

**LEGAL REGIME OF COPYRIGHT OF PHOTOGRAPHS IN NIGERIA**

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**Abstract:**

*This paper explores the legal framework of copyright in Nigeria. Photography has become a phenomenon around the world and has evolved over the years. Its public acceptance as a reputable profession has grown in popularity among the Nigerian elite population. It is indeed, now mainstream. This has prompted the author to point a laser-focus on copyright of photographs, in relation to ownership of social media images, copyright of photographs on websites, ownership of pictures vis-à-vis image rights and most importantly legal remedies available to photographers when their copyright is infringed.*

**1.0. INTRODUCTION**

Intellectual Property rights operate like every other property rights. It gives creators, or owners of patents, trademarks or copyrighted works the right to benefit from their creation thereby rewarding hard work and preventing all forms of plagiarism or exploitation. Its importance cannot be overemphasized as it serves as a medium for self-employment and creation of new technologies, ideas and process. The importance of photography as a medium for self-empowerment is better appreciated in light of statistics that show that 20.9 Nigerians were unemployed in Q3 2018<sup>1</sup>. Intellectual property rights are protected in Article 27 of the Universal Declaration of Human Rights which provides 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. The first major step towards achieving this was the enactment of the Paris Convention for the Protection of Industrial Property, then the Berne Convention for the Protection of Literary and Artistic Works. Both are administered by the World Intellectual Property Organization (WIPO). Nigeria acceded to the former in 1963 and the latter in 1993. Currently in Nigeria, the intellectual property rights in existence are copyright, patent and design and trademarks. While copyright protects cinematographic films, sound recording, broadcasts and works of literary, musical and artistic persuasion; right to patent is accorded to inventions and 3-D product designs; and right to trademark protects trademarks.

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<sup>1</sup>OladeindeOlawoyin, 'Nigeria's Unemployment Rate Rises to 23.1%' NBS(19 December 2018)

## 2.0. COPYRIGHT OF PHOTOGRAPHS

With the current rave about capturing every memory with photographs, and the spate of high-end phones, digital cameras and social media that promote the sharing of photos,<sup>2</sup> it has become necessary to enlighten individuals about the exclusive rights they have over their photographic works. This stems from the fact that it has become the norm for individuals to infringe on artist's work without giving due credit<sup>3</sup> and without any legal action from the aggrieved persons.

Generally, photographs, illustrations and other images will be protected by copyright as artistic works. Copyright according to the Black's Law Dictionary, is a right granted to the author or originator of certain literary or artistic productions, whereby the creator is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the literary or artistic work and publishing or selling them. In Nigeria, the primary legislation for copyright protection is the Copyright Act<sup>4</sup>. Section 1 of Act makes eligible for copyright protection, works ranging from literary, musical and artistic works to cinematographic films, sound recording and broadcasts. Section 51 of the Act makes it abundantly clear that a photograph irrespective of its artistic quality, is an artistic work eligible for copyright protection.

Section 10 of the Act ensures that the creator of a copyright (usually referred to as the author of the work) owns the work in the first instance although he is at liberty to transfer his rights to a third party<sup>5</sup>. Basically, copyright of photographs in Nigeria exists from the time of creation of the work, and lasts for not less than 50 years after the creator's death. This provision enables both creators and their heirs to get monetary benefits for a reasonable amount of time; and a breach thereto attracts fine<sup>6</sup>.

Thus, a user will need the permission of the copyright holder before performing certain acts on the work such as replicating or sharing the image on the internet.<sup>7</sup> According to The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC), a photographer enjoys the

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<sup>2</sup>A. Perrin, 'Social Media Usage: 2005-2015', *Pew Research Center*

<<https://www.pewresearch.org/internet/2015/10/08/social-networking-usage-2005-2015>> accessed 13 April 2020

<sup>3</sup>*Peter Obe v Grapevine Communications Ltd* [1997] 40 NIPJD

<sup>4</sup>Laws of the Federal Republic of Nigeria, Chapter C28, 2004.

<sup>5</sup>Copyright Act, section 10.

<sup>6</sup>Copyright Act, section 27.

