist within those personalities. The image right becomes a property right capable of protection under the law through registration. Registering allows for the image right to be protected, licensed, and assigned.<sup>52</sup>

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<sup>48</sup>Rozanne Verduin Holding B.V (2021) R 378/2021-4 [https://www.novagraaf.com/sites/default/files/2021-05/20210519\\_R0378\\_2021-4.pdf](https://www.novagraaf.com/sites/default/files/2021-05/20210519_R0378_2021-4.pdf).

<sup>49</sup> Jason Romer and Kate Storey, ‘Guernsey Registered Image Rights.’ (Collas Crill, November, 2012) < <https://s3.amazonaws.com/documents.lexology.com/c43f4e62-768b-4477-b1b2-ed-7302f700e8.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1684499190&Signature=%2Fbd%2B2k5CZfkcbzJkX-3qLnjxqQ%3D>>

<sup>50</sup>ibid

<sup>51</sup><https://www.guernseylegalresources.gg/statutory-instruments/guernsey-bailiwick/2015/no-122-the-image-rights-registration-bailiwick-of-guernsey-regulations-2015/>.

<sup>52</sup>‘What are Image Rights?’ <https://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights>.

The Image Rights (Registration) (Bailiwick of Guernsey) Regulations 2015,<sup>122</sup> allows the registration of image rights by a natural person, a legal person, a joint personality, a group (two or more natural or legal persons who are or are publicly perceived to be) linked in a common purpose and who together form a collective group or team), and/or a fictional character.<sup>53</sup>

Image rights allow for the right to commercially exploit and protect one’s image i.e. personal attributes. The Image Rights (Bailiwick of Guernsey) Regulations 2012, 55 under section 3 provides for the protection of personal attributes within image rights to include:-<sup>54</sup>

- Voice;
- Signature;
- Likeness;
- Appearance -silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms;
- Any other distinctive characteristics of a personal attribute, or personage; and
- Any photograph, illustration, picture, moving image, or electronic or other representation (‘picture’) of the personage and of no other person (except to the extent that the other person is not identified or singled out or in connection with the use of the picture.

Image rights also provide a mechanism to tackle cases of infringement by unauthorised third parties and commercial dealings.<sup>55</sup> Like other IP rights, image rights are territorial in that they only have a legal effect in the country or region in which they are granted registration. However, any infringements online will potentially be subject to

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<sup>53</sup>Alix C. Heugas, supra n 8 at pg 2

<sup>54</sup>The Image Rights (Bailiwick of Guernsey) Regulations 2012,55 <https://www.guernseylegalresources.gg/CHttpHandler.ashx?documentid=58784> .

<sup>55</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)>.



## Copyright protects the copyright holder’s property rights or intellectual creation whereas image rights protect the interests of the person who may be the subject of the work or intellectual creation

the jurisdiction of the Guernsey courts and thereby to the Guernsey image rights legislation, and the online environment is where most modern-day infringements are likely to occur in relation to these rights.<sup>56</sup> In the context of copyright law, copyright establishes ownership that creators have over their works. Copyright laws protect two types of rights, economic rights i.e. the right of creators to derive financial gain from the use of their works by others, and, moral rights, the creator’s right to take certain actions to preserve and protect their link with their work for example, the right to prevent distorted reproduction of their works.<sup>57</sup> The distinction between image rights and copyright in this context is established based on the relationship between the photographer, the subject, and a possible third party. Copyright ownership is often given to the author of the image/photograph.<sup>58</sup> However, ownership may vary or change where a photograph is created by an author employed for the purpose of creating the image, the employer, not the author, is the owner of the copyright in that work.<sup>59</sup> A photographer having copyright over an image may be approached to share works with a third party for commercial purposes, the third party in this instance is required to establish the relationship between the photographer and the

subject of the photographer.<sup>60</sup>

Where no formal agreement is established between the photographer and the subject, the photographer has the right to use the image as the original author as prescribed under copyright laws waiving any rights the subject may have.<sup>61</sup> However, image rights require that consent of the subject is sought and in some instances compensation given for use of the image. ‘A subject’s image may not be commercially exploited without consent and potential compensation.’<sup>62</sup> This establishes a clash of sorts between the laws. Image rights observe different interests from copyright interests. Copyright protects the copyright holder’s property rights or intellectual creation whereas image rights protect the interests of the person who may be the subject of the work or intellectual creation.<sup>63</sup> Copy right in Kenya is regulated by the [Copyright Act Cap 130](#) Photographers in the exercise of their copyright rights, must recognize that individuals photographed are entitled to image rights. In recent developments, the Kenya Copyright

