

**THE LEGAL PROTECTION AND COMMERCIAL APPROPRIATION OF
PERSONALITY RIGHTS OF SPORTS PERSONS IN KENYA**

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University Law School

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DECLARATION

I, NGARI ERIC GACHARIRA, 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: 

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

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Table of Contents

| | |
|---|-----------|
| DECLARATION | 2 |
| DEDICATION | 5 |
| ACKNOWLEDGEMENTS | 6 |
| LIST OF ABBREVIATIONS | 7 |
| LIST OF LEGAL INSTRUMENTS | 8 |
| LIST OF CASES | 9 |
| ABSTRACT | 10 |
| 1.1 BACKGROUND | 13 |
| 1.2 STATEMENT OF THE PROBLEM | 14 |
| 1.3 JUSTIFICATION OF THE STUDY | 15 |
| 1.4 STATEMENT OF THE OBJECTIVES | 15 |
| 1.5 RESEARCH QUESTIONS | 16 |
| 1.6 LITERATURE REVIEW | 16 |
| 1.7 THEORETICAL FRAMEWORK | 17 |
| 1.8 HYPOTHESIS | 18 |
| 1.9 RESEARCH DESIGN AND METHODOLOGY | 19 |
| 1.1.0 LIMITATIONS OF THE STUDY | 19 |
| 1.1.1 CHAPTER BREAKDOWN | 19 |
| Chapter 1: Introduction | 19 |
| Chapter 2: Theoretical Framework and Literature Review | 20 |
| Chapter 3: Actions and Cases that constitute Appropriation | 20 |
| Chapter 4: Case Studies and Unjust Enrichment | 20 |
| Chapter 5: Conclusion and Recommendation | 20 |
| Labour Theory | 21 |
| Private Property Theory | 24 |
| Introduction | 26 |
| Issues arising from the Right of Publicity | 29 |
| Personality rights vis-a-vis existing laws | 30 |

| | |
|--|-----------|
| Conclusion | 33 |
| Introduction | 35 |
| The problem of appropriation of personality | 36 |
| Economic interests | 37 |
| Existing trading or licensing interests | 38 |
| Jurisdictional tort of appropriation of personality | 39 |
| Australian Courts | 39 |
| i) Goodwill | 40 |
| ii) Misrepresentation | 40 |
| (iii) Damage | 41 |
| Conclusion | 41 |
| 4.1 Oliech v East Africa Breweries Limited | 42 |
| Facts | 42 |
| Issues | 43 |
| Arguments | 43 |
| Conclusion | 44 |
| 4.2 Julius Yego v East Africa Breweries Limited | 45 |
| Facts | 45 |
| Conclusion | 46 |
| 4.3 Kemboi's victory dance on t-shirts | 47 |
| Facts | 47 |
| Conclusion | 47 |
| 4.4 Joseph Kibunja v. Rohto Mentholatum & Harleys | 48 |
| Facts | 48 |
| Issues | 48 |
| Arguments | 48 |
| Summary | 50 |
| Conclusion | 50 |
| 5.1 Findings of the Study | 52 |
| 5.1.1 Chapter one Findings | 52 |
| 5.1.2 Chapter Two Findings | 52 |
| 5.1.3 Chapter Three Findings | 53 |
| 5.1.4 Chapter Four Findings | 53 |

| | |
|--|-----------|
| 5.2 Recommendations | 53 |
| 5.2.1 Guernsey Approach | 54 |
| 5.2.2 Incorporation into Constitutions of Sports Federations | 54 |
| 5.2.3 Establishing a code of conduct for sports | 54 |
| 5.3 Conclusion | 55 |
| BIBLIOGRAPHY | 55 |
| Books and Journals | 56 |
| Internet Sources | 58 |
| Legislation, Acts of Parliament | 60 |
| Institutional Authors | 60 |

DEDICATION

I gratefully dedicate this dissertation to my family for their continued support and inspiration towards the world of sports law and to my friends who taught me that context is everything.

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LIST OF ABBREVIATIONS

EABL - East Africa Breweries Limited

FKF - Football Kenya Federation

IRO - Image Rights (Bailiwick of Guernsey) Ordinance

KECOBO - Kenya Copyright Board

FIFA - Fédération Internationale de Football Association

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya

The Copyright Act of Kenya

Sports Registrar Regulations, 2016

Code Civil (France)

Trade Practices Act (Commonwealth of Nations)

LIST OF CASES

Rukia Idris Barris v Mada Hotels

Grutter v Lombard and Another

Angella Wells v Atoll Media (PTY) Ltd & Another

Martin Luther King Jr Center for Social Change Inc et a v American Heritage Products Inc

John v MGN

Hogan v Koala Dundee Pty Ltd

Henderson v Radio Corporation

Consorzio del Prosciutto di Parma v Marks & Spencer Plc

Reckitt & Colman Ltd v Borden Inc

Erven Warnink v Townend

Spalding (AG) & Bros v Gamage (AW) Ltd

ABSTRACT

Not only does the current legal framework in Kenya fail to provide for personality rights of sports persons but also courts have not set any precedence in regards to the commercial appropriation of these rights. Personality rights are important insofar as they prevent any individual other than the rights-bearer to use these rights in advertisements or endorsements of commodities. This research paper focused on personality rights by examining the classical theoretical justifications for and against personality rights, the existing literature and laws, cases involving sports persons whose personality rights had been appropriated without their consent and finally put forth recommendations on its practice and improvement for Kenya's legal system.

This research paper was carried out through the examination of a number of scholarly articles and laws on personality rights. This study found that personality rights date as far back as the 1800s and attributes its existence to the right of privacy which provided that everyone had the right to be left alone. These rights later evolved into something of commercial value since products could be associated with well-known sports persons.

Chapter one of this research paper will introduce the concept of personality rights and give some background information of the same while also stating the objectives of the research and the research questions to be addressed by the end of the study. Chapter two discusses the theoretical framework reviews the literature on personality rights of sports persons whereas chapter three examines the elements and actions that constitute the appropriation of personality rights of sports persons and the economic interests tied to them. Chapter four will present case studies on sports persons whose personality rights have been appropriated in Kenya while the final chapter will provide recommendations to improve the laws on personality rights in Kenya.

CHAPTER 1: INTRODUCTION

The main aim of this dissertation is to research on the legal protection of personality rights of sports persons in Kenya and how such rights can be commercially appropriated. It will examine the theoretical justifications for the need to recognize personality rights as well as discuss the existing legal framework and writings on the same. Thereafter, it will present case studies on sports persons whose personality rights have been violated and recommend ways in which to fill a lacunae in the law to prevent such violations in the future.

Definition

Personality rights are the rights available to a well-known personality or celebrity such as a sports person to protect them from the unconsented use of his or her name, image, likeness and other unique aspects of one's personality.¹ Personality rights are mainly of two types: the right to publicity and the right to privacy. The right to publicity is basically the right to keep one's image, likeness and other personality traits from being commercially exploited without permission or compensation.² On the other hand, the right to privacy is the right to be left alone and not have one's personality represented publicly without permission.³

The exploitation of a sports person personality rights is critical not only because the persona and image of a celebrity is a valuable commercial commodity but also because such rights should be protected from use and misappropriation without authorization.⁴

¹ <https://www.lawteacher.net/free-law-essays/criminology/personality-rights.php> on 14 November 2017.

² <https://www.lawteacher.net/free-law-essays/criminology/personality-rights.php> on 14 November 2017.

³ <https://www.lawteacher.net/free-law-essays/criminology/personality-rights.php> on 14 November 2017.

⁴ 'Victor Nzomo: Quick Thoughts on Legal Protection for Image Rights of Professional Sportspersons in Kenya' *Centre for Intellectual Property and Information Technology Law*, 10 September 2015 <http://blog.cipit.org/2015/09/10/quick-thoughts-on-legal-protection-for-image-rights-of-professional-sportspersons-in-kenya/> on 2 December 2017.

Personality rights are known to be linked to a sports person's brand which, if it is worth exploiting, can be valued as an asset. There are a number of ways that personality rights can be used to generate revenue, from being assigned as part of complex tax planning vehicle such as 'Image Rights Companies', to being promoted under agency or representation agreements, where a third party collects a commission every time their successful promotion or management of an individual's image rights results in a new opportunity for endorsement, publicity, sponsorship, or licensing for that individual.⁵

In Kenya, however, there is neither a legislative framework nor guidelines for protection and commercial appropriation of personality rights. These are among the contributing factors to the exploitation of sports persons' personality rights without their consent. As it will be discussed later in this study, most of the complaints are filed by professional players who interact with other players in the European leagues. In effect, such informed players would have an idea of what they are claiming to be their rightful dues.⁶ Few Kenyan athletes understand the commercial value they are entitled to receive if they license their image rights. Many of them are content with just the prize money. Unlawful exploitation is less likely to be a problem unless measures are taken to address it.

1.1 BACKGROUND

The provision of personality rights in law enables the definition, value, commercial exploitation and protection of these rights to be associated with a person.⁷ However, cases on the unconsented exploitation of personality rights of professional sports persons have been on the rise in Kenya. In particular, the unreported case between Dennis Oliech and East African Breweries Limited (EABL) involved the latter using the images of Oliech and two other footballers in

⁵ <https://www.morton-fraser.com/knowledge-hub/image-rights-explained> on 3 January 2018.

⁶ 'Charles Nyende: FKF rule Oliech offside in image row with EABL' *Daily Nation*, 17 April 2012 <http://www.nation.co.ke/sports/football/FKF-rule-Oliech-offside-in-image-row-with-EABL-/1102-1388582-14bx3mz/index.html> on 16 January 2018.

