

**SOCIAL MEDIA AND ITS EFFECTS ON PERSONALITY RIGHTS: THE CASE
FOR A DEFINED LEGAL FRAMEWORK ON PERSONALITY RIGHTS IN KENYA**

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DEDICATION

This journey has been far from easy;

To God, for granting me an abundance of good health, strength and grace while I was working on this dissertation.

To my parents, Dr. Willy Otele and Judith Otele, thank you for setting a good example through your impeccable work ethic, always supporting my dreams, constant prayers and words of encouragement at each stage of this journey.

To my siblings Joy and Junior, and all my close friends with whom I have walked this four year journey, I would not have done this without you.

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I would like to express my sincere gratitude to my supervisor, Sarah Ochwada, for her invaluable guidance and insight throughout this research.

DECLARATION

I, WAFULA JUNE NICOLE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 5/6/2018,

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

SARAH OCHWADA.

ABSTRACT

Personality rights encompass the right of an individual to control the commercial use of their name, image, likeness or other unequivocal aspects of one's identity. Kenya does not have a defined legislative framework on personality rights and individuals are accorded protection by the constitutionally guaranteed right of privacy and copyright laws.

The need for a defined legislative framework is continues to grow, due to the proliferation of data and internet use in Kenya which has eased access to social media platforms. Social media platforms have eased access to and sharing of material that could potentially infringe an individual's personality rights.

This research employs the descriptive research design where literature from academic journals, textbooks and reports is studied. The dissertation explores the concept of personality rights at length by detailing the origins of the right and how personality rights are protected in other jurisdictions with an aim of identifying key provisions which Kenya should borrow should government decide to enact legislation on personality rights. The research also links the concept of personality rights to social media so as to show that the rights are relevant in this era of increased internet use.

Specific online abuses relating to personality rights are discussed, revealing that the internet poses unique challenges to the application of personality rights. The current legal regime in Kenya with regard to digital rights and social media law is discussed and it is found that that the proliferation of internet use in Kenya is not met by a corresponding increase in regulation of internet use, whether through law or policy. The research concludes by finding that a defined legislative framework on personality rights is relevant in the Kenyan context, and suggesting that regulation through policy could be an equally viable method of legally providing for personality rights.

LIST OF ABBREVIATIONS

ADRIF	African Declaration of Internet Freedoms
CDPA	Copyright, Designs and Patents Act
KECOBO	Kenya Copyright Board
KICA	Kenya Information and Communications Act
PIN	Personal Identification Number
TAN	Transaction Authentication Numbers
UK	United Kingdom
US	United States of America

LIST OF CASES

Kenyan cases

Alfred Ombudo K'ombudo v Jane W. Odewale & another [2014] eKLR.

Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & another [2016] eKLR

J W I & another v Standard Group Limited & another [2015] eKLR

Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others [2017] eKLR.

N W R & another v Green Sports Africa Ltd & 4 others [2017] eKLR.

Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR.

Rukia Idris Barri v Mada Hotels Ltd [2013] eKLR.

T O S v Maseno University & 3 others [2016] eKLR.

Ugandan Cases

Asege Winnie v Opportunity Bank and Maad Limited High Court Civil Suit No. 756 of 2013.

American cases

Haelan Laboratories, Inc. v Topps Chewing Gum, Inc. 202 F, 2d 866 (2d Cir. 1953).

Fraley v Facebook, Inc. 830 F. Supp. 2d 785 (N.D. Cal. App. 2011).

La Russa v Twitter, Inc., No CGC09488101 (Cal. Sup. Ct. May 6, 2009).

Maremont v Susan Fredman Design Group, Ltd. No. 10 C 7811 (2011).

South African cases

Angella Wells v Atoll Media (PTY) Limited & another Western Cape High Court Case No. 11961/2006.

UK Cases

Fenty v Arcadia [2013] EWHC 2310 (Ch).

Irvine v Talksport Ltd. [2002] EWHC 367 (Ch).

Re: Elvis Presley Trademarks, Inc. [1997] CH 1996 E No 1337.

LIST OF LEGAL INSTRUMENTS

Kenyan legal instruments

Constitution of Kenya (2010)

Copyright Act (2001)

Data Protection Bill (2013).

Kenya Information and Communications Act (1998)

International legal instruments

The Charter of Human Rights and Principles for the Internet (2014).

Universal Declaration of Human Rights, 10th December 1948, 217 A (III).

US Legislation

California Civil Code (1971).

Lanham (Trademark) Act, (1946).

Restatement (Third) of Unfair Competition (2006).

UK Legislation

Copyright, Designs and Patents Act, (1988)

Trade Marks Act, (1994).

Guernsey legislation

The Image Rights (Bailiwick of Guernsey) Ordinance (2012).

1. CHAPTER 1: INTRODUCTION

1 Background information

Common law jurisprudence has defined personality rights as ‘the right of the individual to control the commercial use of their name, image, likeness or other unequivocal aspects of one’s identity’.¹ The right to personality is further classified into the right of publicity and the right to privacy or seclusion. The right to privacy is one of the inherent and unalienable human rights recognised in many jurisdictions around the world. Personality rights confer on the right holder the right to prevent commercial exploitation of their name, image, likeness and unequivocal aspects of one’s personality.

The need for personality rights continues to grow with time especially with the growth of technology more specifically social media, which enables easy sharing of media files such as images. ‘Social media’ has been defined as ‘websites or applications that enable users to create and share content or to participate in social networking’.² The need for a clearly defined legal framework is supported by numerous instances where there has been exploitation of an individual’s personality rights without consent and to the individual’s detriment.

In the face of it, the issue of personality rights is one that only affects celebrities and well known individuals such as actors, musicians and athletes, who commercialise their images in association with the promotion of goods and services.³ Aside from marketing of goods and services, such celebrities and well known individuals use their name, image and likeness or other unequivocal aspects of their personality as a means of marketing themselves as a personal brand and increasing their fan-base. It should be noted however, that the issue of personality rights also affects non-celebrities. Suits have been instituted before courts of law where non-celebrities seek to be compensated for the commercial exploitation of their name, image and likeness without their knowledge or consent.⁴

Technology, more specifically social media has enabled a one’s name, image and likeness to become a commercially valuable asset. This has led to exploitation of celebrities’ identities.

Sege Winnie v Opportunity Bank and Maad Limited High Court Civil Suit No. 756 of 2013.

https://en.oxforddictionaries.com/definition/social_media on 29 November 2016.

Nzomo V, ‘New Cases to Test the Protection of Image Rights: Microsoft, Safaricom and German Embassy in Kenya’ *CIPIT Blog*, 10 December 2014 --<http://blog.cipit.org/2014/12/10/new-cases-to-test-the-protection-of-image-rights-microsoft-safaricom-and-german-embassy-in-kenya/> on 29 November 2016.

Mukia Iqris Barri v Mada Hotels Limited [2013] eKLR.

personalities and celebrities are now earning more off their names, images and likeness rather than their skills.⁵ This has led to numerous benefits to the celebrities and personalities for ample monetary gains, growth of an individual as a brand and increase in fan-base.

Despite the numerous benefits, there have been several cases of exploitation by advertising agencies and companies which have used celebrities' names, images and likeness for the agencies and companies' benefit but to the detriment of the celebrities. An example is the Kenyan case of *Wangechi v Tecno*. Wangechi is a Kenyan rapper.⁶ Tecno Mobile is a premium mobile phone brand which carries out operations in various countries around the world, including Kenya.⁷ Tecno ran an advertisement campaign in early June 2016, where it used the rapper's image. The advertisement came across as an endorsement of the product.⁸ The advertisement was carried out without the rapper's knowledge, consent, contractual agreement or compensation. Attempts to resolve the matter have proven futile and all that happened is that the advertisement which was partly run on Tecno's social media platforms, has since been taken down.⁹ Such suits have been losing battles for the celebrities, often due to the lacuna in the law as well as lack of solid jurisprudence on personality and image rights.

It should be noted however, that with the exception of Guernsey, no legislation exists anywhere in the world that is specifically designed to protect personality rights.¹⁰ In Kenya, remedies are accorded to the individual by applying the Constitution of Kenya, common law and various statutes such as the Copyright Act to the facts of the case.¹¹ This has necessitated an intellectual debate among individuals who argue that the establishment of a clearly defined system of laws on personality rights is necessary, as a means of supplementing rather than upplanting the existing laws that are applied when individuals seek legal redress for the commercial exploitation of their personality rights.

Helling A, 'Protection of 'Persona' in the EU and in the US: a Comparative Analysis' 45 LLM Theses and Essays, University of Georgia School of Law (2005), 1.

<http://wangechimusic.com/#about> on 23 August 2017.

<http://www.tecno-mobile.com/about-tecno/about-us/#/> on 20 August 2017.

Muchene E, 'Rapper Wangeci calls out phones giant Tecno for using her photo without permission' Standard Newspaper, 5 September 2016- <https://www.standardmedia.co.ke/evewoman/article/2000214748/rapper-wangeci-calls-out-phones-giant-tecno-for-using-her-photo-without-permission> on 20 August 2017.

Nzomo V, 'Copyright and Image Rights: Case of Wangeci vs Tecno' *CIPIT Blog*, 2 September 2016--
<http://blog.cipit.org/2016/09/02/copyright-and-image-rights-case-of-wangechi-vs-tecno/> on 20 August 2017.

Nzomo V, 'New Cases to Test the Protection of Image Rights: Microsoft, Safaricom and German Embassy in Kenya' *CIPIT Blog*, 10 December 2014 --<http://blog.cipit.org/2014/12/10/new-cases-to-test-the-protection-of-image-rights-microsoft-safaricom-and-german-embassy-in-kenya/> on 29 November 2016.

Nzomo V, 'Copyright and Image Rights: Case of Wangeci vs Tecno' *CIPIT Blog*, 2 September 2016--
<http://blog.cipit.org/2016/09/02/copyright-and-image-rights-case-of-wangechi-vs-tecno/> on 20 August 2017.

opposing the need for personality rights, it has been argued that existing laws on the right to privacy and copyright are sufficient in the protection of an individual from commercial exploitation of their name, image, likeness or other unequivocal aspects of their identity.