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<sup>56</sup>ibid

<sup>57</sup>Understanding Copyright and Related Rights (WIPO, 2016) [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_909\\_2016.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf)

<sup>58</sup>Abdulwasiu Ojo Akorede Yusuff, ‘Copyright in Image Capturing (Photography) and Right of Subsequent Use: Addressing the Clash of Rights Through Reform of the Copyright Law.’ *WIPO-WTO Colloquium Papers* 155-166, 2018) [https://www.wto.org/english/tratop\\_e/trips\\_e/colloquium\\_papers\\_e/2018\\_african/2018\\_african\\_complete\\_file\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2018_african/2018_african_complete_file_e.pdf)

<sup>59</sup>ibid

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<sup>60</sup>ibid

<sup>61</sup>Copyright laws give the author of creative works the right to reproduce, distribute copies, make derivative works, and publicly display their works. In Kenya, this is further elaborated under the Copyright Act, section 29

<sup>62</sup>Abdulwasiu Ojo Akorede Yusuff, ‘Copyright in Image Capturing (Photography) and Right of Subsequent Use: Addressing the Clash of Rights Through Reform of the Copyright Law.’ *WIPO-WTO Colloquium Papers* 155-166, 2018) [https://www.wto.org/english/tratop\\_e/trips\\_e/colloquium\\_papers\\_e/2018\\_african/2018\\_african\\_complete\\_file\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2018_african/2018_african_complete_file_e.pdf)

<sup>63</sup>ibid

Board(KECOBO)<sup>64</sup> has offered an advisory on the use of third party photographs and images. The advisory noted that, ‘the laws that protect image rights in Kenya overlap between copyright law, data protection laws and constitutional laws, however copy right laws apply only to ownership and authorship which belongs to the photographer or the person who plans for the photograph to be taken.’ Precedence has further shown that the right to privacy and data protection take precedence over intellectual property.<sup>65</sup>The Digital space and technology have made photographs easier to capture and share, social media and digital marketing have further widened the scope of persons who can be considered photographers. Images are not always taken in a professional setting or context, nonetheless, they may be used to derive monetary gain in different ways. The clash of rights may seemingly be resolved by consent; consent is a key prerequisite in establishing a violation of image rights as will be discussed in the subsequent section. Release forms are one way to establish the parameters of consent and the extent to which a photographer can exercise copyright rights without violating a subject’s image rights, especially where images are used for commercial purposes.

### 3.2 Data Protection and Image Rights

The right to privacy and the right to publicity are two of the establishing components of image rights.<sup>66</sup> As a result, the right to privacy

.....  
<sup>64</sup>The Kenya Copyright Board is a State Corporation under the Ministry of Youth Affairs, Sports and the Arts - State Department for Youth Affairs and the Arts. It is established under section 3 of the Copyright Act 2001 and mandated with the administration and enforcement of copyright and related rights.

<sup>65</sup><Advisory on Use Of Third-Party Photographs and Images (KECOBO,July 2023) <https://copyright.go.ke/sites/default/files/downloads/Advisory%20on%20use%20of%20third%20party%20photographs.pdf>>

<sup>66</sup>Neetika Gandhi, ‘Right to Privacy and Publicity: Two Sides of the Same Coin.’ (Chadha & Chadha Intellectual Property Law Firm, September 16, 2020). < <https://s3.amazonaws.com/documents.lexology.com/d946cd48-72f4-406f-93899149e7797c0a.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1684500699&Signature=pOzUI8nOZkkB-34CC7Hkl9DDh3gY%3D>>.

inadvertently ties in with data protection. In looking at the correlation between data protection and image rights, consideration is given to how far this image right extends regarding the inadvertent sharing of personal information. This correlation, therefore, investigates instances where an image constitutes personal data. Personal data constitutes identifiable information about an individual and may include a name, an identification number, location data, an online identifier, or one of several special characteristics that express the physical, physiological, genetic, mental, commercial, cultural, or social identity of these natural persons.<sup>67</sup>

A photograph or image represents the likeness and, in some cases, characteristics of an individual; a variety of images, including videos, may lead to an individual’s identification.<sup>68</sup> According to the EU, “personal data” refers to all information that relates to an identified or identifiable living individual and also includes pieces of information that can lead to the identification of someone when collected together.<sup>69</sup> This means that assets like images and videos can also fall into this category, and may result in the General Data Protection Regulations (GDPR) and GDPR breaches if not managed correctly. The correlation of data protection and image rights is further nuanced in the next section as it delves further into the overlapping areas.