<sup>7</sup>Intellectual Property Office, Copyright Notice: Digital images, photographs and the Internet, November 2015.

exclusive right to reproduce, distribute, alter, modify, publicly display, sell and publicly exhibit his work.<sup>8</sup>

In Nigeria, the body charged with the administration, enforcement and protection of Copyright in Nigeria is the Nigerian Copyright Commission (NCC); as provided for in the Copyright Act. It is charged with the following responsibilities:

- The certification of countries that are parties to treaty obligations for the purpose of determining whether a work may enjoy copyright, under the aegis of such international obligation.<sup>9</sup>
- The issuance of exemption certificate for the purpose of enabling to commence an action for the infringement of copyright.<sup>10</sup>
- It is saddled with the responsibility of receiving and disbursing funds among approved societies from the imposition of compulsory fees on any materials used or being used to infringe copyright work.<sup>11</sup>

It is important to note that copyright is an inherent right granted to the producer of a work; thus the work does not necessarily have to be registered with the Nigerian Copyright Commission<sup>12</sup> before the producer can claim his rights under such work, provided it is in a fixed medium and is original. However, section 34(2)(3) of the Copyright Act states that the NCC is required to maintain an effective data bank on authors and their works. Thus, registration under the NCC only provides an added advantage; a documentary ownership of the copyright.

The nature of the contract the photographer is under, determines the owner of the photograph. Under contracts of employment with a newspaper, magazine or similar periodical; or contracts of service, the rights of such works belong to the proprietor in the absence of any contract clause negating this<sup>13</sup> so far as the publication or commissioned work is concerned.<sup>14</sup> Moreover,

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<sup>8</sup>Yemisi Falaye and Eniola Sadare "Copyright in Photography" [2016]

<sup>9</sup>Copyright Act, Chapter C 28, Laws of the Federal Republic of Nigeria, 2004, section 5(1)(a) and (b)

<sup>10</sup>Copyright Act, section 17.

<sup>11</sup>Copyright Act, section 37.

<sup>12</sup>Copyright Act, section 30.

<sup>13</sup>Copyright Act, section 10(3).

<sup>14</sup>*Joseph Ikhuoria V Campaign Services Ltd and Anor* [1986] FHC 308.

a written agreement assigning ownership rights to another party supersedes the protection of copyright granted by law<sup>15</sup>.

### **2.1. Registration of a Copyright**

The Nigerian Copyright Commission, a governmental body with corporate personality for the administration of copyright law in Nigeria, has established a voluntary copyright registration scheme designed to enable authors and right owners notify the Commission of the creation and existence of the work. The scheme grants the following benefits:

- It provides an independent source of verifying data relating to a work or its author to the general public.
- It issues an acknowledgement certificate which provides a prima facie evidence of the facts shown on it.
- It provides a depository for preserving original copy of the works notified.
- The information and data contained in the notification database offers reliable rights management information to members of the public and prospective licensees to the work.

In the case of physical submission, a person can submit an application directly or through an agent for registration at any office of the Commission nationwide. This is submitted alongside a completed registration form, copies of the work and evidence of payment of the prescribed fees. Registration could also be done online.

Copyright protection is basically territorial in nature; thus it is only enforceable within the territory in which it is acquired. However, by virtue of membership of certain international copyright treaties and conventions, works of Nigerians may enjoy copyright protection in other jurisdictions where those treaties are applicable. One example of such convention is the Berne Convention.

### **2.2. Exceptions to Copyright of Photographs**

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<sup>15</sup> Copyright Act, section 11

A major exception to the enjoyment of copyright of photographs is the doctrine of fair dealing. According to Lord Denning in *Hubbard v. Vosper*<sup>16</sup>, it is impossible to define what fair dealing is. However, under the Nigerian jurisdiction, it is entrenched under the Second Schedule of the Act<sup>17</sup> and generally, fair use or fair dealing permits use of copyright protected work without permission or payment of copyright royalties. This exception is usually for the purpose of research and other educational activities.<sup>18</sup> Amongst the several activities protected as not being infringement of copyright under the Act are: reproducing the work by way of parody, pastiche or caricature; reproducing and distributing copies of an artistic work permanently situated in a place where it can be viewed by the public; and incidentally including work in a film or broadcast. However, for it to fall under “Fair Dealing”, one must mention the source and author of the work.<sup>19</sup>

This doctrine has been defined as the most troublesome in the whole law of Copyright<sup>20</sup>. Owing to the dearth of Nigerian judicial precedents, much reliance is placed on the English position by the Nigerian Courts in determining whether a particular use is fair dealing. This is buttressed by the fact that Nigeria is under the Common law jurisdiction. Although, the fair dealing approach used in various other jurisdictions could also be of persuasive effect when there is a question of fair use or not. It is however noteworthy that the court usually determines fair usage on a case by case basis, based on the merit of each case<sup>21</sup>. Under the US Copyright Act, fair use factors are:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- The effect of the use upon the potential market for or value of the copyrighted work.<sup>22</sup>

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<sup>16</sup> [1972] 2 Q.B 84.