2 Statement of the problem

The existing laws on copyright mostly offer redress to the owner of the photograph rather than the subject of the photograph. The owner or author in relation to a photograph is legally defined to be the person who is responsible for the composition of the photograph.¹² On the other hand, the right to privacy as enshrined in the Kenyan Constitution protects an individual from having private information relating to their family or private affairs unnecessarily acquired or revealed.¹³ From the stated facts, it can be seen that there is a gap in the protection of individuals from infringement of their personality rights. Individuals are likely to be exploited through the unauthorised commercialisation of their name, image, likeness and other unequivocal aspects of their personality.

3 Justification of the study

Development has led to the diversification of communication media. There are numerous platforms on which unauthorised commercial exploitation of one's personality rights can occur. Access to media files that may contain items falling under the ambit of personality rights has been made easier by technological advancements. The findings of this study will enhance the understanding of the concept of personality rights. This study will clarify that while the issue of unauthorised exploitation of one's name, image and likeness is one that mostly affects celebrities, many non-celebrities, as evidenced by case law, have fallen victim to violation of personality rights. Should Kenya opt to adopt a clearly defined legislative framework, both celebrities and non-celebrities will benefit from the laws.

4 Objectives of the study

1. To prove that the existing laws contained in the Constitution, Copyright Act, Kenya Information and Communications Act (KICA) as well as precedent are not sufficient to protect individuals from unauthorised online commercial exploitation of their name, image, likeness and unequivocal aspects of their personality.

Section 2, *Copyright Act* (2001).

Article 31 (c), *Constitution of Kenya* (2010).

2. To prove that personality rights are relevant to the Kenyan context due to the increased use of technology, mainly social media, which enhances easy sharing of media files.

5 Research questions

This research has attempted to respond to the following issues:

1. What is the current legal regime in Kenya, regarding the protection of individuals from unauthorised commercial exploitation of their name, image, likeness and unequivocal aspects of one's personality?
2. How do other jurisdictions protect their citizens' personality rights?
3. What can Kenya learn from other jurisdictions in terms of protection of personality rights online?

6 Hypothesis

The existing laws contained in the Constitution, Copyright Act, Kenya Information and Communications Act (KICA) as well as precedent are not sufficient in the protection of an individual from the commercial exploitation of their name, image and likeness.

7 Assumptions

This research proceeded on the following assumptions:

1. That the issue of commercial exploitation of one's image, likeness and other unequivocal aspects of one's personality is one that affects celebrities more compared to non-celebrities.
2. That the commercial exploitation of one's image, likeness and other unequivocal aspects of one's identity is facilitated by the recent developments in technology, more specifically social networking sites.
3. That legislation is the more viable solution to protection of personality rights compared to precedent or protection through various social media platforms' community guidelines.

8 Limitations of the study

The main limitation to the research was lack of sufficient literature on personality rights because this is an emerging area of law and not much has been written, especially locally, with regard to concept of personality rights. Most of the existing literature has been authored by persons in different legal jurisdictions around the world.

Literature review

al media and its effects on personality rights is an emerging area of law thus not much been written on the area. Most of the literature used in this research pertains to onality rights, where some authors seek to make a case for personality rights in their ective jurisdictions while others argue that a defined legislative framework on personality ts is unnecessary.

Kenya Copyright Board (KECOBO) in a 2015 news letter made a case for personality ts in Kenya, affirming that there is a gap in Kenyan law that needs to be filled through slation similar to the one adopted by Guernsey.¹⁴ It was stated that when it comes to ges, copyright addresses the issue of ownership to a certain extent in that it only protects owner rather than the subject of the photograph. The issue of subjects who are famous or l-known was raised, with the author questioning whether the owner of the image can do tever he wishes with the image, without the authority of the subject. It was further stated there is a general preference to use the images of persons who are popular such as sports onalities, actors and other well-known persons for advertising, promotions, chandising or promotion of certain values, with the assumption that people are more ly to associate with the famous personalities than those who are not known. The author ed that the use of images and personality rights is gaining currency and there is need to are that such use is well regulated and third parties do not take unfair advantage of the mercialisation of protected attributes.

g¹⁵ outlines the special problems for existing legal doctrines presented by social working sites. The author states that the structure and features of social networking sites create unique problems for publicity rights by outlining how easy it can be for nymous third parties to infringe on publicity rights. The author looks at how intellectual erty, privacy and unfair competition laws in the United States (US) fail to solve problems mauthorised use of celebrities' personas on social networking websites. The author usses the concept of 'twitter jacking' or a fake twitter account, using the American case *la Russa v Twitter*.¹⁶ The author also explains that celebrities use social media platforms

: Ouma M. 'Photography: Image Rights' 18 *Copyright News*, A Publication of the Kenya Copyright Board 5).

g A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social working Websites', 381 *Chicago-Kent Law Review* (2010).

Russa v Twitter, Inc., No. CGC09488101 (Cal. Sup. Ct. May 6, 2009).

both commercially and non-commercially thus it is important to ensure that third parties are not spreading misinformation.

Jennings¹⁷ states that the contractual issue of consent, in the context of a social media platform's agreement terms, is a necessary and contentious prerequisite to an actionable right of publicity claim in the US. Obtaining written consent from the individual whose image and likeness is utilised for commercial gain is a key legal requirement. Consequently, the author questions whether a single click on a box constitutes written consent to pages of terms and conditions of use of a social media platform. The case of *Fraleley v Facebook* is discussed at length, and the author is concerned that some social media platforms fail to notify users of amended terms and conditions. The author discusses use of social media platforms by companies, which may infringe social media users' personality rights through acts such as use of protected attributes in advertising. The author recommends that companies should have in place procedures to ensure informed consent through agreements which have clear terms of use, which users can easily access and plainly understand as license of their publicity rights. Additionally, such companies need to be prepared to comply with take down notices promptly.

Ahmad and Swain¹⁸ acknowledge that celebrities are permitted to make riches out of their identity and that there is constant infringement of celebrities' right to privacy and personality rights through acts such as use of photographs in advertisements without permission. The authors define who a celebrity is with regard to the issue of personality rights, positing that public perception is the main criteria for determining whether an individual is a celebrity or not. Most notable is the 'direct commercial exploitation of identity' test which provides that when an unauthorised use of a person's identity is made that is both direct in nature and commercial in motivation, the person whose identity has been misappropriated has by definition become a celebrity for right of publicity purposes. Furthermore, the authors state that the word 'celebrity' is perceived by a large chunk of population as an honour and reward for success. Different persons earn the title due to different reasons. The authors give examples such as sportspersons and artists earn the title by skill and certain others may acquire the title by their chance involvement in newsworthy events. The authors outline how

¹⁷ Jennings J, 'Right of Publicity Meets Social Media' American Bar Association 2012 Annual Meeting, Chicago, 5 August 2012.

¹⁸ Ahmad T and Swain S, 'Celebrity Rights: Protection under IP Laws' 16 *Journal of Intellectual Property Rights* (2011).

onality rights are protected, directly or indirectly, in various international conventions. authors specifically focus their study to the Indian context.

) Theoretical framework

)1 Intellectual property theories

onality rights are perceived as intellectual property.¹⁹ Consequently, the theories put forth justify intellectual property rights can be applied in the justification of personality rights. theories are outlined below.

)1.1 Utilitarian theory

aim of the utilitarian theory as outlined by Jeremy Bentham, is the maximum benefit for greatest number of people. Maximum benefit for the greatest number of people is a principle that is taken into great consideration by lawmakers when shaping property rights.²⁰ Therefore, in making a case for personality rights, it should be proved that by creating an elaborate legislative framework personality rights, there will be attainment of maximum benefit for the greatest number of people. In the case of companies using celebrities as a means of advertising their product or service, maximum good for the greatest number of people will be attained in threefold. Firstly, the celebrity will attain monetary gain as they will be compensated for the commercial use of their image, likeness or other unequivocal aspects of their personality and they will be able to exercise and enjoy their rights and freedoms as outlined by the Constitution, such as the freedom of choice. Secondly, the company is able to enjoy increased sales and popularity of their brand, products or services as celebrity advertising and endorsement is an effective advertising medium because the celebrity draws attention to the company's products through their popularity and following. Thirdly, in the same way that trademark law protects a consumer and society as a whole from being misled as to the origin of a given product, personality rights protect consumers and society from being misled as to the association of an individual such as a celebrity with a given product as is the case when one's personality rights are commercially exploited for gain by companies. It can be proven therefore that an elaborate legislative framework on personality rights can lead to the attainment of maximum benefit for the greatest number of persons.

19. Ober O, 'Human Dignity and Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus on Publicity Rights?' 1 *SCRIPT-ed* (2004).

20. Fisher W, 'Theories of Intellectual Property' in Munzer S, *New Essays in the Legal and Political Theory of Property*, Cambridge University Press (2001) 2.

0.1.2 Labour theory

is a theory that was propounded by John Locke. It is stated that a person who labours on resources that were held in common or unowned has a natural property right to the fruits of his or her labour and the state has a duty to acknowledge and enforce those rights.²¹

Labour theory can be put forth to justify the need for personality rights especially with regard to celebrity advertising. Companies are now using celebrities as a means of marketing and endorsing their brands.²² Such celebrities, such as actors, musicians and athletes expend a great effort to the marketing campaign so as to come up with a solid advert for a company's product or service. It therefore follows that based on the labour theory, such individuals must be compensated for their work owing to the facts that they have natural property rights to the fruits of their labour.

0.1.3 Private property rights theory

Private intellectual property theory is derived from the writings of philosophers namely, Immanuel Kant and Friedrich Engels. The philosophers argue that private property rights are essential to the satisfaction of some fundamental human needs therefore a responsibility is imposed on legislators to create and allocate entitlements to resources in the fashion that best enables people to fulfil those needs.²³

An individual's name, image, likeness and unequivocal aspects of their personality have become commercially valuable assets. Therefore, in acknowledging and respecting one's personality rights, one's name, image, likeness and unequivocal aspects of their personality become their private property. A defined legislative framework on personality rights accords individuals with the opportunity to satisfy their fundamental human needs, whether pecuniary or non-pecuniary.