Under Kenyan law, the Data Protection Act 2019 offers protections for Personal Data. Personal data is described as any information relating to an identified or identifiable natural person. Given this description one may deduce that images form part of personal data under the Act. Further inference of images considered as personal data is derived from the penalty notice issued by the Office of the data Protection Commissioner (ODPC) to Oppo a smart device manufacturing company. This was

.....  
<sup>67</sup>Data Protection Act, 2019.

<sup>68</sup>‘Are Photos Personal Data?’ <https://bysafeonline.com/are-photos-personal-data/>.

<sup>69</sup>‘What is considered Personal Data Under the GDPR.’ (GDPR. EU) < <https://gdpr.eu/eu-gdpr-personal-data/>>

following a complaint received where the company infringed on the privacy of a complainant by using their photo on the Oppo's social media account (Instagram stories) without the complainant's consent. The penalty notice was issued following an enforcement notice issued earlier requesting the company to remedy the situation. Oppo failed to comply with the provisions in the enforcement notice within a stipulated time which led to the company being issued with a penalty notice requiring them to pay a fine of Kshs. 5,000,000.00 for failure to comply.<sup>70</sup>



#### 4. Kenyan Precedence on Image Rights

Kenya borrows its understanding of image rights from a common law perspective. A person's image constitutes image rights. More people are now open and aware of their image rights, which have been characterised by an increase in court cases arising from the unauthorised use of images for commercial gain and purposes.<sup>71</sup> With the Data Protection Act, there is more awareness of the role the right to publicity plays in protecting one's image. The Constitution of Kenya is one of the key instruments where protections for image rights

can be derived. Protections for image rights can be derived from Articles, 28, 31, and 40 (the rights to human dignity, privacy, and property) of the Constitution. The attribution of these rights to image rights was clearly brought out in the case of *Ann Njoki Kumena v. KTDA Agency Limited*,<sup>72</sup> where the court determined that the defendant was in breach of the plaintiff's constitutional rights when they used the plaintiff's image in their marketing brochure without the plaintiff's knowledge or consent.<sup>73</sup>

Although there are no specific laws that provide for image rights, courts have been helpful in providing precedents for identifying violations of these rights. In Kenya, image rights were distinctly discussed in the case of *Jessicar Clarise Wanjiru v. Davinci Aesthetics & Reconstruction Centre & 2 Others*,<sup>74</sup> where the respondent used the petitioner's image on its billboards to advertise reconstruction and plastic surgery without the petitioner's consent. The respondents continued to financially benefit from using the petitioner's image to promote their work. The court noted that personality rights consist of two types of rights; the right to privacy and the right to publicity. The right to privacy is the right to keep one's image and likeness from exploitation without permission or compensation and applies to members of the general public.<sup>75</sup> Whereas, the right to publicity is the exclusive right of an individual to market his or her image, likeness, or persona for financial gain.<sup>76</sup> This case also provided key elements for establishing a successful claim for unlawful use of a name or image. The three elements that must be met are:-<sup>77</sup>

<sup>70</sup>Office of The Data Protection Commissioner Issues A Penalty Notice Against Oppo Kenya(ODPC) <https://www.odpc.go.ke/download/office-of-the-data-protection-commissioner-issues-a-penalty-notice-against-oppo-kenya/?wpdm-dl=8334&refresh=64b525b2936af1689593266>

<sup>71</sup>Florence Ogonjo, 'Legal Protections for Image Rights in Kenya.' (CIPIT, 2023) < <https://cipit.strathmore.edu/legal-protections-for-image-rights-in-kenya/>>

<sup>72</sup>[2019] eKLR. <http://kenyalaw.org/caselaw/cases/view/169509>.