⁷ <http://ipo.euernscyregistry.com/article/103037/What-are-Image-Rights> on 11 January 2018.

advertisements and billboards. At the end of the dispute, Harambee Stars Management Board and Football Kenya Federation agreed that Oliech lacked grounds to demand compensation.⁸

Others claimed that Dennis Oliech is a professional and should have overlooked the said endorsement fees while others called to the forefront the use of Kenyan sports personalities and lack of proper remuneration and contractual commitments.⁹

Courts in different jurisdictions have already recognized personality rights. For instance, in *Rukia Idris Barris v Mada Hotels*, the judge appreciated two South African cases and considered them good law with regards to image rights under the right to privacy.¹⁰ The judge noted that in *Grutter v Lombard and Another*, it appears to be generally accepted academic opinion that features of personal identity are indeed capable (and deserving) of legal protection.¹¹ Similarly, in *Angella Wells v Atoll Media (PTY) Ltd & anor*, it was held 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.¹² He added that 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 personality rights of the individual, including the person's dignity and privacy.¹³

1.2 STATEMENT OF THE PROBLEM

⁸ 'FKF rule Oliech offside in image row with EABL' *Daily Nation*, 17 April 2012 <http://www.nation.co.ke/sports/football/FKF-rule-Oliech-offside-in-image-row-with-EABL-/1102-1388582-14bx3mz/index.html> on 17 January 2018.

⁹ 'Dennis Oliech, FKF & EABL – Get it Together People!' *SportsKenya*, 19 April 2012 <http://sportskenya.blogspot.co.ke/2012/04/dennis-oliech-fkf-eabl-get-it-together.html> on 17 January 2018.

¹⁰ [2013] eKLR

¹¹ [2007] SA 89 (SCA)

¹² [2006] Western Cape High Court Case No.11961

¹³ [2006] Western Cape High Court Case No.11961

Despite the increase in popularity of sports in Kenya, there is minimal focus on sports persons' personality rights. Little has been done to define personality rights, determine who possesses or controls these rights, evaluate actions that violate these rights and provide appropriate remedies to the owners of these rights. As a result, sports persons have fallen victim to misappropriation of their personality rights. The non-existence of a standalone legal framework for protecting and appropriating personality rights of sports persons has contributed significantly to the incidents of exploitation mentioned.

1.3 JUSTIFICATION OF THE STUDY

The use of personality rights is gaining currency in the sports industry thus there is need to ensure that the same is well protected to prevent third parties from unjustly enriching themselves from commercialisation of the same.¹⁴ Within Kenya, the law on the issue of personality rights is unclear as it stands. As such, academic and judicial writing is of undeniable impatience. Therefore, this paper will present arguments in favour of and against personality rights. From a labour-based moral argument, John Locke contended that an individual owns his labour and the fruits therein to the exclusion of others. From an economic perspective, benefits such as remuneration and compensation are incentives to stimulate creativity and achievement among sports persons.

This research is significant because it will shed light on the existing means of affording legal protection to personality rights such as through copyright laws, privacy laws, publicity laws and appropriation. It will also present case studies on sports persons who have not been afforded such protection. This paper will then recommend a framework in favour of the sports person to protect their personality rights. Lastly, it will highlight the possible outcome from establishing a comprehensive legal framework as well as create awareness to sports persons and the society, including lawmakers, of the need for personality rights.

¹⁴ Kenya Copyright Board, *Copyright News Issue* 18, 2015.

1.4 STATEMENT OF THE OBJECTIVES

The aim of this study is to provide an overview of the legal framework on personality rights in relation to other areas of law (publicity laws, privacy laws, copyright law, trademark law, tort law and passing off), analyse cases where sports persons' personality rights have been violated and address the gap in the law to prevent future exploitation.

1.5 RESEARCH QUESTIONS

These questions will be helpful in achieving the aforementioned objectives of this dissertation:

1. What is the standing general legal framework on personality rights in Kenya?
2. How are personality rights protected under sports law vis-a-vis other areas of law such as publicity laws, privacy laws, intellectual property laws and torts?
3. How have personality rights of sports persons in Kenya been violated and what redress have such victims been afforded?
4. How can personality rights of sports persons be protected from unlawful exploitation?

1.6 LITERATURE REVIEW

Samuel Warren and Louis Brandeis wrote a highly acclaimed law review article in which they argued that the identity of an individual was protected under the right to privacy. They contended that the existing law protects the privacy of the individual from trespass either by the media, the photographer, or the possessor of any other device for documenting, recording or reproducing scenes or sounds.¹⁵

William Prosser expounded on Warren and Brandeis' article by breaking down the violation of the right to privacy into four main torts;

¹⁵ Warren S and Brandeis L. 'The right to privacy' 4 *Harvard Law Review* (1890), 193.

- 1) Protection against intrusion into one's private affairs;
- 2) Avoidance of disclosure of one's embarrassing private facts;
- 3) Protection against publicity placing one in a false light in the public eye; and
- 4) Remedies for appropriation, usually for commercial advantage, of one's name or likeness.¹⁶

The first three of these categories are well placed in tort since their aim is to protect a person's right to privacy; but the fourth category is not sound with the first three. It seems to form its basis more on a personal right (an asset if you will) which sounds more like a property right than a personal one. The reasoning behind this difference is the fact that rights of privacy have not been articulated in statutes, and are rather provided for in case law. On the other hand, rights of publicity are based equally in statutory law as well as case law.

Other scholars such as Professor Melvin Nimmer propose that the use of a prominent person's name, photograph or likeness (i.e., his publicity values) in advertising a product or in attracting an audience is of great pecuniary value.¹⁷ He believes that the well-known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him.¹⁸

The existing laws in Kenya do not provide further clarity on the issue of personality rights. Article 31 of the Constitution of Kenya envisages the right to have his or her personal information respected and protected.¹⁹ Nonetheless, these protections are narrow given the high-profile nature of most sports persons. Furthermore, Copyright Act remotely recognizes the protection of subjects in paintings and sculptures which will be discussed in greater detail in Chapter 3.

¹⁶ Prosser W. 'Privacy' 48 *California Law Review* (1960), 389.

¹⁷ Nimmer M, 'The right of publicity', 19 *Law and Contemporary Problems* (1954), 204, 206.

¹⁸ Nimmer M, 'The right of publicity', 204.

¹⁹ Article 31 *Constitution of Kenya* (2010)

1.7 THEORETICAL FRAMEWORK

This research is premised on the theory of property attributed to Friedrich Hegel who stated that private property rights are crucial to the satisfaction of some fundamental human needs. Lawmakers should thus strive to distribute resources in the manner that best enables people to fulfill those needs.²⁰ Justin Hughes dissects this theory by arguing that a proper shape of an intellectual-property system includes a person's "persona" i.e., his public image, including his physical features, mannerisms and history, is an important "receptacle of personality" and it deserves general legal protection even though ordinarily it does not result from labour.²¹ In principle, a sports person owns and controls his personality rights and as such, these rights deserve legal protection because they are inherent in him or her.

This research is also informed by the labour theory proposed by John Locke who argued that since everyone has a property right in the labour of his own body, when a person mixes his labour with something that is "natural" or not owned, the product thereby becomes his property, at least if there is "enough and as good left in common for others."²² Therefore, sports persons who put in effort and spend resources in creating their image are entitled to commercially appropriate these rights to the exclusion of others. Nimmer advocates for this theory in support of the right of publicity by asserting that in most instances, a person achieves personality rights of substantial pecuniary worth only after he has expended considerable time, effort, skill and even money.²³

²⁰ Fisher W, *Theories of Intellectual Property: New Essays in the Legal and Political Theory of Property*, Cambridge University Press, Cambridge, 2001.

²¹ Hughes J, 'The philosophy of Intellectual Property' 77 *Georgetown Law Journal* (1988), 287.

²² Locke J, *Two Treatises of Government*, 2ed, Cambridge University Press, Cambridge, 1967, 17-19, Grady M, 'A Positive economic theory of the right of publicity' 197 (1994), 108.

²³ Nimmer M, 'The right of publicity', 204.

1.8 HYPOTHESIS

This research supposes that there lacks a clear and distinct legal framework for the protection of personality rights of sports persons in Kenya. As a result, their personality rights are exploited without their consent and there is no legal avenue to seek compensation from that exploitation. Recommending a different legal approach to address these violations will provide an avenue to compensation or remuneration to sports persons in Kenyan courts while creating awareness on the value of personality rights in the sports industry.

1.9 RESEARCH DESIGN AND METHODOLOGY

This research will be conducted by analyzing various legal scholarly writings and judicial opinions on the issue of commercial appropriation of personality rights. It will also examine the existing laws on personality rights in Kenya. The rationale for adopting this research design is that personality rights of sports persons is a fairly new concept in Kenya. Thus it would be prudent to assess the development of these rights in other jurisdictions to inform the legal framework on the same in Kenya.

1.1.0 LIMITATIONS OF THE STUDY

The challenge anticipated while carrying out this research includes inaccessibility of data. Personality rights is a developing area of law. There is no specific law that provides for personality rights in Kenya and instead it is provided for in different areas of law such as privacy law, publicity law and tort. There also lacks substantive published literature within Kenya on personality rights of sports persons to be examined for the purpose of this research.

1.1.1 CHAPTER BREAKDOWN

a. Chapter 1: Introduction

This chapter will introduce the concept of personality rights by providing some background information on personality rights in Kenya. It will also highlight the statement of the problem, the aims and objectives of this research, the hypothesis, the research questions to be answered by the end of this research and the limitations to be faced in conducting this study.

b. Chapter 2: Theoretical Framework and Literature Review

This chapter will provide an in-depth analysis of the theories that have informed the research topic i.e. the labour theory by John Locke and the private property theory. It will also discuss various laws (contracts, copyright law, passing off, trademark law, tort law, privacy laws and publicity laws), scholarly works and other writings providing arguments for and against personality rights of sports persons.

c. Chapter 3: Actions and Cases that constitute Appropriation

This chapter will evaluate actions and elements of appropriation of personality rights of sports persons in different jurisdictions as well as cases and remedies available on the same.

d. Chapter 4: Case Studies and Unjust Enrichment

This chapter analyses various cases involving the violation of personality rights of sports persons without their consent in Kenya. It will also examine the elements of unjust enrichment arising from commercial exploitation in the cases mentioned therein.

e. Chapter 5: Conclusion and Recommendation

The final chapter will present a summary of the findings of the preceding chapters to establish whether the research questions have been answered. It will also suggest whether to afford personality rights a sui generis protection, to amend sports federations' constitutions to include personality rights or to establish a good practice for commercially appropriating personality rights.