1 Research design and methodology

My research methodology is the descriptive research design where I will rely on already existing literature and information acquired mainly through desktop research, in order to make a case for personality rights in Kenya.

Wolff, 'Theories of Intellectual Property' in Munzer S, *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, 2001,4.

Wolton M and Goldson P, 'The New Tort of Appropriation of Personality: Protecting Bob Marley's Face', 56.

Wolff, 'Theories of Intellectual Property' in Munzer S, *New Essays in the Legal and Political Theory of Property*, Cambridge University Press (2001),5.

2 Chapter breakdown

Chapter 1- Introduction to the study

This chapter contains the background to the study, statement of the problem, justification of study, theoretical framework, objectives of the study, research questions, hypothesis, assumptions, research design and methodology, limitations of the study, definition of terms, summary of overall results and chapter breakdown.

Chapter 2-The concept of personality rights

This chapter expounds on the concept of personality rights as enumerated by case law and statutory provisions. The chapter further distinguishes the right of privacy from the right of publicity and goes on to discuss personality rights in various jurisdictions namely the Bailiwick of Guernsey, United States of America and the United Kingdom.

Chapter 3-Personality rights and online presence

This chapter seeks to outline how personality rights relate to online presence. The distinction between a celebrity and non-celebrity is contained in this chapter.

Chapter 4-Abuses online

This chapter seeks to outline online abuses such as abuse of social marketing and false endorsements as well as emerging abuses such as pinning and unauthorised endorsement via a tag.

Chapter 5-Discussion and conclusion

This chapter concludes the dissertation by carrying out a discussion on the findings of the preceding chapters and putting forward recommendations on the regulation of personality rights in Kenya.

2. CHAPTER 2: THE CONCEPT OF PERSONALITY RIGHTS

concept of personality rights is not a novel one in Kenya despite the fact that there is no defined legislative framework. This is evidenced by constitutional and statutory provisions which are applied in cases of alleged infringement of personality rights and precedent, where judges have applied the concept in deciding cases brought before them.

2.1 Constitutional and Statutory provisions

2.1.1 Right to Privacy

Right to privacy in Kenya is recognised at Article 31 of the Constitution. The right to privacy includes the right not to have, firstly one's person, home or property searched, secondly one's possessions seized, thirdly information relating to one's family or private affairs unnecessarily required or revealed and fourthly the privacy of one's communications infringed.²⁴ Most relevant to the discussion on personality rights is the third facet of the right to privacy as outlined in the Kenyan constitution that is, the right not to have information relating to their family or private affairs unnecessarily required or revealed.²⁵ The right to privacy in Kenya was extensively dealt with in the case of *Roshanara Ebrahim v Ashleys Kenya Limited & 3 others*.²⁶

When considering whether there is a breach of the right to privacy, common law courts adopt the 'reasonable expectation of privacy' test taking into account the circumstances of the case, rather than whether the information was confidential or the existence of a confidential relationship.²⁷ This also appears to be the position adopted by Kenyan courts, evidenced in the case of *Roshanara Ebrahim v Ashleys Kenya Limited & 3 others* where the judge agreed with the authors of the Bill of Rights Handbook's consideration of the South African case of *Pratt v Interim National Medical and Dental Council of South Africa*.²⁸ The authors posited

'...informational privacy is an interest in restricting the collection, use and disclosure of private information. It also encompasses a related interest in having access to personal information that has been collected by others in order to ascertain its content and to check

Article 31, *Constitution of Kenya* (2010).

Article 31 (c) *Constitution of Kenya* (2010).

Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR.

Nippell v Mirror Group Newspapers Ltd [2004] 2 AC 457 in Aplin T and Davis J, 3ed, *Intellectual Property Text, Cases and Materials*, OUP, 2016, 548.

Pratt v Interim National Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC).

ts accuracy. These interests can readily be accommodated under the value of dignity since publication of embarrassing information, or information which places a person in false light, is most often damaging to the dignity of the person. But the right to privacy guarantees control over all private information and it does not matter whether the information is potentially damaging to a person's dignity or not. The publication of private photographs, however flattering, will for example constitute a violation of the right to privacy of in this sense. So would be the use of a person's name or identity without his or her consent. But as with the other two elements of the right to privacy, there must be a reasonable expectation of privacy. For example, a person does not have the right to refuse to provide identification to a police official when so requested'.

acking the above statement, it can be seen that the right of privacy acts as a safeguard on an dignity. Further, the right to privacy guarantees control over all private information, rdless of whether the information is potentially damaging to a person's dignity or not. s appears to differ with the position in the seminal article by Warren and Brandeis where right to privacy evolved as a means of preventing offensive (as distinguished from non-nsive) publicity.²⁹

e law shows that most claims involving infringement of personality rights are decided by lying the constitutionally protected right of privacy to the facts of the case. In *T O S v Maseno University & 3 others*³⁰, the judge, quoting the case of *J W I & another v Standard up Limited & another* stated:

'in the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967, the following additional elements of the right to privacy are listed; the prohibition to use a person's name, identity or photograph without his or her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information."³¹

2.1.2 Copyright Act

current copyright laws offer redress to the photographer for infringement of copyright in image. The Copyright Act categorically states that 'author' in relation to a photograph

immer M, 'The Right of Publicity' 19 *Law and Contemporary Problems* (1954), 207.

T S v Maseno University & 3 others [2016] eKLR.

V I & another v Standard Group Limited & another [2015] eKLR.

means a person who is responsible for the composition of a photograph.³² Where the work is done for hire, commissioned or done in the course of employment. The copyright owner is presumed to be the person who commissioned the work or the employer, unless a contract indicates otherwise.³³

2.2 Decided cases

In a 2013 case of *Rukia Idris Barri v Mada Hotels Limited* the plaintiff sued the defendant for publication of her photograph in the Kenya Airways Limited in flight 'traveller magazine' without her knowledge, consent or authority.³⁴ The plaintiff's image had been taken a few years back for use in a brochure to advertise the defendant's facility. At the time, the plaintiff was casually employed in the defendant hotel and the image in question was taken with her full knowledge and consent. The plaintiff sought an injunction as well as general damages. The defendant argued that it was common practice that employee's images were used in advertising its facilities and there was no limit in the duration within which the picture could be used. The judge however, stated that the image was taken for one purpose, which is advertisement in the defendant's 1997/1998 brochure. Any further use of the image required the plaintiff's consent.

The judge further stated that a person's privacy, as protected by Article 31 of the Constitution, includes his or her identity and likeness.³⁵ The judge adopted two South African cases, most notably *Angella Wells v Atoll Media (PTY) Limited & another* where it was stated that;

'...the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in case, for the benefit of a magazine sole to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy.'³⁶

³² Section 2, *Copyright Act* (2001).

³³ Dr. Ouma M. 'Photography: Image Rights' 18 *Copyright News*, A Publication of the Kenya Copyright Board.

³⁴ *Rukia Idris Barri v Mada Hotels Ltd* [2013] eKLR.

³⁵ *Rukia Idris Barri v Mada Hotels Ltd* [2013] eKLR, para. 22.

³⁶ *Angella Wells v Atoll Media (PTY) Limited & another* Western Cape High Court Case No. 11961/2006.

The judge therefore held that the unauthorised exploitation of the plaintiff's photograph or likeness for commercial purposes was a violation of her right to privacy and human dignity, therefore the prayers were granted as sought.

The case of *Alfred Ombudo K'ombudo v Jane W. Odewale & another* is one that not only acknowledged the concept of personality rights but also outlined the current legal regime on infringement of personality rights in Kenya. The applicant claimed that his constitutional rights to privacy and religion had been violated through the airing, broadcasting and publication of the applicant's wedding videos and images without prior consent.³⁷ The applicant had not signed a talent or model release which would have authorised the respondents to commercially exploit the applicant's personality rights. Consequently, the applicant sought an injunction to bar the respondents from airing, broadcasting and publishing the videos and images in question as well as costs of the suit. According to the judge, no amount of damages is sufficient to redeem the exploited image of a person and it is for that reason that an injunction is necessary to mitigate that loss and damage.

In the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* the petitioner's image was used for advertising on billboards without her consent. The judge stated that personality rights are generally considered a property right as opposed to a personal right and the justification for the rights from a policy standpoint is the notion of natural rights and the idea that every individual should have the right to control how, if at all, his persona is commercialised by third parties. Usually the motivation to engage in such commercialisation is to help propel sales or visibility of a product or service, which usually amounts to some form of commercial speech.³⁸ The judge further stated that 'privacy', 'dignity', 'identity' and 'reputation' are facets of personality. All persons have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.³⁹

Most notable however is a three step test cited by the judge which is applied in order to establish whether there has been infringement of a petitioner's personality rights. The first step is whether there has been use of a protected attribute. Here, the plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law including the plaintiff's name or likeness. The second step is whether the protected aspect of one's identity

³⁷*Alfred Ombudo K'ombudo v Jane W. Odewale & another* [2014] eKLR.

³⁸*Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR.

³⁹*Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR.

was used for an exploitative purpose. It was stated that 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 plaintiff's identity and a matter of legitimate public interest. The final step is whether the plaintiff consented to the use of their image or other aspect of their persona.⁴⁰

2.3 The right to privacy v the right to publicity

Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one's image, likeness or persona include but are not limited to name, face, body or recognizable body part, voice or voice impersonation, photograph, look-alike, signature phrase, paraphernalia or action, costume or personal signature.⁴¹ Personality rights are classified into the right to privacy and the right to publicity.

2.3.1 The right to privacy

The development of the right to privacy is said to have been influenced by a 1890 Harvard Law Review article by Warren and Brandeis.⁴² The authors vented their frustration with the intrusions into individual privacy by nineteenth century journalists armed with the latest technological innovations.⁴³ The authors argued that political, social and economic changes entail the recognition of new rights, and the common law in its eternal youth grows to meet the needs of the society.⁴⁴ Warren and Brandeis therefore urged courts to combat this threat to individual privacy by adding a broad new right to the common law - the 'right to be let alone' or 'right to privacy'.⁴⁵

The right to privacy is guaranteed both constitutionally and in various human rights instruments.⁴⁶ The right to privacy safeguards individuals' dignity in every society.⁴⁷ Rossler opines that the protection of the right to privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and

⁴⁰ *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR.