<sup>73</sup>Protection of Image Rights in Kenya [https://netsheria.com/protection-of-image-rights-in-kenya/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=protection-of-image-rights-in-kenya](https://netsheria.com/protection-of-image-rights-in-kenya/?utm_source=rss&utm_medium=rss&utm_campaign=protection-of-image-rights-in-kenya).

<sup>74</sup>[2017] eKLR. <http://kenyalaw.org/caselaw/cases/view/140816>.

<sup>75</sup>ibid

<sup>76</sup>ibid.

<sup>77</sup>ibid.

1

Use of a Protected Attribute: this is the use of an aspect of a person’s identity protected by the law. This ordinarily means a person’s name or likeness. Notably, the law protects certain other personal attributes as well (data protection laws include personal data);

2

For an Exploitative Purpose: the use of the name, likeness, or other personal attributes for commercial or other exploitative purposes. The use of someone’s name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the identity and a matter of legitimate public interest; and

3

No Consent: establish that a person did not give permission for the offending use.

Although the case was dismissed because the third element was not met, it set the precedent for determining a violation of image rights.

More recently, the case of *Catherine Njeri Wanjiru vs. Machakos University*,<sup>78</sup> addressed image rights. The University of Machakos used Catherine’s photograph in advertising and marketing of courses offered by the University without her consent or knowledge. In this suit, Catherine sued the University for the violation of her right to privacy through the publication of her image and likeness for commercial gain with no personal financial gain to her. In making its decision, the court noted that a person’s image is one of the chief attributes of their personality and that the person has a right to protect their image.

<sup>78</sup>[2022] KEHC 10599 (KLR) < <http://kenyalaw.org/caselaw/cases/view/236535/>>

Further, in *Shimlo vs. the University of Kabianga*,<sup>79</sup> the court had to determine whether the University of Kabianga violated Shimlo’s fundamental rights to privacy and human dignity by publishing his image for the purpose of commercial advertisement without his consent and a violation of image rights (right to publicity and personality rights). The court in this matter, like in the case of *Catherine Njeri Wanjiru vs. Machakos University*<sup>80</sup>, found that the petitioner’s fundamental rights to privacy and human dignity as provided in the Constitution of Kenya were violated by the act of publishing his image without express consent. Additionally, in the case of *T.O.S. vs. Maseno University and 3 others*,<sup>81</sup> the Court held that the publication or use of images of an individual without his consent violates that person’s right to privacy as a person’s life is a restricted realm in which only that individual has the power of determining whether another may enter and if so, when, for how long, and under what conditions. In Shimlo’s case, his petition was successful, and he was awarded Kshs. 500,000.00.

The Kenyan Jurisdiction, implores the two-pronged nature of image rights, in that, it refers to both the right to privacy as well as the right to publicity. The Kenyan Courts have established the trend within which image rights are to be perceived and protected in Kenya. Image rights, therefore, do not only accrue to celebrities or persons of interest but also to ordinary citizens who, in the course of their work or day-to-day activities, may have their images exploited without their knowledge or consent.

<sup>79</sup>Petition No. E002 of 2022 <<https://media.licdn.com/dms/document/media/C4D1FAQGMOKtrlLj1w/feedshare-document-pdf-analyzed/0/1677131839605?e=1685577600&v=beta&t=Yk8r4oJiw8anoYEz03UMEYxWc1K30R03Ya31oAF-BB0>>

<sup>80</sup>Jessicar Clarise Wanjiru v. Davinci Aesthetics & Reconstruction Centre & 2 Others [2017]eKLR. <http://kenyalaw.org/caselaw/cases/view/140816>.

<sup>81</sup>[2016] eKLR <http://kenyalaw.org/caselaw/cases/view/119551/>.