CHAPTER 2: THEORETICAL FRAMEWORK AND LITERATURE REVIEW

THEORETICAL FRAMEWORK

This chapter discusses the justifications in favour of personality rights. It examines the classical theories developed under different jurisdictions which include the Labour theory and the Private Property theory. The aims of this framework is to partly set the focus of this thesis and partly to illustrate the challenges each theory faces.

Labour Theory

The labour theory forms the foundation commonly advanced by judges and scholars to provide a justification for the protection of personality rights. This theory dates as far back as 1954 when Melvin Nimmer espoused that individuals such as sports persons who have “long and labouriously nurtured the fruit of publicity values,” and expended “time, effort, skill, as well as money” in their creation presumes that they ought to enjoy them on his own.²⁴

A renowned professor by the name Thomas McCarthy views the right of personality as “a ‘common-sense’, self-evident right requiring minimal intellectual rationalisation to justify its existence.”²⁵ Ideally, the personality rights of a sports person ought not to be appropriated by any member of society without his or her consent since it is a matter of common sense that such actions are wrong. This statement is backed up by John Locke's labour theory. According to Locke, the right of personality is natural and owned by self which justifies property.²⁶ This means that a sports person owns his personality rights as well as any other benefits that results from exploiting his personality rights, for instance, through endorsements or advertisements.

²⁴ Nimmer M, ‘The right of publicity’, 204, 206.

²⁵ McCarthy T, *The Rights of Publicity and Privacy*, West Publishing Company, Minnesota, 1992, 3.

²⁶ Fox L, ‘A Brand New Image? Should Personality Rights be Recognised in the UK?’ Published LLB Thesis, University of Kent, 2006, 17.

Locke's labour theory could be used to award a property right to sports persons for the protection of their persona, where they have expended time, effort and investment in building their celebrity status.²⁷ That identity, embodied in his or her personal traits, is "the fruit of their publicity values" which must not be reaped or sown by anyone else and ought to be classified as their personal property.²⁸

He further contends that since we own and possess our labour, we have the ability to blend it with resources of the external world and in turn, we appropriate those resources in an effective manner.²⁹ Similarly, a sports person has a reasonable interest in the fruits of their labour which created their celebrity status. Such an argument for personality rights holds the presumption that their celebrity status which carries commercial value is 'no mere gift of the gods'.³⁰ The only requirement for a famous sports person to exploit his or her commercial persona or image is that it has to be as a result of the individual labour expended by that specific sports person.

Michael Madow states that courts usually treat commercially valuable popularity as a crown of individual achievement and such individuals are described as carefully "cultivating" their talents, slowly "building" their images, judiciously and patiently "nurturing" their publicity values, and working long and hard to make themselves famous, popular, respected, beloved.³¹ However, other scholars hold a contrary view that the commercially marketable personality of a sports person is not as a result of his or her expended labour.

²⁷ Walsh C, 'The justifications underlying personality rights' *Entertainment Law Review* (2013), 20.

²⁸ Synodinou T, 'Image Right and Copyright Law in Europe: Divergences and Convergences' University of Cyprus Law Department (2014), 11.

²⁹ Locke J, *Two Treatises of Government*.

³⁰ Madow M, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' 84 *California Law Review* (1993), 182.

³¹ Madow M, 'Private Ownership of Public Image: Popular Culture and Publicity Rights', 182.

Among those scholars who find flaws in the labour-based moral argument includes Justin Hughes who states that from a realistic viewpoint, persona is not normally a by-product of labour. He explains that unlike politicians who put in effort to build their image in the public eye, sports persons do not labour to create their public images.³²

It therefore begs the question of whether personality rights arise out of a joint effort comprising of a sports person's choices and labour, social demands and genetic traits.³³ Richard Dyer explains that despite our genetic construction (which is beyond our control) establishing the 'raw material' for our appearance, the actual labour of structuring the image is not necessarily attributed to the bearer of the image alone.³⁴ Rather, it is based on the notoriety of the product.³⁵

Judith Williamson furthers the argument that a sports person can enhance the marketability of the products which he or she endorses only if it already means something to the rest of us.³⁶ Williamson explains that normally famous sports person's images are used to convey meaning and identity, and it is only due to the ability of these images to communicate meaning that they are able to enhance the attractiveness of the commodities which they endorsed.³⁷ In effect, such commodities can be valuable in the market only when people take notice and attach importance to the sports person's image.

This notion that fame is a "relational" phenomenon, i.e. created by other factors other than the sports person's sweat and tears, such as social demands and generic traits, also means that the

³² Hughes J, 'The Philosophy of Intellectual Property', 340.

³³ Fox L, 'A Brand New Image? Should Personality Rights be Recognised in the UK?' Published LLB Thesis, University of Kent. 2006, 18.

³⁴ Dyer R, *Heavenly Bodies: Film Stars and Society*, Basingstoke and London: Macmillan, London, 1986, 6.

³⁵ Fox L, 'A Brand New Image? Should Personality Rights be Recognised in the UK?' Published LLB Thesis, University of Kent. 2006, 18.

³⁶ Williamson J, *Decoding Advertisements: Ideology and Meaning in Advertising*, Marion Boyars, London, 1984, 25.

³⁷ Williamson J, *Decoding Advertisements: Ideology and Meaning in Advertising*, 25.

premise by Professor McCarthy was inaccurate.³⁸ In short, a sports person can neither claim to have created his public image nor claim to the exclusive ownership or control of the commercial benefits attached to it.³⁹

Private Property Theory

Personality rights are justified by the Hegelian metaphysical concept of property which dictates that an individual's property is the extension of his personality.⁴⁰ It therefore denotes that personality rights fall under a property rights classification.

Intellectual property theorists derived this personhood approach from theories of Kant and Hegel, who viewed private property as an embodiment of the personality. They support the contention of private property rights in one's personality as they promote self-expression and human development and thus contribute to the society.⁴¹ Therefore an individual's personality embodies emotional, dignitary, human and moral values attached to it.⁴² Professor Kwall argues that moral rights could be stretched to constructed personas to protect personality and reputational aspects of celebrities.⁴³ The persona displayed by the famous sports person is his or her brainchild and his livelihood depends on its preservation and integrity.⁴⁴ Similarly, Kant

³⁸ Fox L, 'A Brand New Image? Should Personality Rights be Recognised in the UK?' Published LLB Thesis, University of Kent, 2006, 18.

³⁹ Murumba SK. *Commercial Exploitation of Personality*, Law Book Company, 1986, 132.

⁴⁰ Ahmad T and Swain RS, 'Celebrity Rights: Protection under IP Law' 16 *Journal of Intellectual Property Rights* (2010), 2.

⁴¹ Bird RC and Ponte LM, 'Protecting Moral Rights in United States and United Kingdom: Challenges and Opportunities Under U.K.'s New Performance Regulations' *Boston University International Law Journal* (2006), 213.

⁴² Garima B. 'Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime' 6 *NALSAR Student Law Review* (2011), 85.

⁴³ Kwall RR, 'Preserving Personality and Reputational Interests Through Constructed Personas Through Moral Rights: A BluePrint for Twenty First Century' *University of Illinois Law Review*, (2001), 81.

⁴⁴ Garima B, 'Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime' 85.

argues that copyright for literary works such as books has no primary nexus to the author's person because the words in the book are the thoughts owned by the author and they cannot be dispossessed by someone else.⁴⁵ These thoughts form a fundamental part of the personality of the author owned exclusively by him or her.⁴⁶ In a similar tangent, the legal protection for personality rights has no connection to the persona of a sports person because the image, voice and likeness are owned exclusively by such a person and cannot be taken away from him or her.

The resources used in constructing a persona of a sports person manifests an intellectual, emotional and physical effort, comparable to that of an author.⁴⁷ This effort ought to be protected from all kinds of encroachment, economic or otherwise.⁴⁸ But mass media often infringes personality rights by affiliating them with products and activities that are contrary to their image.

⁴⁹

LITERATURE REVIEW

This chapter introduces the right of publicity as the core of personality rights and attempts to link the relevance of both rights. It delves into the issues and limitations relating to the right of publicity. Thereafter, it bridges the gap between personality rights and the other existing areas of law including copyright law, trademark law and the right to privacy while the last section presents an overview of the existing material on personality rights and presents the status quo in the legal realm of personality rights.

⁴⁵ Gunten A, *Intellectual Property is Common Property: Arguments for the abolition of private intellectual property rights*, Buch and Netz, Switzerland, 50.

⁴⁶ Gunten A, *Intellectual Property is Common Property: Arguments for the abolition of private intellectual property rights*, 50.

⁴⁷ Garima B, 'Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime' 85.

⁴⁸ Garima B, 'Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime' 85.

⁴⁹ Garima B, 'Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime' 85.

Introduction

Commercial appropriation of personality is not a new phenomenon, although debate concerning its status and mode of legal regulation is becoming increasingly topical.⁵⁰ The practice of using celebrities and ordinary individuals with no obvious public profile to help sell a vast range of goods and services flourishes.⁵¹ Yet relatively little attention has been devoted to the legal basis on which some of these often lucrative arrangements are based.⁵²

The Right of Publicity is the foundation upon which personality rights of sports persons is embedded. In turn, the right of publicity owes its existence to a broader area of law: the law of privacy. Keitel propounds that the right of privacy and the right of publicity are not totally different; they both recognize the civil wrong in using a person's image and likeness for commercial purposes without their authorized consent and the harm suffered.⁵³ However, the right of publicity is violated when one appropriates someone else's name or likeness for the purpose of economic benefit without his or her permission.⁵⁴ For this very reason, a need arises to create a legal mechanism capable of protecting the interests of both sides and preventing unfair commercialization of a sports person's persona.⁵⁵

American legal doctrine has already responded to such need, having developed case law and a comprehensive legal framework allowing sports persons to freely license and transfer their right

⁵⁰ Smith BH, *The Commercial Appropriation of Personality*, Cambridge University Press, England, 2002.