⁴¹ *NWR & another v Green Sports Africa Ltd & 4 others* [2017] eKLR.

⁴² Warren S and Brandeis L, 'The Right to Privacy', 4 *Harvard Law Review* (1890).

⁴³ Kramer I, 'The Birth of Privacy Law: A Century Since Warren and Brandeis' 39 *Catholic University Law Review* (1990), 703.

⁴⁴ Warren S and Brandeis L, 'The Right to Privacy', 193.

⁴⁵ Kramer I, 'The Birth of Privacy Law: A Century Since Warren and Brandeis', 703.

⁴⁶ Article 12, *Universal Declaration of Human Rights*, 10th December 1948, 217 A (III).

⁴⁷ *Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & another* [2016] eKLR.

participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part.⁴⁸

2.3.2 The right to publicity

The right to publicity has been defined to be the right of every person to control the commercial use of their identity.⁴⁹ It is worth stating at this point that the right to publicity is not a kind of trademark. It is not a species of copyright. And it is not just another kind of privacy right. It is a wholly different and separate legal right.⁵⁰ Historically, this right grew out of the right of privacy, and bears some resemblance to trademarks, copyright and the law on false advertising. The right differs from the law of registered and un-registered trademarks in that liability may arise despite there being no likelihood of confusion as to source or connection by way of endorsement or sponsorship.⁵¹

According to McCarthy the right to publicity differs from the right to privacy in that privacy rights are personal rights whereas the right to publicity is a property right.⁵² Where one's privacy rights are infringed, damage is to the human dignity and the injury caused is measured primarily by 'mental distress', to which damages awarded are connected. Where publicity rights are violated, there is commercial injury to the business value of personal identity and damages can include the fair market value of the plaintiff's identity; unjust enrichment and the infringer's profits.⁵³ Liability for infringement of one's right to publicity arises where the defendant appropriates the commercial value of a person's identity by using, without consent, the person's name, likeness or other indicia of identity for the purposes of trade. This liability is based on misappropriation rather than misrepresentation thus proof of

⁴⁸ Justice Lenaola citing B. Rossler, 'The Value of Privacy' (Polity, 2005) p. 72 in *Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & another* [2016] eKLR.

⁴⁹ V.Q, 'Publicity Rights: Who owns a famous face?' 69 *American Bar Association Journal* (1983) 568.

⁵⁰ McCarthy T, 'The Human Persona as Commercial Property: The Right of Publicity' 19 *Columbia- VLA Journal of Law and the Arts* (1994), 131.

⁵¹ Beverly-Smith H, 'The Commercial Appropriation of Personality' in Aplin T and Davis J, 3ed, *Intellectual Property Law: Text, Cases and Materials*, OUP, 2016, 590.

⁵² McCarthy T, 'The Human Persona as Commercial Property: The Right of Publicity', 134.

⁵³ McCarthy T, 'The Human Persona as Commercial Property: The Right of Publicity', 134.

reception or consumer confusion is not needed. The interest that is protected is the intangible value of one's identity rather than trading or promotional goodwill.⁵⁴

The right of publicity is said to have emanated from the American case of *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.*⁵⁵ The decision in the aforementioned case is said to be the start of a judicial and legislative movement delineating an economic right in one's persona from the right of privacy.⁵⁶

2.4 The Guernsey approach to Personality rights

As earlier stated, Guernsey is the only jurisdiction in the world with defined legislation on personality rights. The Bailiwick of Guernsey is a group of islands located within the Channel Islands. The islands are geographically closer to France.⁵⁷ It consists of different jurisdictions namely: Guernsey, Alderney and Sark.⁵⁸

Personality rights in Guernsey are protected under 'The Image Rights (Bailiwick of Guernsey) Ordinance' (the ordinance).⁵⁹ Whereas the ordinance provides for image rights extensively, much attention is also paid to personality rights.

2.4.1 Nature of personality rights

The ordinance provides that a registered personality is a property right obtained by registration of a personality.⁶⁰ Persons eligible for registration of personality rights include: natural persons, legal persons, two or more natural or legal persons who are publicly perceived to be intrinsically linked and who together have a joint personality, two or more natural or legal persons who are publicly perceived to be linked in a common purpose and who together form a collective group or team and fictional characters of a human or non-human.⁶¹ The ordinance collectively refers to the aforementioned as 'personnage'.⁶²

⁵⁴ Beverly-Smith H, 'The Commercial Appropriation of Personality' in Aplin T and Davis J, 3ed, *Intellectual Property Law: Text, Cases and Materials*, OUP, 2016, 590.

⁵⁵ *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.* 202 F, 2d 866 (2d Cir. 1953).

⁵⁶ Halpern S, 'The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality', 46 *Hastings Law Journal* (1995), 855.

⁵⁷ <https://www.gov.gg/article/120176/Information-on-the-location-of-the-islands-and-their-constitution> on 11th November 2017.

⁵⁸ <https://www.channelislands.eu/about-channel-islands/about-bailiwick-of-guernsey/> on 11th November 2017.

⁵⁹ *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶⁰ Section 2(1), *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶¹ Section 1, *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶² Section 1, *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

Upon registration, personality rights are protected for a period of ten years subject to renewal.⁶³ Personality rights are transmissible by assignment, testamentary disposition or operation of law in the same way as other personal or moveable property.⁶⁴

2.4.2 Key definitions

'Personality' is defined to be the personality of persons who are eligible for registration of personality rights.⁶⁵

'Image' is defined in the ordinance to mean firstly, the name of a personage or any other name by which a personage is known secondly, the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a *personage* and thirdly, any photograph, illustration, image, picture, moving image or electronic or other representation ("picture") of a *personage* and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of the picture.⁶⁶

'Infringement of image rights' is defined to occur when one's image is used for a commercial purpose or a financial-economic benefit without the proprietor's consent where firstly, because the image is identical or similar to a protected image of that registered personality, a likelihood of confusion on the part of the public exists which includes the likelihood of association with the registered personality or secondly, which is identical or similar to a protected image or that registered personality which takes unfair advantage or is detrimental to either the character, reputation or value of that registered personality.⁶⁷

2.4.3 Moral rights

Moral rights apply to natural persons only and consist of the right to be identified and the right not to be subjected to derogatory treatment. The right to be identified comes into play whenever a person uses a protected image associated with or registered against a registered personality and makes such an image available to the public.⁶⁸ The right to be identified is not infringed unless it has been asserted and the right can be asserted generally or in relation

⁶³ Section 18, *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶⁴ Section 52 (1), *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶⁵ Section 1 (2), *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶⁶ Section 3, *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶⁷ Section 27, *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁶⁸ Section 65 (1), *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

to any specified act or description of acts.⁶⁹ It is worth stating that this right cannot be said to have been infringed where the act in question has no commercial purpose or no economic benefit has been derived.⁷⁰

Infringement of the right not to be subjected to derogatory treatment occurs where there has been distortion, mutilation, or other modification of the image of a person entitled to protection of personality rights.

2.5 The American approach to Personality rights

The equivalent of personality rights in the United States (US) is the right of publicity. The right is recognised as an economic right.⁷¹ It is essentially a freely assignable property right and is the basic framework for endorsement transactions.⁷²

There is no federal legislation dedicated entirely to regulating the right of publicity, although some states have chosen to adopt laws that include and systemise the view held by courts. Two general options exist for protection of publicity rights namely reliance on federal statutes more specifically the Lanham Act and the Restatement (Third) of Unfair Competition or reliance on state right of publicity laws. The current count is thirty-eight states with some form of common law precedent, and twenty-two states with statutory protection.⁷³ It has been stated that state right of publicity laws provide protection in areas that would not be protectable under a Lanham Act claim.⁷⁴

As earlier stated, the right is said to have emanated in the case of *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.* which involved contracts made between athletes and two rival chewing gum manufacturers, for use of the athletes' images in advertising of products.⁷⁵ Both manufacturers packaged their products with baseball cards. The contract between the claimants and the athletes assured the claimant that it would have the exclusive rights to use the images and the athletes could not grant similar rights to any other chewing gum manufacturer. The respondent however, continued to produce baseball cards and closed

⁶⁹ Section 66, *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁷⁰ Section 67 (4), *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

⁷¹ Pina C, 'The Role of IP for Athletes and Image Rights' *WIPO/REG/IP/SPORT/SIN/14*, 25 November 2014 available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=291665 on 18th December 2017.

⁷² Bergmann S, 'Publicity rights in the United States and Germany: A Comparative Analysis' 19 *Loyola of Los Angeles Entertainment Law Review* (1999), 479.

⁷³ <http://rightofpublicity.com/statutes> on 6 January 2018.

⁷⁴ Schlegelmilch J, 'Publicity Rights in the U.K. and the U.S.A.: It is time for the United Kingdom to follow America's Lead' 1 *Gonzaga Law Review Online* (2016), 104.

⁷⁵ *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.* 202 F, 2d 866 (2d Cir. 1953).

contracts with some of the athletes contracted by the claimants, with full knowledge of the prior contractual obligations.⁷⁶ The court recognised the right of publicity which gave Haelan, the claimant, a valid claim against Topps, the respondent. According to Judge Jerome Frank, the athletes possessed a property right in their images and the right was transferable to third parties who then had the same right as the individual himself to enforce it against competing, but unauthorised, users.⁷⁷

Several reasons have been put forward for the recognition of the right of publicity by courts and scholars. Firstly, the right aims to secure the economic value of an individual's identity and prevent unjust enrichment to the infringer.⁷⁸ Secondly, publicity rights protect against the dilution of celebrities commercial value through excessive and unauthorised uses.⁷⁹

2.5.1 Reliance on Federal Statutes

The Lanham Act which is the federal trademark law, provides for publicity rights.⁸⁰ Section 43 (a) (1) (A) of the Lanham Act provides for false designations of origin; false description or representation. It states that:

‘Any person who, on or in connection with any goods or services,...uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person...shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act’.⁸¹

⁷⁶*Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.* 202 F. 2d 866 (2d Cir. 1953) in Bergmann S, ‘Publicity rights in the United States and Germany: A Comparative Analysis’ 19 *Loyola of Los Angeles Entertainment Law Review* (1999), 481.