<sup>17</sup> Copyright Act, second schedule.

<sup>18</sup> *University of London Press V University Tutorial Press Ltd* (1916) 2 Ch. At 608-609

<sup>19</sup> Copyright Act, second schedule, paragraph A.

<sup>20</sup> *Lawrence V Dana* 15 F. Cas. 26,51 (C.C.D Mass. 1869)

<sup>21</sup> *Dodsley V Kinnersley* (1761) Amb. 403

<sup>22</sup> *Perfect 10 V Google* 508 F.3d 1146 (9<sup>th</sup> Cir.2007)

However, it must be noted that the onus of proving that an act is an infringement of copyright falls within the foregoing grounds of exception, rests with the defendant.<sup>23</sup> It is noteworthy that under Section 35 of the Copyright Act, it was stated that in an action for the infringement of copyright in a work; the following shall be presumed in the absence of any evidence to the contrary:

- The copyright subsists in a work which is the subject matter of an alleged infringement.
- That the plaintiff is the owner of copyright in the work.
- That the name appearing on a work purporting to be that of the publisher or producer of the work is the valid name.

### 3.0. LEGAL PERSPECTIVES TO THE COPYRIGHT OF PHOTOGRAPHS

#### 3.1. Copyright of Photographs for Blogs/ Websites

Although it is common to download pictures from the internet for upload to individual blogs, it does not make it legal or within permissible grounds for copyright infringement.<sup>24</sup> It therefore means that one needs permission to use photographs under copyright before the pictures can be posted. This is regardless of whether credit is given to the owner. In the case of *Absolute Lofts South West London Limited v. Artisan Home Improvements Limited and another*<sup>25</sup>, the Intellectual Property Enterprise Court ruled, granting a quantum of damages to be paid by the defendants to the claimant for their infringement of copyright in, and use on their website of, twenty-one photographs without the consent of the claimant, who was the copyright owner.

It is worthy to note the images which bloggers are allowed to use without contravening the provisions of the Copyright Act.

- **Public Domain Photographs:** A public domain image is one which never had a copyright or the copyright has ceased to exist. It invariably means that these images are free for commercial or public use. The only exception is where it includes the picture of a celebrity, in which case permission may be needed before the picture is posted.

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<sup>23</sup>*Johnston V Bernard Jones Publications Ltd & Beau Champ* (1938) 1 Ch.559

<sup>24</sup>*Lard Nordrhein-Westfalen V Dirk Renckhoff*[2018] ECLI 634

<sup>25</sup>[2015] EWHC 2608 (IPEC).

- Royalty-free Images: It means that these copyrighted pictures can be used without having to pay royalties. Normally, these kind of photographs are accessed through sites that have already paid certain fees for them.
- Creative Commons: This is a medium through which photographers license their image and decide how they will be used by the public. These licenses work in every country around the world and lasts for as long as the applicable copyright lasts. It serves as the building block on which licensors decide whether to grant additional permissions when deciding how they want their work to be used. The most common are 'CC0' or 'CC BY 2.0'; the former license means that the owner has relinquished the rights to their work; while the latter requires attribution to the owner of the work.

### 3.2. Ownership of Pictures on Instagram and other Social Media

The number of social media users globally has reached more than 2 billion.<sup>26</sup> Bearing in mind that we are part of a generation that enjoys sharing experiences with others, a large amount of social media users naturally generate a large number of social apps and web services that allow content sharing<sup>27</sup>. It is therefore imperative that people realize that their copyrights over photographs still exist on social media.

Instagram, Facebook, Flickr are examples of online services that allow artistic work to be shared to the public. Flickr is a popular website for users to share and embed personal photographs and an online community, the service is widely used by photo researchers and by bloggers to host images that they embed in blogs and social media.<sup>28</sup> It has over 112 million users<sup>29</sup>. Similar to Flickr is Instagram which allows for visual storytelling and currently has 400 million active users.<sup>30</sup> Facebook has about 25 million Nigerian users<sup>31</sup> and has over 2.27 billion users globally. The content shared on these sites is by definition considered to be artistic work, to which

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<sup>26</sup>S. Kemp, "Global Social Media Users Pass 2 Billion", <<https://wearesocial.com/blog/2020/01/digital-2020-3-8-billion-people-use-social-media>> accessed 13 April 2020

<sup>27</sup>O. Nov et al, "Analysis of Participation in an Online Photo-Sharing Community: A Multidimensional Perspective" [2010] 61(3)*Journal of The American Society for Information Science and Technology*, 555

<sup>28</sup>Terdiman, Daniel, "Photo Site a Hit with Bloggers". <<https://www.wired.com/2004/12/photo-site-a-hit-with-blogg>> accessed 13 April 2020

<sup>29</sup>J. Bonforte, "Thank You, Flickr Community". *Flickr Blog*. November 6, 2015.