⁵¹ Smith BH, *The Commercial Appropriation of Personality*.

⁵² Smith BH, *The Commercial Appropriation of Personality*.

⁵³ Keitel D, 'Right of Publicity' 4 *Loyola of Los Angeles Entertainment Law Review* (1984), 233.

⁵⁴ 'Victor Nzomo: Quick Thoughts on Legal Protection for Image Rights of Professional Sportspersons in Kenya' *CIPIT Blog*, 10 September 2015 <https://cipitblog.wordpress.com/2015/09/10/quick-thoughts-on-legal-protection-for-image-rights-of-professional-sportspersons-in-kenya/> on 1 December 2017.

⁵⁵ Moskalenko K, 'The right of publicity in the USA, the EU, and Ukraine' 1 *International Comparative Jurisprudence* (2015).

of publicity in spite of having contentions in the nature and scope of protection.⁵⁶ For example, Section 391.170 of the Kentucky Revised Statutes (1999) provides for commercial rights to use names and likeness of public figures.⁵⁷ Also Section 47-25-1103 of the Tennessee Code (2010) provides for a property right in use of name, photograph and likeness.⁵⁸ This “right of publicity” was first recognized in the United States over sixty years ago while European countries are still at the development stage of their national legislative framework on protection of the right of publicity.⁵⁹

Samuel Warren and Louis Brandeis, two American professors, in an 1890 acclaimed article in the Harvard Law Review, first coined the right of privacy as the right “to be left alone”.⁶⁰ William Prosser further enunciated a personal right of privacy based on four categories namely:⁶¹

⁵⁶ In *Motschenbacher v RJ Reynolds Tobacco Company* [1974] 498 F 2d 821, where the court held that the use of the identifiable race car of a popular race car driver in a television infringes on the right of publicity of this driver. Also in *Hirsch v SC Johnson & Son Inc* [1979] 90 Wis 2d 379, the court ruled that that the use of the nickname of a well-known football player, Crazy Legs, on the packaging of a shaving gel for women infringed on his right of publicity.

⁵⁷ The general assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation. The general assembly further recognizes that although the traditional right of privacy terminates upon death of the person asserting it, the right of publicity, which is a right of protection from appropriation of some element of an individual’s personality for commercial exploitation, does not terminate upon death.

⁵⁸ Every individual has a property right in the use of that person's name, photograph, or likeness in any medium in any manner. The individual rights provided for constitute property rights and are freely assignable and licensable, and do not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.

⁵⁹ ‘Victor Nzomo: Quick Thoughts on Legal Protection for Image Rights of Professional Sportspersons in Kenya’ *CIPIT Blog*, 10 September 2015 <https://cipitblog.wordpress.com/2015/09/10/quick-thoughts-on-legal-protection-for-image-rights-of-professional-sportspersons-in-kenya/> on 1 December 2017.

⁶⁰ Warren S and Brandeis L, ‘The Right to Privacy’, 193-220.

⁶¹ Prosser LW, ‘Privacy’, 389.

- 1) Protection against intrusion into one's private affairs;
- 2) Avoidance of disclosure of one's embarrassing private facts;
- 3) Protection against publicity placing one in a false light in the public eye (i.e. defamation); and
- 4) Remedies for appropriation, usually for commercial advantage, of one's name or likeness.

The first three categories are commonly found in tort law because their aim is to protect a person's right to privacy but the fourth category doesn't fit well with the first three and seems to be based more on a personal right – or rather an asset if you may – which is viewed more like a property right than a personal one. This fourth category is specifically what the next chapter is aimed at shedding new light. From this variance, one might conclude that the rights of privacy are yet to find their way into statutes but instead they are introduced, articulated and refined in cases – whereas the rights of publicity are found equally in both statutes and cases.⁶²

The commonly accepted three elements comprising the Right of Publicity include: a) name b) image and c) likeness.⁶³ Minor disparities in these elements may be found in different statutes but the main concept comprised in these elements are still provided in all of the relevant American statutes.

Issues arising from the Right of Publicity

A wider perspective of the right of publicity which incorporates not only “name, image and likeness”, but also any and all personality and appearance characteristics, such as distinctive

⁶² Marc H. Greenberg, “Right of Publicity and the Intersection of Copyright and Trademark Law” The 6th Annual Intellectual Property Law Institute, Pennsylvania, 29 March 2012.

⁶³ Marc H. Greenberg, “Right of Publicity and the Intersection of Copyright and Trademark Law” The 6th Annual Intellectual Property Law Institute, Pennsylvania, 29 March 2012.

clothing, mannerisms, traits or voice is what is often missing.⁶⁴ These extra elements, often referred to as the “elements of identifiability”, are deemed to be “common law” right of publicity elements.

Apart from the expansion of the right of publicity, another issue is the scope of its coverage – i.e., whether it is limited to well-known persons such as athletes, or whether anyone can own this right. Greenberg and Lovitz agree that the majority view is that the Right of Publicity is extended to anybody whether famous or not.⁶⁵ Be that as it may, practically speaking, the Right of Publicity cases usually involve famous sports persons for it is they who possess the names and images that help promote advertisements and sell, endorse or “hype” goods or services. This is clear from the case studies discussed in the subsequent chapters (Chapters 3 and 4).

One other important issue is whether the Right of Publicity limits its application to only during the lifetime of a sports person, or whether it should extend to post-mortem contexts. California and some of the other States in the United States of America which have enacted Right of Publicity statutes, allow post-mortem rights.⁶⁶ These are rights that enable a person to control the commercial use of his persona after his or her death. Some of those statutes incorporate provisions that a sports person must have exploited their celebrity status during their life while others require that the name and related rights generated economic value during their life. In this context, the *Martin Luther King Jr Center for Social Change Inc et a v American Heritage Products Inc et al* where the Supreme Court of Georgia addressed the question of whether the right of publicity survives its owner and whether the right is inheritable and devisable.⁶⁷ The Supreme Court of Georgia held that ‘the right of publicity survives the death of its owner and is

⁶⁴ Marc H. Greenberg, “Right of Publicity and the Intersection of Copyright and Trademark Law” The 6th Annual Intellectual Property Law Institute, Pennsylvania, 29 March 2012.

⁶⁵ Marc H. Greenberg, “Right of Publicity and the Intersection of Copyright and Trademark Law” The 6th Annual Intellectual Property Law Institute, Pennsylvania, 29 March 2012.

⁶⁶ Marc H. Greenberg, “Right of Publicity and the Intersection of Copyright and Trademark Law” The 6th Annual Intellectual Property Law Institute, Pennsylvania, 29 March 2012.

⁶⁷ Moskalenko K, ‘The right of publicity in the USA, the EU, and Ukraine’, 115.

inheritable. . . If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right continued commercial use'.⁶⁸

Other issues concern the fact that copyright does not protect name, fame, likeness, and other peculiarities of a persona and sports persons usually do not own the copyright by themselves despite the fact that they are the subjects of copyrighted material.⁶⁹

Personality rights vis-a-vis existing laws

The Right of Publicity is usually taught in law schools such as Strathmore University as a subset of Sports and Entertainment law, and distinguished from the known IP rights sources of copyright and trademark laws. Jonathan Faber, in an article praising the state of Indiana's approach to Right of Publicity, presents an elaborate summary of how the Right is to be distinguished from traditional copyright and trademark law:⁷⁰

"The Right of Publicity has little to do with copyright. Copyright applies to the bundle of rights one acquires in "original works of authorship fixed in any tangible medium of expression," according to 17 U.S.C. Section 102 (a), so the exclusive rights held by a copyright owner apply to the work itself. This can get complicated, as Right of Publicity and copyright considerations can simultaneously be implicated in a single usage. An advertisement featuring a celebrity's picture may require authorization from the photographer for the copyright use, and from the celebrity for the Right of Publicity use. Because these are wholly distinct claims with independent parties charged with standing to assert them, federal copyright laws generally will not preempt a state-based, Right of Publicity claim."

⁶⁸ *Martin Luther King, JR. Centre for Social Change, Inc. et. al v American Heritage Products, Inc et al* (1982), Supreme Court of Georgia in the United States of America.

⁶⁹ Moskalkenko K, 'The right of publicity in the USA, the EU, and Ukraine', 118.

⁷⁰ Faber JL, "'Res Gestae". Indiana: a celebrity-friendly jurisdiction' 43, *The Journal of the Indiana States IMF Association* 9 (2000), 2.

There are also some notable similarities between the Right of Publicity and trademark law. As a theoretical matter, the Right of Publicity is of the same genus as unfair competition and, more specifically, the doctrine of misappropriation – two tell-tale signs of trademark law.⁷¹ Just like a trademark, the Right of Publicity can serve as an indication of quality assurance to a consumer, especially if a sports person maintains reputable quality standards and exercises caution in licensing his or her publicity rights. Furthermore, proprietors of both trademark and publicity rights seek to prevent others from reaping unjust rewards by appropriation of the mark or celebrity's fame.⁷²

The right of publicity has certain similarities with copyright. The author has patrimonial and extra-patrimonial rights as well as being the owner of the right of publicity. Patrimonial rights are the rights that enable a person to claim ownership of his or her work while extra-patrimonial rights enable a person to perform other rights apart from claiming ownership such as, reproduction and distribution. Some scholars even suggest the establishment of a pan-European patrimonial right to one's image based on the model of copyright law.⁷³ In Tatiana Synodinou's opinion, the copyright model can be used when 'building a harmonized regulatory framework governing image contracts'.⁷⁴

No single law recognises personality rights in Kenya. Whilst Kenya does not have a "unified" legal system to protect personality rights, the combination of rights and causes of action under the Constitution, common law and various statutes on Intellectual Property, trespass/intrusion upon seclusion, appropriation, defamation, consumer protection, privacy and publicity laws afford sufficient level of protection which enables sports persons to exploit and protect their image and brand very effectively.⁷⁵

⁷¹ The doctrine of misappropriation will be explained in detail in Chapter 3.