⁷⁷ Hylton G, ‘Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v Topps Chewing Gum’ 12 *Marquette Sports Law Review* 1 (2001), 274.

⁷⁸*Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) in Bergmann S, ‘Publicity rights in the United States and Germany: A Comparative Analysis’ 19 *Loyola of Los Angeles Entertainment Law Review* (1999), 482.

⁷⁹*Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 138 (Wis. 1979) in Bergmann S, ‘Publicity rights in the United States and Germany: A Comparative Analysis’ 19 *Loyola of Los Angeles Entertainment Law Review* (1999), 482.

⁸⁰ Section 43 (a), *Lanham (Trademark) Act* (1946).

⁸¹ Section 43 (a) (1) (A), *Lanham (Trademark) Act*, (1946)

Furthermore, the Restatement (Third) of Unfair Competition provides that consent should be sought prior to appropriation of a person's publicity rights.⁸² Failure to seek consent may lead to sanctions such as injunctions and monetary compensation.⁸³ Most notable is the fact that 'use for the purposes of trade' does not include use of a person's identity for news reporting, commentary, entertainment, works of fiction and non-fiction, or in advertising that is incidental to such uses.⁸⁴

2.6 The United Kingdom approach to Personality rights

There is no single umbrella right in the United Kingdom (UK) that protects image rights.⁸⁵ The two potentially most celebrity-friendly legal rights available in other countries, namely personality image rights and the right of privacy, have steadfastly been refused recognition by the courts of England and Wales.⁸⁶ The primary methods of protection are based on intellectual property law including copyright, trademark law and the closely related tort of 'passing off'.⁸⁷ Other methods of protection include claims based on defamation, violation of advertising codes, and breach of confidence under contract law.⁸⁸

2.6.1 Claims based on copyright law

Copyrightable works as outlined in the Copyright, Designs and Patents Act (CDPA) include original literary, dramatic, musical or artistic works, sound recordings, films or broadcasts and the typographical arrangement of published editions.⁸⁹ Photographs are classified under artistic works.⁹⁰ In order to present a *prima facie* case for copyright infringement, the plaintiff must establish that firstly he is the copyright owner, secondly the work in question is copyrightable in that the work is original, the author is a qualifying person by reference to domicile or residency or the work was first published in the UK, thirdly that the work is still in copyright, fourthly one of the acts restricted by copyright has been committed in the UK

⁸² Section 46, *Restatement (Third) of Unfair Competition* (2006).

⁸³ Sections 48 and 49, *Restatement (Third) of Unfair Competition* (2006).

⁸⁴ Section 47, *Restatement (Third) of Unfair Competition* (2006).

⁸⁵ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 9 *Journal of Intellectual Property*(2014), 137.

⁸⁶ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK', 137.

⁸⁷ Stallard H, 'The Right of Publicity in the United Kingdom' 18 *Loyola of Los Angeles Entertainment Law Review* (1998), 566.

⁸⁸ Stallard H, 'The Right of Publicity in the United Kingdom', 566.

⁸⁹ Section 1, *Copyright, Design and Patents Act* (1988).

⁹⁰ Section 4, *Copyright, Design and Patents Act* (1988).

and lastly, none of the exceptions and defences to copyright infringement apply.⁹¹ The copyright holder with regard to an image is the person who creates it.⁹²

According to Schlegelmilch, the wording of Section 85 of the CDPA seems to imply that an individual should be able to protect their likeness when it is fixed in a photograph or film.⁹³ Section 85 of the CDPA provides for privacy of certain photographs and only applies where an individual commissioned taking of photographs for private and domestic purposes.⁹⁴

Application of copyright law to celebrity identities was seen in *Re: Elvis Presley Trademarks, Inc.* (the 'Elvis' Case) where Justice Laddie stated that there is nothing akin to copyright in a name or in one's appearance.⁹⁵

Therefore, the only protection for celebrities' identities will come in the scenario where they authorize a photograph or recording, own the copyright, and have it copied completely or in substantial part. Unfortunately, this means that a very small fraction of cases involving publicity rights will be actionable.⁹⁶

2.6.2 Claims based on trademark law

According to the UK Trade Marks Act, a trademark means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.⁹⁷ A person infringes a registered trademark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.⁹⁸

⁹¹ Section 17-18, *Copyright, Designs and Patents Act*, 1988 in Stallard H, 'The Right of Publicity in the United Kingdom' 18 *Loyola of Los Angeles Entertainment Law Review* (1998), 576.

⁹² Section 9 (1), *Copyright, Design and Patents Act* (1988).

⁹³ Schlegelmilch J, 'Publicity Rights in the U.K. and the U.S.A.: It is time for the United Kingdom to follow America's Lead', 111.

⁹⁴ Section 85, *Copyright, Design and Patents Act* (1988).

⁹⁵ *Re: Elvis Presley Trademarks, Inc.* [1997]CH 1996 E No 1337.

⁹⁶ Schlegelmilch J, 'Publicity Rights in the U.K. and the U.S.A.: It is time for the United Kingdom to follow America's Lead', 112.

⁹⁷ Section 1, *Trade Marks Act*, (1994).

⁹⁸ Section 10 (1), *Trade Marks Act*, (1994).

Often cited is the *Elvis Case* where the court rejected an application for registration of the name 'Elvis Presley' because it was so commonly known that it possessed no distinctive quality to identify goods.⁹⁹

In *The Estate of Diana, Princess of Wales' Application* an application to register the words 'Diana, Princess of Wales' was rejected because the names lacked the necessary trademark character for the goods listed in the application.¹⁰⁰

The above cases show that, to qualify for registration in cases where the celebrity is already famous, the public must associate the celebrity with the goods sought for registration. With this public association, the celebrity's name will be seen to be indicating origin and will not merely be indicating subject matter. The celebrity therefore needs to educate the public that the celebrity is using his or her name in a trade mark sense on the goods or services in question.¹⁰¹

2.6.3 Claims based on the tort of passing off

According to Ohta and Blum, the most common action used to enforce image rights in the UK is the tort of passing off.¹⁰² Claims brought under this head are used where the subject matter can neither be protected by copyright nor registered design protection.¹⁰³ This protection depends on having an established reputation in the mark meaning that commercial exploitation would be necessary before the right would apply.¹⁰⁴

It has been stated that the classical trinity of passing off is that the claimant must establish goodwill attached to the goods, a likely misrepresentation has been caused by the defendant; and damage has been suffered.¹⁰⁵ The landmark case of *Irvine v Talksport* was the start of the expansion of the scope of passing off to cover false advertisement claims.¹⁰⁶ The defendant

⁹⁹ Schlegelmilch J, 'Publicity Rights in the U.K. and the U.S.A.: It is time for the United Kingdom to follow America's Lead', 113.

¹⁰⁰ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 139.

¹⁰¹ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 140.

¹⁰² Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 138.

¹⁰³ Stallard H, 'The Right of Publicity in the United Kingdom', 577.

¹⁰⁴ Stallard H, 'The Right of Publicity in the United Kingdom', 577.

¹⁰⁵ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 138.

¹⁰⁶ Schlegelmilch J, 'Publicity Rights in the U.K. and the U.S.A.: It is time for the United Kingdom to follow America's Lead', 115.

had digitally manipulated an image of the plaintiff, who was a famous race car driver, such that it appeared like he was holding a portable radio bearing the name of the defendant radio station, without his consent. The image was then printed on an advertising brochure sent to various businesses.¹⁰⁷ The judge found that the defendant's actions gave rise to a false message, which would mislead the public that the plaintiff had endorsed the defendant radio station.¹⁰⁸

Another noteworthy case was *Fenty v Arcadia*, where the main issue was whether fashion retailer (Topshop) had committed passing off by selling a t-shirt bearing the image of the famous pop star, Rihanna.¹⁰⁹ It should be noted that Rihanna had her own clothing label, which was retailed by another store (River Island).¹¹⁰ It was found that there was a high likelihood of confusion by the public. The court made it clear that selling a garment with a recognisable image of a celebrity is not in itself an act of passing off. There must be a misrepresentation about trade origin that creates a false belief in the potential purchaser's mind that influences their decision to buy the product.¹¹¹

¹⁰⁷ *Irvine v Talksport Ltd.* [2002] EWHC 367 (Ch).

¹⁰⁸ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 138.

¹⁰⁹ *Fenty v Arcadia* [2013] EWHC 2310 (Ch).

¹¹⁰ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 138.

¹¹¹ Ohta T and Blum J, 'Personality Disorder: strategies for protecting celebrity names and images in the UK' 138.

3. CHAPTER 3: PERSONALITY RIGHTS AND ONLINE PRESENCE

This chapter outlines the proliferation of data and internet use in Kenya and expounds how personality rights relate to online presence. The chapter further discusses the assertion that a defined legislative framework on personality rights will only benefit celebrities.

3.1 Proliferation of data and internet use in Kenya

As stated in the introductory chapter of this dissertation, the need for personality rights in Kenya is rapidly evolving due to numerous technological advancements. Proliferation of data and internet use in Kenya has eased access to social networking sites. A recent report by the Communications Authority of Kenya (CAK) reveals that the demand and uptake of internet and data services in the country maintains an upward trajectory. The estimated number of data or internet users grew by 12.5 percent in the July-September 2017 quarter, bringing it to 51.1 million subscriptions. This translated to an Internet penetration of 112.7 percent during the quarter under review.¹¹² Another report by Stat Counter revealed that Facebook is the most used social media platform in Kenya.¹¹³

The internet poses unique challenges to the protection of personality rights as it can be a source of material used in the infringement of personality rights as well as a platform on which infringement can take place. Content such as images and voice recordings can easily be accessed and modified for use in advertising.