<sup>30</sup> "Celebrating a Community of 400 Million" *Instagram Blog*. September 22, 2015.

<sup>31</sup>TitilolaOludimu, "Facebook now has 26 million active users in Nigeria" <<https://techpoint.africa/2018/05/23/26-million-nigerians-use-facebook/>>accessed 13 April 2020

copyrights apply. These rights can as well be transferred, for example by the grant of a license.<sup>32</sup> The WIPO Copyright Treaty (WCT) that was established in 1996 was the first treaty on intellectual property to address copyright in the digital environment.<sup>33</sup> However the online sharing of images on social media is still not hassle-free.

Furthermore, each social media application has terms and conditions which each user has to accede to, but the reality is that many users agree to these terms without fully understanding the implications. Regardless, as with contracts, they are bound by the terms of these agreements. It is therefore in each party's best interest to properly understand the terms of usage before signing.

In the real sense, users of Instagram as well as other social media have ownership over their pictures. However, Instagram for instance has very broad license rights: a non-exclusive, fully-paid and royalty-free, transferrable, sub-licensable, worldwide license to use content posted on its platform. It therefore means that Instagram owns the right to use any of the pictures for free; also it is able to give the rights to a third-party. This license subsists even if the user discontinues use of the platform. It is also noteworthy that under Instagram's terms, the onus of obtaining the necessary license from all applicable rights holder rests with the user.<sup>34</sup> The user is to ensure that the content posted is owned or have at least the right to grant Instagram these rights and licenses to the content. The user is also responsible to pay any royalties, fees or money owed for the content posted.

### **3.3. Ownership of Images and Image Rights**

Image rights refer to the provision in law that enables the definition, value, commercial exploitation and protection of image rights associated with a person.<sup>35</sup> A "personage" could register their personality and hence be able to protect their image just like any other property, depending on the individual jurisdiction. The holder could be a natural person, legal person, joint personality, group or a fictional character. The image that is being protected could be the right holder's voice, signature, likeness, appearance, silhouette, feature, face, expressions,

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<sup>32</sup>T.K Armstrong, "Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public" [2009] 47 (9-16) *Harvard Journal on Legislation*, 360.

<sup>33</sup>R. Towse, "Economics and copyright reform: aspects of the EC Directive", [2005] 22 (1-2) *Telematics and Information* 11, 24.

<sup>34</sup>Instagram Platform Policy, 2019.

<sup>35</sup>Intellectual Property Office of Bailiwick of Guernsey.



gestures, mannerisms, photographs etc. This concept of “image rights” was established through the “rights of publicity” as held in *Haelan Laboratories, Inc v. Topps Chewing Gum, Inc*<sup>36</sup>. Image rights extend to commercialization of images by celebrities ranging from sportsmen to actors and musicians,<sup>37</sup>this is evident for example where; Golf star Tiger Woods acts in Buick Commercials or football Star Cristiano Ronaldo endorses Nike. Endorsement by a celebrity seems to be an effective tool to increasing consumer attention and ultimately product sale.

It thereby means that, there is an intersection between image rights and copyright of images. In as much as the latter is enforceable, it is only exercisable to the extent that it does not infringe on the image rights of another. Like all other property rights, image rights cannot be appropriated without permission. Invariably, a photographer cannot take a picture of a person without express permission and use it for commercial purposes. The latter is entitled to bring legal action. A claimant must however show that some pecuniary benefits are to accrue from such use. This is unlike an action for copyright infringement where it is sufficient to establish unlawful use. Image rights are also inherent and are enforceable without registration.

Although it is common practice for celebrities to institute successful actions for copyright infringement, persons who are non-celebrities are equally entitled to institute such actions. Therefore, a person can bring action against a shop-seller using his pictures, without prior consent, for advertisement of sale of fish.<sup>38</sup> Basically, he could also bring actions on the grounds of violation of his right to privacy.<sup>39</sup> In *Naomi Campbell V MGN*<sup>40</sup>, the defendant was found guilty of a breach of the claimant’s right of privacy. It was held by the House of Lords that every individual has a reasonable expectation of privacy. However, the right of privacy does not protect against the disclosure of matters of legitimate public concern such as newsworthy events. This means that politicians, celebrities and other newsworthy persons may lose their right to privacy to the extent that their private facts are relevant to legitimate news.<sup>41</sup>

Lately, there has been a trend in documenting happenings around through street photography; a burgeoning form of aesthetics. It is photography conducted for art or enquiry that features

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<sup>36</sup>(1953) 202 F. 2d 866.