⁷² Faber JL, "'Res Gestae'. Indiana: a celebrity-friendly jurisdiction' 2.

⁷³ Synodinou T. 'Image Right and Copyright Law in Europe: Divergences and Convergences', 11.

⁷⁴ Moskalenko K, 'The right of publicity in the USA, the EU, and Ukraine' 118.

⁷⁵ 'Victor Nzomo: Kenya Copyright Board Suggests Guernsey Approach to Image Rights Protection' IP Kenya, 23 December 2015

The Copyright Act, 2001 regulates copyright law in Kenya. The existing Act does not expressly provide for the protection of personality rights but rather the interpretation section provides some guidance.⁷⁶ The Act generally provides for the protection of literary, musical and artistic works, audio-visual works, sound recordings and broadcasts.⁷⁷ These works are eligible for protection through registration if they are original works and fixed in a tangible form. The closest recognition of a sports person's personality may be fixed into paintings, drawings, works of sculpture or photographs. In the context of photographs, the photographer or a third party (in the case of a commissioned work) is the copyright owner as discussed in the often cited Oliech case.

Notably, a new wave of personality rights protection has been advocated by Dr. Marisella Ouma in her paper titled "Copyright Contracts: Can they be used to manage Personality Rights?" which was presented at the WIPO African Sub-regional Workshop on New Perspectives on Copyright in 2015. She posits that performers, actors and other celebrities can claim the rights as part and parcel of their moral rights as the extension of their persona.⁷⁸ She further proposes that the clause on personality rights in copyright contract must be clear and specific.⁷⁹ Such a clause may also be included in contracts of engagement or combined in the clause of merchandising.⁸⁰

The right to privacy under Article 31 of the Constitution of Kenya provides that every person has the right not to have their possessions seized.⁸¹ A farfetched understanding of this provision

<https://ipkenya.wordpress.com/2015/12/23/kenya-copyright-board-suggests-guernsey-approach-toimage-rights-protection/> on 15 December 2017.

⁷⁶ See section 2, *Copyright Act* (2009).

⁷⁷ Section 22, *Copyright Act* (2009).

⁷⁸ Kenya Copyright Board, Copyright News Issue 18, 2015, 3-4.

⁷⁹ Kenya Copyright Board, Copyright News Issue 18, 2015, 3-4.

⁸⁰ 'Victor Nzomo: Kenya Copyright Board Suggests Guernsey Approach to Image Rights Protection' IP

Kenya, 23 December 2015
<https://ipkenya.wordpress.com/2015/12/23/kenya-copyright-board-suggests-guernsey-approach-toimage-rights-protection/> on 15 December 2017.

⁸¹ Article 31, *Constitution of Kenya* (2010).

would imply that sports persons are entitled to quiet possession of their personality rights if they are to be considered as property.

Conclusion

Celebrities such as professional sports persons generate the most economic value from this right of publicity.⁸² Their identities are predominantly used to attract the attention of customers to products, for example through advertisement campaigns.⁸³ A sports person's involvement in such campaigns sometimes creates a bigger paycheck opportunity than the income from his/her main activity.⁸⁴

Sports persons typically invest considerable energy in nurturing their public image, and few can argue that it would be anything but unfair for a business to siphon the sports person's success into their advertising or products to increase sales, without compensating the sports person for the heightened profits, profile or recognition of the product or company. If the manipulation of one's image in order to increase revenue streams is nothing new, the advent of publicity laws in the 20th century at least ensure that the profits derived from these valuable personas are more equitably channeled.⁸⁵

The policies supporting Right of Publicity laws are not simply about ensuring that a sports person or his or her estate gets paid. It is also about the right to control how a sports person is commercialized, or if he or she will be used at all. Thus, the ability to control commercialization

⁸² 'Victor Nzomo: Quick Thoughts on Legal Protection for Image Rights of Professional Sportspersons in Kenya' CIPIT *Blog*, 10 September 2015 <https://cipitblog.wordpress.com/2015/09/10/quick-thoughts-on-legal-protection-for-image-rights-of-professional-sportspersons-in-kenya/> on 1 December 2017.

⁸³ Moskalenko K. 'The right of publicity in the USA, the EU, and Ukraine', 547.

⁸⁴ Moskalenko K. 'The right of publicity in the USA, the EU, and Ukraine', 547.

⁸⁵ <http://rightofpublicity.com/brief-history-of-rop> on 9 January 2018.

in the first place is as much a policy objective of the Right of Publicity as is providing revenue streams for the rightful recipient.⁸⁶

⁸⁶ <http://righttopublicity.com/brief-history-of-rop> on 9 January 2018.

CHAPTER 3: ACTIONS THAT CONSTITUTE APPROPRIATION OF PERSONALITY RIGHTS

This chapter delves into the actions and elements that amount to appropriation of personality rights of individuals which can well be extended to sports persons. It analyses the problem underlying appropriation and the economic interests attached thereto. It also focuses on the approach adopted by various Courts in how they determine the elements of appropriation as a tort.

Introduction

In the words of Frazer, the concept of an individual's personality or persona is the "indicia of identity."⁸⁷ An elucidation of this concept would include the name, likeness and voice of a natural person.⁸⁸ This personality right enables sports persons to safeguard their "indicia of identity" by giving them the right to control and benefit from the commercial exploitation of one's name, image, and likeness and prevent unauthorised appropriation of the same for commercial purposes.⁸⁹

As seen from the preceding chapters, commercial appropriation of personality rights is not a fairly new occurrence, although debate about its status and manner of legal regulation has piqued the curiosity of many. The culture of using well-known or even ordinary sports persons without an apparent celebrity status to market a variety of products is prospering. That notwithstanding, little attention has been given to the legal basis on which most lucrative arrangements are based.

⁸⁷ Frazer T, 'Appropriation of Personality - A New Tort', 99 *Law Quarterly Review*, (1983), 281

⁸⁸ Bains S, 'Personality rights: Should the UK grant celebrities a proprietary right in the personality? Part 1' *Entertainment Law Review*, (2007), 164.

⁸⁹ 'Azmul Haque: India: Face Value: Personality Rights and Celebrity Endorsements' *Mondaq*, 2 September 2003, <http://www.mondaq.com/article.asp?articleid=22487> on 6 February 2018.

The problem of appropriation of personality

The underlying problem of appropriation of personality can be explained in simple terms; if one person (A) uses in advertising or merchandising the name, voice or likeness of another person (B) without his or her consent, to what extent will that person (B) have recourse or a remedy to prevent such an unauthorised exploitation?⁹⁰ Most likely, B might be a famous sports person, although this is not always the case, since the images of ordinary people have been used for advertising purposes.⁹¹ Be that as it may, lack of a public profile for personality rights holders does not necessarily grant immunity to third parties from unauthorised exploitation, even though those probable to find recourse are the well-to-do.⁹²

The other problem lies in the fact that sports persons whose personality rights have been commercially appropriated do not receive any economic benefit from such use. Arguably, pecuniary loss and non-pecuniary harm are more often than not impossible to disentangle. For purposes of this study, the two facets need to be distinguished since in some jurisdictions compensation for material losses caused by damage to interests in personality does not face any hindrances, whereas compensation for non-pecuniary harm is subject to restrictions.⁹³ For example, the French Civil Code does not separate material and 'moral' harm and protects both aspects under the general principle which states everybody must pay for the harm caused by his *faute*.⁹⁴ However, in English law, damage to interests in personality is usually not legally institutable unless it also affects some other interests of substance.⁹⁵ Although the law of defamation recognises damage to a plaintiff's non-pecuniary interests, the action is, theoretically at least, based on the economic or social damage done to the plaintiff as third parties cut their ties with him or her.⁹⁶ In spite of the fact that American law shares its roots with English law, it has

⁹⁰ Smith BH, *The Commercial Appropriation of Personality*, 3.

⁹¹ Smith BH, *The Commercial Appropriation of Personality*, 3.

⁹² Smith BH, *The Commercial Appropriation of Personality*, 3.

⁹³ Smith BH, *The Commercial Appropriation of Personality*, 7.

⁹⁴ Article 1382 and 1383, *Code Civil* (France).

⁹⁵ Smith BH, *The Commercial Appropriation of Personality*, 7.

⁹⁶ *John v MGN* [1996] 3 WLR 593, 608. Smith BH, *The Commercial Appropriation of Personality*, 7.

departed from its heritage, and one area of law where a notable difference can be seen between English and American law is in the wider protection in the United States for interests in personality through torts of invasion of privacy and intentional infliction of mental distress.⁹⁷

Economic interests

The problem of appropriation of personality brings forth economic interests that might be adversely affected from an unauthorised appropriation of personality. A narrow definition of an economic interest might have the following characteristics: (i) a finite sum of money can provide complete recompense for an invasion of such an interest and (ii) a plaintiff should feel no further sense of loss, having received a sum of money which accurately reflects the value of what has been lost; if the plaintiff does feel a sense of unsatisfied loss, then his or her interest is not purely economic, or, probably, the plaintiff has some non-economic interest in addition to the economic interest.⁹⁸ Furthermore, (iii) an economic interest is capable of objective valuation and cannot be a purely economic interest if it has a subjective value for its owner, and (iv) it is an interest based on exchange; if there is no market in what a person has lost, that person has not suffered damage to an economic interest strictly speaking.⁹⁹ The fact that many sports persons are, in fact whether in right or not, holding valuable economic interests in their personality is very much established, although it is troublesome to reconcile such interests with their types of damage to economic interests which are actionable injuries.¹⁰⁰

Existing trading or licensing interests

This category covers the interests of those who might have an actual economic interest in their personality and who might be pro-actively involved in using their celebrity status in return for money.¹⁰¹ Clear examples are sports persons in which it is custom to see the images of such

⁹⁷ Section 46 and 652A, Volume 3, *Restatement of Torts, Second* (United States of America). Smith BH, *The Commercial Appropriation of Personality*, 7.