The nascent potential for digital content to go ‘viral’ through the internet, to not only a national but also global audience, can be both a blessing and a burden for those seeking to economically exploit their image rights.¹¹⁴ According to Ohta and Blum, the ease with which digital content can be created and managed anonymously poses challenges to all rights holders. In the context of image rights, this is particularly true where the ability to misappropriate celebrity names and images quickly, cheaply and to a global audience is facilitated by the proliferation of online social networking sites and e-commerce generally.¹¹⁵

¹¹² Communications Authority of Kenya, *First Quarter Sector Statistics Report for the Financial Year 2017/2018 (July to September 2017)*, 22.

¹¹³ <http://gs.statcounter.com/social-media-stats/all/kenya> on 24 January 2018.

¹¹⁴ Ohta T and Blum J, ‘Personality Disorder: strategies for protecting celebrity names and images in the UK’ 145.

¹¹⁵ Ohta T and Blum J, ‘Personality Disorder: strategies for protecting celebrity names and images in the UK’ 145.

Social media platforms began and were first widely adopted as a way for individual users to connect with each other and share information and content.¹¹⁶ Such platforms were not invented with businesses, corporations and commercial enterprises in mind as the target consumer.¹¹⁷ However, many businesses are now making use of social media platforms to market their products. This commercial use of social media networks that revolve around identity thus creates a greater likelihood that unauthorised commercial use of users' identities will occur.¹¹⁸

A mere examination of the structure of social networking websites can reveal just how easy it can be for anonymous third parties to infringe on personality rights.¹¹⁹ The major social media platforms merely require a valid electronic mail (e-mail) address or telephone number as a prerequisite to creating an account. With free e-mail hosting services such as Gmail, Hotmail and Yahoo Mail, any potential infringer can easily create an account without having to divulge any personal information.¹²⁰ The potential infringer can then proceed to create an account on their social media platform of choice. According to Jung, the anonymous dealing that can take place on social media platforms makes it more difficult to identify perpetrators than in historical right of publicity cases where, for example, a likeness is used in an advertisement for a company or on a product that is easily traceable to a manufacturer.¹²¹

3.2 Personality rights: Rights that will only benefit celebrities?

A common assumption in personality rights protection is that a clearly defined legislative framework will only benefit celebrities. Although personality rights were initially developed to protect celebrities and well known individuals from the unauthorised commercial exploitation of their persona, there are diverse opinions on whether the right applies only to celebrities and non-celebrities as well.¹²² In the Kenyan context, the assertion that a defined legal framework on personality rights will only benefit celebrities can be disproved by

¹¹⁶ Jennings J, 'Right of Publicity Meets Social Media' American Bar Association 2012 Annual Meeting, Chicago, 5 August 2012, 8.

¹¹⁷ Jennings J, 'Right of Publicity Meets Social Media', 8.

¹¹⁸ Jennings J, 'Right of Publicity Meets Social Media', 9.

¹¹⁹ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 400.

¹²⁰ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 399.

¹²¹ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 401.

¹²² Helling A, 'Protection of 'Persona' in the EU and in the US: a Comparative Analysis' 45 LLM Theses and Essays, University of Georgia School of Law (2005), 14.

looking at precedent as outlined in the preceding chapter. Most of the cases involve ordinary citizens whose personality rights have been infringed. Therefore, unauthorised commercial exploitation of personality rights affects both celebrities and ordinary citizens in equal measure.

There is no standard definition of a celebrity. What makes an individual a celebrity is difficult to define in the contemporary era when the status has become increasingly available to many in our populace.¹²³ According to Ahmad and Swain, public perception is the main criteria for determining whether an individual is a celebrity or not.¹²⁴ Traditionally, a celebrity status could be acquired by birth or by skill, and sportspersons, political leaders and actors were recognised as such. Media and global communication however, has defined and redefined the ambit of celebrity status.¹²⁵ The term 'celebrity' is perceived by a large chunk of the population as an honour and reward for success. Sportspersons and artists earn it by skill, businesspersons and television personalities earn it by wit and politicians earn it by votes. Others may acquire it by their chance involvement in newsworthy events.¹²⁶

The danger in holding the assertion that personality rights will only benefit celebrities is that the application of personality rights will change depending on the public perception. According to McCarthy, the status of the plaintiff only affects the amount of damages.¹²⁷ An unknown person can probably be unable to prove that his identity is very valuable therefore the compensation for the use of it may not be very high.¹²⁸

This problem faced by non-celebrities in quantifying the value of their identity can be solved in different ways. The state of California for example, provides at Section 3344 of its Civil Code recovery for injured persons for either the actual damages suffered from the unauthorised use plus any profits attributable to the use or, in the alternative, \$750.¹²⁹ Since the statute sets a floor on damages, non-celebrities who may otherwise struggle to quantify

¹²³ Budhiraja G, 'Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime' 6 *Nalsar Student Law Review* (2011), 86

¹²⁴ Ahmad T and Swain S, 'Celebrity Rights: Protection under IP Laws', 8.

¹²⁵ Budhiraja G, 'Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime' 6 *Nalsar Student Law Review* (2011), 86.

¹²⁶ Ahmad T and Swain S, 'Celebrity Rights: Protection under IP Laws', 8.

¹²⁷ Helling A, 'Protection of 'Persona' in the EU and in the US: a Comparative Analysis', 15.

¹²⁸ Helling A, 'Protection of 'Persona' in the EU and in the US: a Comparative Analysis', 14.

¹²⁹ Koehler J, 'Fraley v Facebook: The Right of Publicity in Online Social Networks' 28 *Berkeley Technology Law Journal* (2013), 974.

and demonstrate commercial value of in their name, image or likeness may be able to claim for infringement of publicity or personality rights.¹³⁰

3.3 Celebrities and the internet

The importance of the internet to a celebrity can be looked at from both an economic and non-economic perspective. From an economic perspective, celebrities undoubtedly have a financial incentive to control all the commercial facets of their persona, including those facets on the internet, so that they can profit from their persona to the fullest extent.¹³¹ Jung opines that in order to increase brand value and marketability, celebrities would want to make sure that they can use social media to reach potential fans or customers of products that the celebrity endorses.¹³² The internet is a very powerful marketing tool that can be used by a celebrity to market himself and ultimately increase the value of his persona.¹³³

In the Kenyan context, the importance of the internet to a celebrity from an economic perspective can be illustrated by the case of *Wangeci v Tecno*, which was discussed in the introductory chapter of this dissertation. Infringement of the complainant's personality rights took place online as the advertisement by Tecno was run on various social media platforms. The complainant artist argued that an artist's image and likeness is their source of livelihood; their bread and butter and misuse of the same should be prohibited, so as to prevent exploitation of what artists have worked hard to build.¹³⁴

From a non-economic perspective, celebrities can use the internet to directly connect with and interact with fans as well as in advancing their own charitable interests and causes.¹³⁵ For the politician, social media can be an avenue through which potential voters are informed about policy issues.¹³⁶ Consequently, it would be important for a celebrity and politician alike

¹³⁰ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 393.

¹³¹ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 399.

¹³² Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 399.

¹³³ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 399.

¹³⁴ Muchene E, 'Rapper Wangeci calls out phones giant Tecno for using her photo without permission' Standard Newspaper, 5 September 2016- <https://www.standardmedia.co.ke/evewoman/article/2000214748/rapper-wangeci-calls-out-phones-giant-tecno-for-using-her-photo-without-permission> on 16 February 2018.

¹³⁵ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 400.

¹³⁶ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 400.

to ensure that third parties are not spreading misinformation and that their name or likeness is not being associated with persons or activities of which they do not approve.¹³⁷

¹³⁷ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 400.

4. CHAPTER 4: ABUSES ONLINE

This chapter seeks to detail specific online abuses that relate to personality rights. The United States has robust jurisprudence on online abuses relating to violation of publicity rights which will be discussed at length in this chapter.

4.1 Abuse of social marketing

In the context of online social networks, advertisers and companies refer to word-of-mouth advertising as ‘social marketing’.¹³⁸ Word-of-mouth advertising has been described to mean peer-to-peer interaction in which an individual passes opinions about a product to others.¹³⁹ Traditionally, this type of advertising occurs without prompting by an advertiser and a user or the purchaser of a service or product shares, of his own will, his opinions about the product or service with other consumers who are likely to be the individual’s close friends and family.¹⁴⁰

In the case of social marketing, consumers provide both the audience and message by connecting with their family and friends while also freely espousing their interests.¹⁴¹ Through advertising measures implemented by the online social network provider, advertisers have both the messages and content at their fingertips and merely need to pay the ‘gatekeeper’ to be able to send their social marketing messages.¹⁴²

Social media companies can be infringers of users’ personality rights. Oft cited is the case of *Fraley v Facebook*.¹⁴³ Facebook, Inc. is a private company based in Menlo Park, California which provides various products to connect and share through mobile devices, personal computers and other surfaces worldwide.¹⁴⁴ One of the products offered by the company is Facebook Website and mobile application, which enable people to connect, share and discover and communicate with each other on mobile devices and personal computers.¹⁴⁵

In January 2011, Facebook launched a new advertising service labelled ‘Sponsored Stories’ which exploited a user’s stated preferences for certain products and services (likes) together

¹³⁸ Koehler J, ‘*Fraley v Facebook: The Right of Publicity in Online Social Networks*’, 980.

¹³⁹ Koehler J, ‘*Fraley v Facebook: The Right of Publicity in Online Social Networks*’, 980.

¹⁴⁰ Koehler J, ‘*Fraley v Facebook: The Right of Publicity in Online Social Networks*’, 980.

¹⁴¹ Koehler J, ‘*Fraley v Facebook: The Right of Publicity in Online Social Networks*’, 981.

¹⁴² Koehler J, ‘*Fraley v Facebook: The Right of Publicity in Online Social Networks*’, 982.

¹⁴³ *Fraley v Facebook, Inc.* 830 F. Supp. 2d 785 (N.D. Cal. App. 2011).

¹⁴⁴ <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=20765463> on 21 February 2018.

¹⁴⁵ <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=20765463> on 21 February 2018.

with the user's name and profile photo to convince the user's 'friends' to 'like' a product or service.¹⁴⁶ This new feature was enabled for all its 600 million users as a default setting.