## 5. Emerging Trends in Image Rights

With digitization and the constant evolution of technology, image rights protections across different jurisdictions could inform the manner in which emerging technologies and trends utilise images and likenesses for commercial purposes and structure their policies and directives on image use. Emerging areas in which image rights protections are likely to be utilised are related to video games, post-mortem images, virtual reality, NFTs, and holograms.<sup>82</sup> The application of image rights with respect to these emerging trends will also vary from jurisdiction to jurisdiction. The extent of image rights protections likely to be applied to video games depends on whether video games are considered to constitute artistic expression in the same way photographs or paintings do. This question was considered by the US Supreme Court in 2011 in the case of *Brown v. Entertainment Merchants Association*, 564 U.S. 768 (2011).<sup>83</sup> In this case, the court held that video games constituted comprehensive works of art for the first time, explaining that video games, story plots, music, and dialogue were common literary devices much like books. The court, in its decision, declared that since video games shared messages and ideas through their various devices and distinctive features, they acted as an artistic expression. Notably, copyright law, validated by the World Intellectual Property Organization (WIPO), regards video games as creative works.<sup>84</sup>

<sup>82</sup>Alix C. Heugas, "Protecting Image Rights in the Face of Digitization: The United States and European Analysis," (2021) JWIP 275 -467 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12194>.

<sup>83</sup>[2011]

<sup>84</sup>The same is also considered in Kenyan statute through the Copyright Act, under section 2 where audio-visual works include, means a fixation in any physical medium of images, either synchronised with or without sound, from which a moving picture may by any means be reproduced and includes videotapes and videogames but does not include a broadcast;

In circumstances where characters in video games use the likeness of celebrities, such representation is evaluated based on the level of artistic value in determining the legitimacy of the image used. Referencing the US jurisdiction, the courts have, through different cases, determined the tests applicable in determining legitimacy.

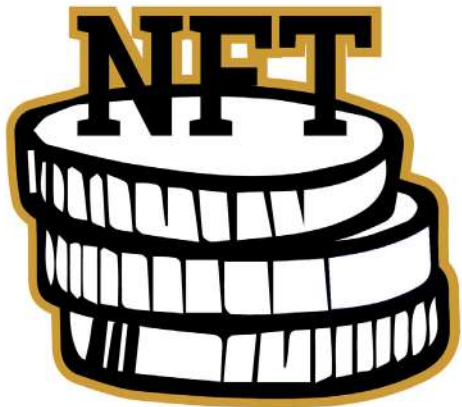
- **Predominant use test:** the function of this test is to determine whether the purpose of the works is predominantly expressive or commercial. The court in using this test must assess whether the use of the name of the celebrity was used for exploitative purposes to bring attention to the expressive works and obtain commercial advantage or whether it was for legitimate artistic purposes. Where this test is applied, there is often a similarity between the real-life person and digital reproduction. This test was applied in the case of *John Doe v TCI Cable Vision*.<sup>85</sup>
- **Relatedness:** This test is used to determine whether the use of a celebrity's name or image is 'wholly unrelated' to the content of the work or whether it explicitly misleads the consumer into thinking that the celebrity has endorsed the work. This test was derived from the case of *Rodger v Grimaldi*.<sup>86</sup>
- **Transformative use test:** this test evaluates the extent to which an image has been creatively transformed so as to become an artistic expression rather than a mere depiction of a person's image for commercial profit. Image rights protections will apply, similar to the principle of fair use in copyright law where for example, in creating a holographic image where the celebrity's image is one of the raw materials from which the artistic work is derived.<sup>87</sup> This test is more commonly used and was used in

<sup>85</sup> ED 78785.

<sup>86</sup>[1989] 57 USLW 2692.

<sup>87</sup>Non- Fungible Tokens (NFTs) <<https://www.investopedia.com/non-fungible-tokens-nft-5115211>>

the case of *Comedy III Productions Inc v Gary Saderup Inc*,<sup>88</sup> where the court found that the plaintiff's right to publicity was infringed as there was no sufficient creative expression in the depiction to justify the use of the image under the First Amendment (specifically referencing the freedom of expression).



Non-Fungible Tokens (NFTs) are cryptographic tokens that exist on a block chain and cannot be replicated. They can be exchanged and traded for money. Cryptocurrencies, or other NFTs depend on the value the market and owners have placed on them.<sup>89</sup> The nature of NFTs as a continuously emerging technological advancement, comes with legal exposures to which image rights would likely apply, especially, where NFTs are developed to mimic an individual's likeness.<sup>90</sup> These could

include, digital artwork, virtual fashion items, in-game items, and digital collectibles. The right to publicity could be seen to apply to NFTs, especially those associated with literal photorealistic depictions of an individual for commercial gain, especially if the creations were made without the individual's consent.<sup>91</sup>