⁹⁸ Cane P, *Tort Law and Economic Interests*, Oxford University Press, Oxford, 1994, 5.

⁹⁹ Cane P, *Tort Law and Economic Interests*, 5.

¹⁰⁰ Smith BH, *The Commercial Appropriation of Personality*, 8.

¹⁰¹ Smith BH, *The Commercial Appropriation of Personality*, 8.

people being exploited in advertising and merchandising.¹⁰² Sports persons usually endorse products which might be used in connection with goods or services that are completely unrelated to his or her specific sport, for instance, jewelry and cars.¹⁰³ Unrelated trade endorsements are whereby the sports person is associated with an unrelated product, for example, football players with houses. The player receives the fee as a result of the use of his or her personality, and that use is governed by their contract.¹⁰⁴ Companies strive to associate their products with the images of a sports person in a manner which falls short of endorsement of any particular product.¹⁰⁵ It is therefore important in the marketing industry to draw a line between, (i) 'tools of the trade' endorsements, which involve products that sports persons use in their course of trade or profession such as bodybuilding supplements or training shoes; (ii) 'non-tools' endorsements, which basically involves products on which sports persons do not use on their primary engagement of sports, and (iii) 'attention grabbing devices' which involve using the names of such persons on, or in connection with, products without suggesting any endorsement.¹⁰⁶

Jurisdictional tort of appropriation of personality

Australian Courts

Personality rights are non-existent in Australia as well.¹⁰⁷ However, the silver lining exists in famous sports persons managing the use of certain personality rights by trademarking their image and instituting a suit in the tort of passing off.¹⁰⁸ There is also the viable option of bringing an action for misleading and deceptive action provisions of the Trade Practices Act in safeguarding the goodwill in personality.¹⁰⁹

¹⁰² Smith BH, *The Commercial Appropriation of Personality*, 9.

¹⁰³ Smith BH, *The Commercial Appropriation of Personality*, 9.

¹⁰⁴ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 4.

¹⁰⁵ Smith BH, *The Commercial Appropriation of Personality*, 9.

¹⁰⁶ Rein I, *High Visibility, Third Edition: Transforming Your Personal and Professional Brand*, McGraw Hill Professional, New York, 2006, 49. Smith BH, *The Commercial Appropriation of Personality*, 9.

¹⁰⁷ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 4.

¹⁰⁸ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 4.

¹⁰⁹ Section 52 and 53, *Trade Practices Act* (Commonwealth of Nations). Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 4.

The Australian courts have been ready to adopt the tort of passing off to cure any cases of appropriation of personality rights.¹¹⁰ Nonetheless, this approach is not without its flaws, as was evidenced by cases such as *Hogan v Koala Dundee Pty Ltd*.¹¹¹ In this case, the defendants had used images extracted from the plaintiffs' film, 'Crocodile Dundee', and, specifically, had used the name 'Dundee' on their merchandise without the defendant's consent.¹¹² As per Pincus J, it was viable to bring a passing off action concerning an image, including a name, unrelated with any business at all'.¹¹³ This brilliant, novel and wide proposition can be extended to the personality rights of sports persons.

The main elements of the tort of passing off are normally examined from the 'classical trinity' point of view namely: '(i) an established reputation (or goodwill) acquired by the plaintiff in his or her goods, name, mark *et al.* (ii) misrepresentation by the defendant leading to confusion (or deception) and (iii) causing damage to the plaintiff'.¹¹⁴ The appropriation of personality cases will be analysed in line with this 'classical trinity'.

i) Goodwill

The common law progressed immensely in the landmark case of *Henderson v Radio Corporation*, as the court did not require for there to be a 'common field of activity'.¹¹⁵ Manning J explained, stating that the development in the advertising business had 'opened up a new field of gainful employment for many persons, who, by reason not only of their sporting... have

¹¹⁰ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 7.

¹¹¹ *Hogan v Koala Dundee Pty Ltd* [1988] 83 ALR 187.

¹¹² Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

¹¹³ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

¹¹⁴ *Consorzio del Prosciutto di Parma v Marks & Spencer Plc* [1991] RPC 351, 368 following the remarks of Lord Oliver in *Reckitt & Colman Ltd v Borden Inc* [1990] 1 WLR 491, 499.

¹¹⁵ *Henderson v Radio Corporation* [1969] RPC 218. Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

attracted notoriety, and found themselves in a position to earn substantial sums of money by lending their recommendation or sponsorship to an almost infinite variety of commodities'.¹¹⁶

ii) Misrepresentation

Cases of appropriation of personality rights are usually concerned with misrepresentations plaintiff's reputation, which leads to public confusion, therefore resulting in damage or a real threat to damage to the plaintiff.¹¹⁷ As evidenced in the Henderson case, the actions of the defendant amounted to a misrepresentation that the business of the plaintiff was affiliated with the business of the defendant.¹¹⁸ The idea of a business, as mentioned above, was interpreted in its broadest sense to include professions and callings.¹¹⁹

(iii) Damage

In instances of passing off, the plaintiff has the burden of proving damage to his or her goodwill.¹²⁰ In *Erven Warnink v Townend*, the court stated that the defendant's misrepresentation must amount to actual damage to his or her business, or the threat of damage.¹²¹ In the classic action for passing off, the defendant would have misrepresented that his or her business were the plaintiff's business, thereby shifting trade from the plaintiff to the defendant, which would amount to damage done to the plaintiff.¹²²

Conclusion

This chapter has attempted to discuss the main research problem which is the issue of appropriation of personality rights together with the economic interests lost as a result of

¹¹⁶ [1969] RPC 218. Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

¹¹⁷ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

¹¹⁸ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

¹¹⁹ Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

¹²⁰ Cane P, *Tort Law and Economic Interests*, 78.

¹²¹ *Erven Warnink v Townend* [1979] AC 731.

¹²² *Spalding (AG) & Bros v Gamage (AW) Ltd* [1915] 32 RPC 273. Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia', 8.

unauthorized exploitation of these rights. It has also highlighted various Australian cases revealing the approach taken by advanced common law courts in determining what constitutes an appropriation of personality rights. The subsequent chapter will examine case studies in Kenya to establish whether the Kenyan courts have addressed the same issue.

CHAPTER 4: CASE STUDIES

This chapter presents various cases regarding the commercial use of personality rights of sports persons both with and without their consent in Kenya. Due to the cases being unreported, unsettled and/or unpublished, there lacks a conclusive view or opinion by the courts in these matters hence uncertainty in what constitutes misappropriation of personality rights. The researcher has therefore resorted to the use of secondary materials, being one of the limitations of this study, in analyzing these cases.

4.1 Oliech v East Africa Breweries Limited

Facts

AJ Auxerre striker Dennis Oliech, Parma midfielder Macdonald Mariga and locally based Sofapaka FC player Bob Mugalia, players of Harambee Stars (the Kenya national football team), sought to sue East African Breweries Limited (EABL), the former sponsors of the team, for misappropriating their photo in an advertisement for its brand, Tusker. The image in contention was photographed during Kenya's match against Angola on 26 March 2011 as the three players celebrated Mariga's goal.¹²³

However, FKF, EABL and Harambee Stars Board representatives instead opted to refer the matter to FIFA. The matter was later dismissed by FIFA on the ground that it was an internal issue that could potentially be solved amicably in Kenya.¹²⁴ The matter also found itself in the

¹²³ 'Brian Moseti: Oliech, Mariga, Mugalia take EABL to court' *Futaa* 28 Feb <http://www.futaa.com/article/18002/oliech-mariga-mugalia-take-eabl-to-court> on 2 January 2018.

¹²⁴ 'Odindo Ayieko: Auxerre's Oliech gives Kenyan players voice in image rights' *Business Daily* 30 May 2012 <https://www.businessdailyafrica.com/Life/society/Auxerres-Oliech-gives-Kenyan-players-voice-in-image-rights--/3405664-1416820-view-printVersion-46p99v/index.html> on 12 January 2018.

Parliament of Kenya where its members echoed the players' complaints and took notice of other players whose rights had been violated prior to the suit.¹²⁵

Issues

It was undisputed that there existed a group contract between EABL and the whole of the Harambee Stars Team in relation to image rights.¹²⁶ The issue is whether this agreement could be relied on where specific players' images were singled out to be used in advertisements.¹²⁷

The other issue is whether EABL was on the right in arguing that the three players pictured represented the whole team so as to preclude EABL from entering into separate agreements for image rights with each of the three players.¹²⁸

¹²⁵ 'Odindo Ayieko: Auxerre's Oliech gives Kenyan players voice in image rights' *Business Daily* 30 May 2012 <https://www.businessdailyafrica.com/Life/society/Auxerres-Oliech-gives-Kenyan-players-voice-in-image-rights--/3405664-1416820-view-printVersion-46p99v/index.html> on 12 January 2018.

¹²⁶ 'Victor Nzomo: Intellectual Property and Sports in Kenya: Copyright Protection of Image Rights?' *CIPIT Law Blog* 13 June 2012 <https://ipkenya.wordpress.com/2012/06/13/intellectual-property-and-sports-in-kenyacopyright-protection-of-image-rights/> on 14 January 2018.