The Sponsored Stories appeared on users' Facebook pages after the user who seemingly endorsed the product or service clicked 'like' on the advertiser's Facebook page or any affiliated page, when the user used the 'post' or 'check-in' feature or when the user opened an application whose content somehow related to the advertiser.¹⁴⁷ Since Facebook users join the site for free, the company generates income through sources such as selling targeted advertising, including 'Sponsored Stories' where advertisers pay Facebook for the targeted advertising.¹⁴⁸ Consequently, a class action suit was brought against Facebook in California, alleging the misappropriation of users' names, images and likenesses in paid advertising without their consent.

The plaintiffs were found to have a colourable cause of action owing to the fact that Facebook users are likely to be misled into thinking that they had full control over their appearances in the Sponsored Story advertisements while otherwise engaging the different Facebook features, for example clicking on the 'like' button, when in fact members lacked such control.¹⁴⁹ Although Facebook included the ability to appropriate its users' likenesses for other commercial purposes in its Terms of Use, it did not allow users to opt out of being featured in 'sponsored Stories' when the feature launched.¹⁵⁰ Facebook however, argued that the right of publicity claim could not stand because the use was authorised: the users agreed to the site's Terms of Use when they initially joined, could control who saw the content based on their privacy settings, could choose not to take the types of actions that resulted in a Sponsored Story, and could opt-out on a 'story' by 'story basis'.¹⁵¹ Facebook, in response to the plaintiffs' claim, argued the defence of newsworthiness as outlined in the California Civil Code.¹⁵² The parties eventually reached a settlement with Facebook paying \$20 million for its massive-scale right of publicity violations.¹⁵³

¹⁴⁶ Koehler J, 'Frale v Facebook: The Right of Publicity in Online Social Networks', 964.

¹⁴⁷ Grea F, 'To Like or Not To Like: Fraley v Facebook's Impact in California's Right of Publicity Statute In The Age Of The Internet' 47 *Loyola of Los Angeles Law Review* (2014), 868.

¹⁴⁸ Koehler J, 'Frale v Facebook: The Right of Publicity in Online Social Networks', 964.

¹⁴⁹ Grea F, 'To Like or Not To Like: Fraley v Facebook's Impact in California's Right of Publicity Statute In The Age Of The Internet', 869.

¹⁵⁰ Koehler J, 'Frale v Facebook: The Right of Publicity in Online Social Networks', 985.

¹⁵¹ Jennings J, 'Right of Publicity Meets Social Media', 3.

¹⁵² Section 3344 (d), *California Civil Code* (1971).

¹⁵³ Koehler J, 'Frale v Facebook: The Right of Publicity in Online Social Networks', 964.

Amplified use of social marketing, as seen in the aforementioned case, harms a person's privacy and right to publicity both qualitatively and quantitatively. According to Professor McGeeveran, on a qualitative level, abuse of social marketing by infringing on one's personality rights decreases one's credibility or reliability of endorsements thus mitigating the strength of the person's future endorsements.¹⁵⁴ Quantitatively, repeated appropriation of one's personality right in social marketing devalues the person's right because the sheer volume of marketing messages floods the market and makes each recommendation or endorsement less important as the messages add to and compete with the other noise of social marketing.¹⁵⁵

4.2 False Submissions

As stated in the previous chapter, social media platforms are easy to join. False submissions in the context of social media platforms denotes a situation where an individual shares information while assuming the identity of another individual without his or her consent.¹⁵⁶ Most social media platforms and users of such platforms find it difficult to verify whether a social media account bearing a given individual's name is legitimate.

This verification problem led Twitter, a social media platform, to devise a system of verifying the accounts of those particularly vulnerable to fake social media accounts namely celebrities, politicians and corporate entities.¹⁵⁷ The *locus classicus* in this area of false submissions is the case of *La Russa v Twitter*.¹⁵⁸ The plaintiff was the manager of Major League Baseball's St. Louis Cardinals.¹⁵⁹ The defendant company is a free online social network that allows users to post and read messages called 'tweets'.¹⁶⁰ Twitter permits users to make postings under any name they wish on condition that such users make it clear that they are impersonating someone.¹⁶¹ In 2009, an unknown Twitter user created a fake account for Anthony La Russa. The user posted 'tweets' or updates, as La Russa, a few of which were vulgar and related to his team. The page included a photo of La Russa and only one line on

¹⁵⁴ Koehler J, 'Fralely v Facebook: The Right of Publicity in Online Social Networks', 982.

¹⁵⁵ Koehler J, 'Fralely v Facebook: The Right of Publicity in Online Social Networks', 982.

¹⁵⁶ Jennings J, 'Right of Publicity Meets Social Media', 5.

¹⁵⁷ Jennings J, 'Right of Publicity Meets Social Media', 5.

¹⁵⁸ *La Russa v Twitter, Inc.*, No. CGC09488101 (Cal. Sup. Ct. May 6, 2009).

¹⁵⁹ Jung A, 'Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites', 383.

¹⁶⁰ Bluestone J, 'La Russa's Loophole: Trademark Infringement Lawsuits and Social Networks' 17 *Jeffrey S. Moorad Sports Law Journal* (2010), 574.

¹⁶¹ Bluestone J, 'La Russa's Loophole: Trademark Infringement Lawsuits and Social Networks', 574.

the page suggested that the account was fake.¹⁶² La Russa tried to contact Twitter to have the page removed to no avail. La Russa's complaint alleged trademark infringement and dilution, cybersquatting and violation of the right to publicity.¹⁶³ Twitter eventually removed the page hours after the suit was filed and the case was eventually withdrawn.¹⁶⁴

The *La Russa case* demonstrates the potential difficulty in succeeding in a right to publicity claim based on new forms of expression on social media, even if there is apparent appropriation of an individual's image, likeness or other unequivocal aspects of one's personality.¹⁶⁵ This especially arises in proving the commercial aspect of the right to publicity or personality rights; that a fake Twitter account constitutes commercial use. In the case at hand for instance, creator of the fake account could claim that the First Amendment accorded them protection in that it allows Twitter users to enjoy the tweets of parodies.¹⁶⁶

In the case of *Maremont v Susan Fredman Design Group, Ltd.*, the plaintiff instituted a suit against the defendant for alleged violations of the Lanham Act, the Stored Communications Act, the Illinois Right of Publicity Act and the common law right to privacy.¹⁶⁷ The plaintiff was the defendant's Director of Marketing, Public Relations and E-commerce. The defendant company is an interior design firm headquartered in Chicago. The gist of the suit is that, while the plaintiff was recuperating after a motor vehicle accident, the plaintiff's co-workers accessed her Facebook and Twitter accounts without her permission and posted to the accounts in her absence. It is worth stating at this point that the plaintiff used her personal Facebook and Twitter accounts to promote the defendant company; the company's Facebook account was created through the plaintiff's personal Facebook Account whereas the Twitter account was in the plaintiff's name.¹⁶⁸ The court, stated that the plaintiff's right to publicity had not been violated because she could not prove 'appropriation' of her name or likeness. Instead, the court held that because the co-workers stated in their initial tweets that they were not the plaintiff but instead were filling in for her due to her accident, and because the

¹⁶² Seseck K, 'Twitter Or Tweeter: Who Should be Liable for a Right of Publicity Violation Under the CDA?' 15 *Marquette Intellectual Property Law Review* (2011), 237.

¹⁶³ Seseck K, 'Twitter Or Tweeter: Who Should be Liable for a Right of Publicity Violation Under the CDA?', 238.

¹⁶⁴ Seseck K, 'Twitter Or Tweeter: Who Should be Liable for a Right of Publicity Violation Under the CDA?', 238.

¹⁶⁵ Jennings J, 'Right of Publicity Meets Social Media', 6.

¹⁶⁶ Jennings J, 'Right of Publicity Meets Social Media', 6.

¹⁶⁷ *Maremont v Susan Fredman Design Group, Ltd.* No. 10 C 7811 (2011).

¹⁶⁸ *Maremont v Susan Fredman Design Group, Ltd.* No. 10 C 7811 (2011).

plaintiff acknowledged and thanked her replacements once she resumed control of her Twitter account, there was no appropriation.¹⁶⁹

4.3 Emerging trends

The following social media related practices have not appeared in complaints but if taken up by businesses and corporations can constitute infringement of publicity or personality rights.

4.3.1 Pinning

Pinterest is a social networking site that was launched in 2010. The site claims to be the visual discovery engine whose mission is to help people discover and do what they love.¹⁷⁰ It allows users to 'pin' images to boards, share these boards, and follow or comment on other users' boards. Unlike Facebook and Twitter where most content is user-generated, the majority of Pinterest photos are not created by users nor are they part of the Creative Commons, such that the potential for copyright and trademark infringement abounds.¹⁷¹

Infringement of personality rights by businesses that use Pinterest can be illustrated by drawing parallels between use of the platform by an individual and use of the platform by a business. Jennings gives an example of a Pinterest image featuring a woman in a wedding dress that an individual user has 'pinned' to one of their boards.¹⁷² If that user is a bride to be pinning the picture to a board dedicated to planning her wedding, it would be difficult to prove commercial intent or infringement of personality rights, however, if the user is instead a commercial entity, for example a bridal boutique, the intended use might indeed be for commercial purposes, where an individual's personality rights have been infringed.¹⁷³

4.3.2 Unauthorised endorsements via hashtag

Unauthorised endorsements through hashtag take place on Twitter. A commercial entity engaged in unauthorised endorsements through hashtag when the hashtag phrase consists of an individual's name and the tweet originates from a commercial entity seeking to profit from the use of someone's identity within that tweet.

Unauthorised endorsement via hashtag can be illustrated using a hashtag of Kenyan origin, *#GitheriMan*, which was trending during the August 2017 electoral period. The hashtag was

¹⁶⁹ Jennings J, 'Right of Publicity Meets Social Media', 7.

¹⁷⁰ <https://newsroom.pinterest.com/en> on 22 January 2018.

¹⁷¹ Jennings J, 'Right of Publicity Meets Social Media', 8.