<sup>37</sup>*Proactive Sports Management v Wayne Rooney & Others*[2011] ECWA Civ 1444.

<sup>38</sup>*RR RajGopal V State of Tamil Nadu JT* 1994 (6) SC 514

<sup>39</sup>Constitution of the Federal Republic of Nigeria 1999, section 37.

<sup>40</sup> [2004] UKHL 22

<sup>41</sup>*Mosley V News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

unmediated chance encounters and random incidents within public places.<sup>42</sup> Photographers are allowed to display, publish and even sell street photography without the subject's permission.<sup>43</sup> It is also important to note the Freedom of Panorama<sup>44</sup> which gives the public the right to republish pictures of artworks found in the public space. These artworks include buildings, architecture, statues, monuments and other items such as bridges; however, this does not extend to pictures of copyrighted artworks in galleries.

#### 4.0. REMEDIES FOR INFRINGEMENT OF COPYRIGHT IN PHOTOGRAPHS

In cases of substantial claim for an infringement of copyright, there are certain civil remedies available to the claimant viz;

- **Injunction** - An interim injunction may be granted to stop a party from continuing to use the work until the matter has been decided. At the final decision of the matter in favour of the claimant, a permanent injunction will restrain the further use of the copyrighted image.
- **Damages** - As a result of copyright infringement, a claim can be made for actual damages. The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement. Also, the Copyright Act provides for statutory damages- damages set by law. However, only a person who has registered a work with the Nigerian Copyright Commission before the infringement or within three months of publication can claim under this statutory provision.
- **Account of Profits** - As an equitable remedy, the fundamental principle behind account of profits is that the infringer must not be allowed to reap the benefits from another person's intellectual work. Therefore, an award of account of profits entitles the plaintiff to the profits illegally made by the defendant from the infringement of the former's copyright. It is usually an option to damages; both cannot be granted because a claim of account of profit means that the plaintiff has condoned the infringement by the defendant.<sup>45</sup>

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<sup>42</sup>Warner Marien, Mary, *100 Ideas that Changed Photography* (London: Laurence King Publishing 2012) 169

<sup>43</sup>*Erno Nussenzweig v Philip-Lorca diCorcia et al* 9 N.Y. 3d 184 (2007)

<sup>44</sup>Copyright Act, section 5

<sup>45</sup>Hon Justice Tajudeen Adewale Odunowo, *The Owner and the User of Copyright Works: The Role of the Judiciary in the Enforcement of Copyright* [1993].

The option of Account of profit is usually advised in situations where the claimant has discovered that his right was infringed upon, and he has substantial evidence that prove there was profit generated by the defendant from the infringement of copyright; or where there is no proof of any exact damage done to the claimant. In some cases, account of profit may be more than the damage suffered by the plaintiff.<sup>46</sup>

- **Delivery Up** -The court may order that the infringer delivers all infringing copies of the work, with all the equipment used in the production thereof to the owner of the copyright; or the court could decide to have all the infringing copies of the work and the equipment destroyed.<sup>47</sup> In *American Motion Pictures Export Co. v. Minesota Nigeria Ltd*,<sup>48</sup> the court decided that there should be delivery up of the infringing copies for the purpose of preventing the copyright violator from benefiting from its illegal action.
- **Conversion Right** -This right ensures that the copyright owner does not suffer a loss from the injurious act of the violator. The copyright violator's property and entitlements in relation to the copyright infringement automatically becomes that of the copyright owner.<sup>49</sup>

It is noteworthy that these remedies can be sought alongside an action for criminal proceedings against the alleged infringer.<sup>50</sup>

## 5.0. CONCLUSION

Photography is fast becoming a lucrative venture with certain famous photographers making as much as 20 million US Dollars. This new trend is encouraged by a spike in the use of high end phones with digital cameras -which has made amateur photographers of many of us-;and by the increased content-sharing on the internet. Yet many photographers are short-changed of the benefits accruing from their legal rights in photographs due to sheer ignorance of the law. It is therefore imperative that they explore the legal options available to them, as regards their copyright in order to reap maximum benefits.

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<sup>46</sup>*Rose Records V Motown Records* (1983) FSR 361.

<sup>47</sup>Copyright Act, section 18(4).

<sup>48</sup>(1981) FHCLR 64

<sup>49</sup>Copyright Act, section 16.

<sup>50</sup>*Akilu V Fawehinmi* (1989) 4 NWLR (Pt. 67) 797.