¹²⁷ 'Victor Nzomo: Intellectual Property and Sports in Kenya: Copyright Protection of Image Rights?' *CIPIT Law Blog* 13 June 2012 <https://ipkenya.wordpress.com/2012/06/13/intellectual-property-and-sports-in-kenyacopyright-protection-of-image-rights/> on 14 January 2018.

¹²⁸ 'Victor Nzomo: Intellectual Property and Sports in Kenya: Copyright Protection of Image Rights?' *CIPIT Law Blog* 13 June 2012 <https://ipkenya.wordpress.com/2012/06/13/intellectual-property-and-sports-in-kenyacopyright-protection-of-image-rights/> on 14 January 2018.

Arguments

Oliech averred that he was not contacted prior to the commissioning of the advertisement which was displayed on roadside billboards and newspapers.¹²⁹

EABL, and the Chairman of FKF, Mr. Sam Nyamweya, rebutted that Oliech was not entitled to compensation as the terms of the sponsorship deal permitted the sponsors to use the national team pictures for promotional purposes.¹³⁰

EABL on its part argued that it had signed a contract with Harambee Stars as a team together for a sponsorship amounting to Kshs. 110 Million and that that contract included clauses which allowed them as the team's sponsor to use images of the national team players' in promotions.¹³¹ Clause 9 of the agreement read that the sponsor shall have the right "to use the images of members of the Harambee Stars team for promotional and advertising activities".¹³²

Mr Nyamweya supported the argument that Oliech did not have any recourse because it was not only Oliech's image which was used but also of the team. He further argued that EABL legitimately expected to get some benefits from the team by using their images for promotions since they were the team's sponsor.¹³³

¹²⁹ 'Brian Moseti: Oliech, Mariga, Mugalia take EABL to court' *Futaa* 28 Feb <http://www.futaa.com/article/18002/oliech-mariga-mugalia-take-eabl-to-court> on 2 January 2018.

¹³⁰ 'Charles Nyende: Oliech threatens to dump Kenya' *Nation Media Group*, 27 March 2012 <https://www.nation.co.ke/sports/football/Oliech-threatens-to-dump-Kenya-/1102-1374818-egl576z/index.html> on 15 January 2018.

¹³¹ 'Charles Nyende: Oliech threatens to dump Kenya' *Nation Media Group*, 27 March 2012 <https://www.nation.co.ke/sports/football/Oliech-threatens-to-dump-Kenya-/1102-1374818-egl576z/index.html> on 15 January 2018.

¹³² 'Charles Nyende: Oliech threatens to dump Kenya' *Nation Media Group*, 27 March 2012 <https://www.nation.co.ke/sports/football/Oliech-threatens-to-dump-Kenya-/1102-1374818-egl576z/index.html> on 15 January 2018.

¹³³ 'Gilbert Wandera: FKS Seeks FIFA Help Over Oliech Image Rights Issue' *Standard Group Limited*. 18 April 2012

Conclusion

In the absence of consent by the three players being sought, EABL breached the terms of the contract by exploiting their image rights and ought to have compensated the players. The issue that arose during this discussion was by there not being a single source of law that recognises image rights.¹³⁴

Ideally, national team players would sign a contract with the respective federations.¹³⁵ This in effect gives them collective bargaining power in regards to participation for the national team. Such an arrangement incorporates insurance, image rights, player bonuses, sponsorships, and many other relevant items.¹³⁶ Most times there's the issue of individual earning power whereby experienced players such as Oliech would have higher commercial power than a newbie such as Kevin Kimani. Nonetheless, the underlying principles that a number of federations have based their contract on is that everybody in the team is used equally, and there is uniformity in terms of payment between players irrespective of their celebrity status.¹³⁷

<https://www.standardmedia.co.ke/lifestyle/article/2000056491/fkf-seeks-fifa-help-over-oliech-image-rights-issue> on 14 January 2018.

¹³⁴ 'Victor Nzomo: Intellectual Property and Sports in Kenya: Copyright Protection of Image Rights?' *CIPIT Law Blog* 13 June 2012 <https://ipkenya.wordpress.com/2012/06/13/intellectual-property-and-sports-in-kenyacopyright-protection-of-image-rights/> on 14 January 2018.

¹³⁵ 'Brian Jibbo: EABL, FKF Should Know People...And Sports Image Rights' *Futaa* 27 March <http://www.futaa.com/article/19884/eabl-fkf-should-know-peopleand-sports-image-rights> on 16 January 2018.

¹³⁶ 'Brian Jibbo: EABL, FKF Should Know People...And Sports Image Rights' *Futaa* 27 March <http://www.futaa.com/article/19884/eabl-fkf-should-know-peopleand-sports-image-rights> on 16 January 2018.

¹³⁷ 'Brian Jibbo: EABL, FKF Should Know People...And Sports Image Rights' *Futaa* 27 March <http://www.futaa.com/article/19884/eabl-fkf-should-know-peopleand-sports-image-rights> on 16 January 2018.

4.2 Julius Yego v East Africa Breweries Limited

Facts

An online 'congratulatory message' was posted by EABL acknowledging Julius Yego's efforts in winning a gold medal in the javelin throw event of the World Championships in Beijing in 2015.

The poster portrayed a silhouette of a sports person who is about to throw a javelin with the caption reading as "YEGOLD! A WORLD LEADING RECORD IN JAVELIN THROW #TEAMKENYA". The caption blended two words, 'Yego' and 'Gold' (also known as a portmanteau) to come up with the word 'Yegold'.

On one side, the actions of EABL did amount to an endorsement and they ought to have compensated Yego for reaping benefits from his 'trademark/brand.' On the other side, EABL's actions were legal and they could not be forced to compensate let alone apologize to Julius Yego.

138

Issues

Whether the 'congratulatory message' by EABL gave the impression that Julius Yego was either endorsing their products or had entered into a commercial arrangement with them.¹³⁹

Conclusion

The Court could conclude that EABL neither attempted to show that Julius Yego won a gold medal because he indulges in Tusker nor that he promotes or commercially endorses their products. They simply found a creative way of congratulating him.¹⁴⁰ In the famous words of Dr. Benjamin Mitra-Khan, "when it comes to intellectual property rights, not everything that glitters

¹³⁸ 'Dennis Odera: Julius Yego vs EABL (The Battle of YEGOLD)' *LinkedIn* 1 September 2015
<https://www.linkedin.com/pulse/julius-yego-vs-eabl-battle-yegold-dennis-odera> on 16 January 2018.

¹³⁹ 'Dennis Odera: Julius Yego vs EABL (The Battle of YEGOLD)' *LinkedIn* 1 September 2015
<https://www.linkedin.com/pulse/julius-yego-vs-eabl-battle-yegold-dennis-odera> on 16 January 2018.

¹⁴⁰ 'Dennis Odera: Julius Yego vs EABL (The Battle of YEGOLD)' *LinkedIn* 1 September 2015
<https://www.linkedin.com/pulse/julius-yego-vs-eabl-battle-yegold-dennis-odera> on 16 January 2018.

is gold.”¹⁴¹ On the other hand, the Court could find that EABL did in fact use his personality rights to market themselves.

However, a few weeks after Julius Yego lashed out at EABL, he entered into an agreement with the alcohol manufacturing company to become the ambassador of their flagship brand, Tusker Lager.

4.3 Kemboi’s victory dance on t-shirts

Facts

After winning the men’s 3000m steeplechase race in Moscow, athlete Ezekiel Kemboi captivated the audience with his victory dance. Kemboi also made himself more appealing with his Mohawk hairstyle, the Kenyan flag around his waist and his green shoes.¹⁴² Thereafter, t-shirts with images depicting his sequential dance moves together with the words “Do The Kemboi” emerged.

Issues

As his dance gains recognition across the world, whether Kemboi could name his dance and copyright the choreography part of the dance as well as bring a suit against the makers of the t-shirts for copyright infringement.

¹⁴¹ ‘Professor Pierre Mohnen: Intellectual Property Rights in Developing Countries’ *Unu-Merit* 10 December 2013 <https://www.merit.unu.edu/intellectual-property-rights-in-developing-countries/> on 17 January 2018.

¹⁴² ‘Anil Bakari: Ezekiel Kemboi should patent his victory jig’ *Standard Group Limited* 25 August 2013 <https://www.standardmedia.co.ke/lifestyle/article/2000091852/ezekiel-kemboi-should-patent-his-victory-jig> on 17 January 2018.

Conclusion

Kemboi and his dance moves are well-known. However, original dances constitute “dramatic compositions” when fixed in some permanent record from which the dance can be performed.¹⁴³

Thus, a comprehensive statement on the creative requirement of dance choreography is as follows: a choreographic work should constitute an original creation of dance movements to be performed for an audience, conveying some story, theme or emotional concept.¹⁴⁴ In this case, Kemboi’s dance moves deserve copyright protection since they constitute his own creativity and they were recorded while celebrating his win after a marathon.

4.4 Joseph Kibunja v. Rohto Mentholatum & Harleys

Facts

Joseph Kibunja, an athlete and guide for well-known Kenyan Paralympian Henry Wanyoike filed a suit in December 2016 to bar two companies, Rohto Mentholatum Limited and Harleys Limited from using his image to promote their product “Deep Heat” without his authorization.

Wanyoike had on his end distanced himself from Kibunja’s allegations by stating his position on the fact that they both represented the Henry Wanyoike foundation, which signed a contract with Rohto Mentholatum Ltd, giving them rights to use both their images.¹⁴⁵

¹⁴³ ‘Copyright in Choreographic Works’ Report prepared for the Sub-Committee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, <https://www.copyright.gov/history/studies/study28> on 18 January 2018.

¹⁴⁴ ‘Copyright in Choreographic Works’ Report prepared for the Sub-Committee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 100. <https://www.copyright.gov/history/studies/study28> on 18 January 2018.