With advances in Virtual Reality (VR) and computer technology, the latest version of a collaborative virtual reality experience is likely to continue evolving.<sup>92</sup> Keenly considering Meta's development of the Metaverse, legal issues are likely to arise, particularly related to the right to publicity and image use, noting that the Metaverse hopes to create virtual real-life experiences not only for brands but also for individuals.<sup>93</sup> As a continuously emerging concept, it will be significantly important to consider in its development whether the virtual real-life experiences will involve the use of a person's likeness or persona, noting that a person's likeness is not limited to their physical appearance.<sup>94</sup>

Although precedents illustrate a direction for the application of image rights to emerging technologies, it is still a grey area that can be pre-adjudicated upon based on already existing precedent or will be adjudicated upon and legislated upon based on the issues that arise with use and continued technological evolutions.

<sup>88</sup>[2001] 25 Cal. 4th 387<<https://caselaw.findlaw.com/court/ca-supreme-court/1211379.html>>

<sup>89</sup>Supra n33 at pg 6.

<sup>90</sup>Ghaith Mahmood, Nima H. Mohebbi, and Tara McCartney 'NFTs and the Right of Publicity: Assessing the Legal Risks.' (Global Fintech and Digital Assets,2021) <https://www.fintechanddigitalassets.com/2021/08/nfts-and-the-right-of-publicity-assessing-the-legal-risks/>

<sup>91</sup>ibid.

<sup>92</sup>'Image Rights and the Metaverse.' (Multilaw, 2021) [https://www.multilaw.com/Multilaw/Multilaw\\_News/Multilaw\\_News/Image\\_rights\\_metaverse\\_article.aspx](https://www.multilaw.com/Multilaw/Multilaw_News/Multilaw_News/Image_rights_metaverse_article.aspx)

<sup>93</sup>ibid.

<sup>94</sup>ibid.

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## 6. Policy Considerations

In considering the regulatory landscape of image rights, such as the protections afforded by different areas of the law and more specifically, intellectual property and data protection resulting from the duality of image rights, the implications to consider relate to: -

- **Necessity to legislate on image rights:** this raises the question of whether it would be more efficient to have a singular legislation that offers image rights protections as opposed to having it derived from the application of numerous laws. Further, it has been noted that image rights cannot be the reserve of one law owing to its dual nature. Consideration must then be given to whether the application of image rights should be left as is or fortified in legislation.

- **Laws catching up with precedent:** across the jurisdictions presented in this report, it is clear that image rights have been more clearly defined and elaborated in case laws as opposed to legislation. With precedent, the position may hold for a time and significantly change and/or be overturned based on developing circumstances. In as much as precedent creates room for the evolution of technology, the law in itself should equally be clear and validate the realisation of image rights.

- **Applicable laws:** With the differences in the extent of the application of image rights in different jurisdictions, and in further consideration of the internet opening up the global village, the application of laws on image rights may vary, and this may to an extent jeopardise the exercise of image rights in jurisdictions where precedent has not adequately considered changes and trends brought about by technology. Further, laws applicable in one jurisdiction may not be applicable in another, whereas there are situations where one may need to exercise their image rights outside of their normal jurisdiction.

- **Dual Nature of image rights:** the two-pronged nature of image rights in enforcing the right to privacy and the right to publicity presupposes that its protections derive from different laws as has been the norm. However, with jurisdictions such as the EU having a clear position on data protection and image rights, it will be significantly imperative especially in the African context and in Kenya to have directives and/or guidelines on the position of data protection as it relates to images and the context where images are considered personal data.

## Conclusion

Overall, the intersection of laws i.e. data protection, intellectual property, and precedence presents different elements in the protection of image rights with visible similarities, particularly in establishing consent. This report presents considerations for individuals, businesses, and society as a whole in addressing the issues of image rights and how best to uphold and derive protections. With the continuous evolution of the digital ecosystem, more nuanced elements regarding image rights come into play as demonstrated in the discussion on emerging trends. It is therefore paramount that legal systems and industry practices equally evolve to ensure that, individuals are respected. This can be achieved by considering the arising legal implications surrounding image rights in order to cultivate a digital ecosystem that fosters both creativity and innovation whereas upholding the respective rights and attributing the relevant benefits.







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