¹⁷² Jennings J, 'Right of Publicity Meets Social Media', 10.

¹⁷³ Jennings J, 'Right of Publicity Meets Social Media', 10.

born after one voter, Martin Kamotho, was pictured in a voting queue in Kayole, Nairobi, eating boiled beans and maize from a polythene bag.¹⁷⁴ The image's social media take-off was driven by the fact that most people had to queue for more than two hours in order to cast their votes, hence seeing the image of a voter who went to buy food and proceeded to eat it on the queue touched on the realities of their long wait.¹⁷⁵ Kenyan brands moved to be part of the conversation on Twitter and engage with online consumers by embracing the then social media trending hashtag. Biscuit maker Britannia Foods, for instance, posted an animated photo of Kamotho holding the polythene bag of maize and beans on its Twitter page.¹⁷⁶

In conclusion, social media poses unique challenges in the application of personality rights. The case of *Fraley v Facebook* has illustrated that social media companies can be infringers of users' personality rights. Precedent has also illustrated that companies should take caution while using social media platforms as they are the main culprits in personality rights infringement. Further, precedent discussed in this chapter has shown that the law has potential to adapt to online abuses of personality rights

¹⁷⁴<https://www.businessdailyafrica.com/corporate/marketplace/GitheriMan-Using-trending-topics-to-market-products/4003114-4064232-k5rpv4/index.html> on 22 February 2018.

¹⁷⁵<https://www.businessdailyafrica.com/corporate/marketplace/GitheriMan-Using-trending-topics-to-market-products/4003114-4064232-k5rpv4/index.html> on 22 February 2018.

¹⁷⁶<https://www.businessdailyafrica.com/corporate/marketplace/GitheriMan-Using-trending-topics-to-market-products/4003114-4064232-k5rpv4/index.html> on 22 February 2018.

5. CHAPTER 5: DISCUSSION AND CONCLUSION

This chapter discusses the current legal regime in Kenya with regard to digital rights and social media law so as to give the dissertation a Kenyan perspective. This chapter concludes this dissertation, by putting together findings from preceding chapters and giving recommendations.

5.1 Digital rights and social media law: A Kenyan perspective

5.1.1 Data Protection Bill

The Data Protection Bill of 2013 is an Act of Parliament to give effect to Article 31(c) and (d) of the Constitution, and to regulate the collection, retrieval, processing, storage, use and disclosure of personal data.¹⁷⁷ Article 31(c) of the Constitution outlines the right not to have information relating to one's family or private affairs unnecessarily required or revealed whereas Article 31(d) outlines the right not to have the privacy of one's communications infringed.¹⁷⁸ With regard to the issue of personality rights, the Data Protection Bill provides for commercial use of data.¹⁷⁹ It forbids use of personal data for commercial purposes, unless express consent has been granted by the data subject or use of the data has been permitted under any other written law.¹⁸⁰

It appears that this bill is very important, especially in the age of increased social media use in Kenya. Social media companies due to their very nature, participate in collection, storage and use of users' data. Such activities need to be regulated. The Data Protection Bill is yet to undergo presidential ascent.

5.1.2 Draft Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Communications Networks (2017)

Though not related to the issue of social media and its effects on personality rights, the aforementioned watershed guidelines deserve a mention in this dissertation as they can provide a model for the protection of personality rights through guidelines issued by a statutory body.

¹⁷⁷ *Data Protection Bill (2013)*.

¹⁷⁸ Article 31 (c) and (d), *Constitution of Kenya (2010)*.

¹⁷⁹ Section 17, *Data Protection Bill (2013)*.

¹⁸⁰ Section 17, *Data Protection Bill (2013)*.

These draft guidelines were co-authored by the National Cohesion and Integration Commission (NCIC) and the Communications Authority, to regulate content during the 2017 electioneering period in Kenya.¹⁸¹ Noteworthy is the fact that those publishing content online were obliged to authenticate the source and truthfulness of their content, to prevent spreading of rumours.¹⁸² Additionally, social media platform administrators would be held responsible for moderating and controlling any form of hate speech shared in their groups.¹⁸³

5.1.3 International and regional instruments

The constitution recognises any treaty or convention ratified by Kenya as being part of the law of Kenya.¹⁸⁴ There exists a normative framework governing digital rights and freedoms at the international and regional levels.¹⁸⁵ Internationally, the Charter of Human Rights and Principles for the Internet interprets and explains universal human rights standards in a new context-the internet, emphasizing that human rights apply online as they do offline.¹⁸⁶ This charter recognises protection of the virtual personality, which comprises of digital signatures, user names, passwords, personal identification numbers (PIN) and transaction authentication numbers (TAN codes).¹⁸⁷

Regionally, the African Declaration of Internet Freedoms (ADRIF) is a Pan-African initiative to promote human rights and standards and principles of openness in Internet policy formulation and implementation on the continent. The Declaration builds on well-established African human rights documents including the African Charter on Human and Peoples' Rights of 1981, the Windhoek Declaration on Promoting an Independent and Pluralistic African Press of 1991, the African Charter on Broadcasting of 2001, the Declaration of Principles on Freedom of Expression in Africa of 2002, and the African Platform on Access to Information Declaration of 2011.¹⁸⁸

The international and regional instruments are anchored in the core international human rights treaties such as the Universal Declaration of Human Rights of 1946, the International

¹⁸¹ Bloggers Association of Kenya, *State of the Internet in Kenya*, 2017, 8.

¹⁸² Bloggers Association of Kenya, *State of the Internet in Kenya*, 2017, 8.

¹⁸³ Bloggers Association of Kenya, *State of the Internet in Kenya*, 2017, 8.

¹⁸⁴ Article 2(6), *Constitution of Kenya* (2010).

¹⁸⁵ Bloggers Association of Kenya, *State of the Internet in Kenya*, 2017, 7.

¹⁸⁶ Internet Rights and Principles Dynamic Coalition UN Internet Governance Forum, *The Charter of Human Rights and Principles for the Internet* (2014), 11.

¹⁸⁷ Article 8 (d), The Charter of Human Rights and Principles for the Internet available at <http://internetrightsandprinciples.org/site/>.

¹⁸⁸ <http://africaninternetrights.org/about/> on 1 March 2018.

Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966.¹⁸⁹

5.2 Research findings

5.2.1 Chapter 1 findings

The term 'personality rights' was defined in this introductory chapter where it was stated that the right is aimed at preventing an individual from unauthorised commercial exploitation of their name, image, likeness and unequivocal aspects of their personality. It was stated that the need for a defined legislative framework on personality rights continues to grow with time especially due to the proliferation of internet and data use in Kenya. It was argued that a defined legislative framework on personality rights will supplement the already existing laws contained in the Constitution, Copyright Act and the Kenya Information and Communications Act (KICA).

5.2.2 Chapter 2 findings

This chapter began with a discussion on the current legal regime in Kenya regarding personality rights by outlining constitutional and legislative provisions which revealed that the concept of personality rights in Kenya is not a novel one, despite the fact that there is no defined legal framework. Further, courts have acknowledged the existence of the rights, as evidenced by Kenyan precedent discussed in the chapter.

The concept of personality rights was discussed at length in this chapter. The right to privacy was distinguished from the right to publicity. The right to privacy differs from the right to publicity in that privacy rights are personal rights whereas the right to publicity is a property right. This was followed by a discussion on the Guernsey, US and UK approach to personality rights in order to gain perspective on how the rights are guaranteed or protected in different jurisdictions. This discussion revealed that different jurisdictions guarantee personality rights differently.

5.2.3 Chapter 3 findings

This chapter explained how personality rights relate to online presence. The chapter opened with a discussion on the proliferation of data and internet use in Kenya, putting forth statistics to prove that there is increased use of the internet more so social media platforms. It was

¹⁸⁹ Bloggers Association of Kenya, *State of the Internet in Kenya*, 2017, 7.

found that the internet poses unique challenges to the protection of personality rights as it can be a source of material used in the infringement of personality rights as well as a platform on which infringement can take place.

It was found that what makes an individual a celebrity is difficult to define in the contemporary era when the status has become increasingly available to many. This chapter found that, contrary to the common assumption, a defined legislative framework on personality rights will also benefit non-celebrities. The chapter closed with a discussion on the importance of the internet to a celebrity. It was found that celebrities can use the internet for both economic and non-economic gain therefore it is important to ensure that third parties are not spreading misinformation and that their name or likeness is not being associated with persons or activities which such celebrities do not approve.

5.2.4 Chapter 4 findings

This chapter discussed specific abuses online. Jurisprudence from the US was widely cited in discussing online abuses specifically abuse of social marketing and false submissions. On the issue of false submissions, it was found that social media companies can also be the infringers of their users' personality rights. The chapter also discussed emerging trends and found that use of social media by corporate entities in ways such as pinning and unauthorised endorsement via hashtag can amount to violation of personality rights.

5.2.5 Chapter 5 findings

This final chapter of the dissertation found that there is no specific law in Kenya governing digital rights and social media use. Digital rights however, are protected by international and regional legal instruments which are anchored in the core human rights treaties. The core human rights treaties have been ratified by Kenya thus form part of law in accordance with Article 2(6) of the Constitution. The 2017 Draft Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Communications Networks show that policy makers can draft guidelines on the emerging area of personality rights.

5.3 Recommendations

1. Amendment of existing legislation. A defined legislative framework on personality rights does not necessarily mean that parliament must enact a stand-alone legislation catering to the issue of personality rights. Law making in Kenya is quite a lengthy process and expecting parliament to table and discuss a bill on personality rights may

not be feasible. Provisions on personality rights can be incorporated into the Copyright Act by carrying out amendments to the already existing legislation.

2. Protection of personality rights through policy guidelines. Guidelines such as the Draft Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Communications Networks (2017) can be drafted by the relevant statutory body. Such guidelines, despite not being law *per se* can acquire the status of norms in Kenya.

5.4 Conclusion

This dissertation finds that a defined legislative framework on personality rights is relevant in Kenya, owing to the proliferation of data and internet use in the country. Social media platforms have enhanced easy access to and sharing of material that may infringe individuals' personality rights.

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