¹⁴⁵ ‘Victor Nzomo: Deep Heat in Image Rights Suit from Kenyan Athlete: Joseph Kibunja v. Rohto Mentholatum & Harleys’ *CIPIT Law Blog*, 5 January 2017 <http://blog.cipit.org/2017/01/03/deep-heat-in-image-rights-suit-from-kenyan-athlete-joseph-kibunja-v-rohto-mentholatum-harleys/> on 20 January 2018.

Issues

Whether the commercial appropriation of Kibunja's image by the defendants in the promotion of their product without his consent was illegal and whether he deserved to be awarded compensatory damages for such unauthorisation.

Arguments

Kibunja averred that he discovered in 2013 that this image was being exploited to advertise and market a product called 'Deep Heat' manufactured by Rohto and distributed by Harleys without his permission. Thereafter, he discovered his image had also been used several times to advertise and market the aforesaid product, Deep Heat, in several media outlets such as "The Asian Weekly" promotional calendar, promotional fliers and in corporate sponsorship materials such as banners, fliers and tee shirts.¹⁴⁶ However, Kibunja averred that he resigned from the Foundation in January 13, 2015 and even as a member of the foundation, he did not waive any right or proprietary interest in the use of his image. Kibunja further averred that he did not receive any remuneration in any form by both defendants for using his image. Kibunja asserted that he made a name for himself as an athlete who had featured and won national and international athletic events including the 2003 Singapore Marathon where he was the first runners up, 2004 Hong Kong Half Marathon, 2005 Great City Run (United Kingdom), 2005 Nairobi Marathon, 2005 Bangkok Marathon and many others.¹⁴⁷ He claimed that he brought up the issue of image rights with the defendants to award him a suitable compensation but that claim was ignored.

¹⁴⁶ 'Victor Nzomo: Deep Heat in Image Rights Suit from Kenyan Athlete: Joseph Kibunja v. Rohto Mentholatum & Harleys' *CIPIT Law Blog*, 5 January 2017 <http://blog.cipit.org/2017/01/03/deep-heat-in-image-rights-suit-from-kenyan-athlete-joseph-kibunja-v-rohto-mentholatum-harleys/> on 20 January 2018.

¹⁴⁷ 'Victor Nzomo: Deep Heat in Image Rights Suit from Kenyan Athlete: Joseph Kibunja v. Rohto Mentholatum & Harleys' *CIPIT Law Blog*, 5 January 2017 <http://blog.cipit.org/2017/01/03/deep-heat-in-image-rights-suit-from-kenyan-athlete-joseph-kibunja-v-rohto-mentholatum-harleys/> on 20 January 2018.

The defence that was likely to be raised by Rohto and Harleys was that there was no need to seek Kibunja's consent due to his involvement with the Henry Wanyoike Foundation allowing them to use both the images of the Foundation's representatives.¹⁴⁸ The case is still pending for determination.

Summary

Any involvement of a sports person with an organization does not authorize the latter to use the images of a sports person that he or she has tirelessly worked to build for several years unless he or she receives benefits of whatever kind. Observers will be keen to see how the court goes about determining the various issues raised in this case.¹⁴⁹

Conclusion

In other cases such as the campaign by Blueband dubbed 'Good Breakfast Challenge', the use of David Rudisha's personality rights have not been problematic. The aim of the campaign was to encourage parents to provide a good breakfast for the children at the start of the day. Similarly, rugby players such as Collins Injera, Humphrey Kayange, Biko Adema and Andrew Amonde have endorsement deals with Samsung Galaxy Mega in East Africa, Kenchic, Prestige Margarine and Guinness respectively.

¹⁴⁸ 'Victor Nzomo: Deep Heat in Image Rights Suit from Kenyan Athlete: Joseph Kibunja v. Rohto Mentholatum & Harleys' *CIPIT Law Blog*, 5 January 2017 <http://blog.cipit.org/2017/01/03/deep-heat-in-image-rights-suit-from-kenyan-athlete-joseph-kibunja-v-rohto-mentholatum-harleys/> on 20 January 2018.

¹⁴⁹ 'Victor Nzomo: Deep Heat in Image Rights Suit from Kenyan Athlete: Joseph Kibunja v. Rohto Mentholatum & Harleys' *CIPIT Law Blog*, 5 January 2017 <http://blog.cipit.org/2017/01/03/deep-heat-in-image-rights-suit-from-kenyan-athlete-joseph-kibunja-v-rohto-mentholatum-harleys/> on 20 January 2018.

Nonetheless, cases concerning misappropriation of personality rights of sports persons are still experienced to date and such victims do not have any recourse in Kenyan courts due to lack of precedence.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

This final chapter acknowledges that the aims of this research have been achieved. It has provided an overview of the elements and actions that constitute appropriation of personality rights, discussed the legal framework on the same and examined case studies involving such appropriation in Kenya. Accordingly, this chapter will concisely present the main findings of the research and the implications of this for personality rights of sports persons. Lastly, it shall provide recommendations for practice and improvement of this topic and conclusions of the research therefrom.

5.1 Findings of the Study

5.1.1 Chapter one Findings

Chapter one introduced the concept of personality rights and defined them as the right of sports persons to own and control the commercial use of their name, likeness, persona and other unequivocal features of their identity and, to receive remuneration from that use. Such a right is attributable to professional sports persons who have expended resources to create their public image and reputation for themselves. It is only fair to afford legal protection to such hardworking individuals to prevent others from exploiting their personality rights without their consent or without compensating them. However, Kenya lacks a comprehensive framework to recognize these rights and as a result, cases involving commercial misappropriation of personality rights fail to provide such victims with any redress. The Courts have also failed to recognize or adjudicate any of these rights.

5.1.2 Chapter Two Findings

Chapter two presented justifications for and against personality rights under the Labour and Private Property theories. These theories contend that an individual owns and controls their labour and the fruits of their labour as private property. Furthermore, personality rights are inherent in individuals and form part of their identity to the extent that it is common sense not to

violate these rights. In the same tangent, sports persons who expend resources such as time and money to increase the value of their personality rights and maintain their celebrity status ought to be remunerated by anyone that uses these rights. Companies that seek to advertise and associate their products with famous sports persons should respect their personality rights by not appropriating them.

Examining the literature on personality rights, the US legal system, in spite of the difference in some Statute provisions from State to State, protects the commercial appropriation of personality rights. The legal architecture in Kenya, on the other hand, remotely recognizes sports persons' personality rights under the Copyright Act. Instead, various laws such as privacy law, publicity law, trespass and appropriation provide other legal avenues that sports persons can fall back on in protecting their commercial value. For example, Copyright law protects sports persons who commission a photographer to take photos of them by barring photographers from using those images without the subject's consent.

5.1.3 Chapter Three Findings

This chapter examined the elements that constitute appropriation of personality rights vis-a-vis the economic interests attached to them. It also analysed various cases that established the said elements and the pecuniary harm that arose from such appropriation.

The outcome of these cases presented that personality rights hold economic interests but courts have been unsure on how to award types of damages.

5.1.4 Chapter Four Findings

Chapter four looked into cases involving the commercial appropriation of personality rights of sports persons without their authorization. The difficulty in examining these cases in the Kenyan context is that there lacks precedence on the subject. All of the cases filed by sports persons remain unsettled, unpublished or unreported because of the limited recourse available to such victims under the current legal framework. The net effect is that sports persons tend to rely on

other areas of law to receive compensation for the use of their personality rights. Not only is justice not done but also justice is not seen to be done.

Apart from lack of a distinct legal framework on personality rights, the other contributing factor for the commercial appropriation of these rights is lack of awareness. Most sports persons file their cases long after third parties have used their personality traits in advertising their products under the guise of 'congratulating' sports persons for their achievements. For instance, Oliech realized that EABL had used the image of himself and his fellow teammates in advertising the company's product without consulting the subjects of the image.

5.2 Recommendations

This research paper provides the following recommendations to address the issue of personality rights of sports persons in Kenya;

5.2.1 Guernsey Approach

Following the proposed amendments to intellectual property laws failing to address personality rights, it is evident that drafting of a piece of law to protect these rights will not suffice in the current Kenyan context. This assumption is also informed by the lack of precedence in Kenyan courts to recognize personality rights of sports persons and commercial appropriation of the same.

A more suitable approach would be to adopt the Bailiwick of Guernsey model which introduced the registration of personality rights system. The Image Rights (Bailiwick of Guernsey) Ordinance (IRO) 2012 enables individuals to register personality rights as a property right under a public record. This would go a long way in punishing any person who uses a registered personality right without the rights-bearer's consent.

5.2.2 Incorporation into Constitutions of Sports Federations

The next viable option would be for legal committees in sports federations, such as the Football Kenya Federation, to propose an amendment in the body's constitution to include a section of image rights of sports persons. Such a section would provide that third parties would need to seek authorisation from rights holders of image rights before engaging in any commercial appropriation. The specific terms and conditions of the arrangement such as remuneration would be determined on a case by case basis to give a wider protection of image rights or specified in the same subsections.

5.2.3 Establishing a code of conduct for sports

Sports is neither good nor bad; it can be a positive character-building experience if it is in the hands of people with the right attitudes. There is a need to establish principles to be applied by everyone involved leading, supporting or managing in the sports industry. These principles will evolve into a code of conduct which will go a long way in instilling good practice among stakeholders in the sports industry to respect the personality rights of sports persons.

5.3 Conclusion

A journey of a thousand miles begins with a single step. This research paper has provided the first step to ensure that personality rights of sports persons are afforded the protection and recognition they deserve. This paper has also achieved its objectives in attempting to find ways to protect personality rights and provide recommendations to facilitate sports persons in benefitting from the commercial appropriation of their rights.

BIBLIOGRAPHY

Books and Journals

- Ahmad T and Swain RS, 'Celebrity Rights: Protection under IP Law' 16 *Journal of Intellectual Property Rights* (2010).
- Bains S, 'Personality rights: Should the UK grant celebrities a proprietary right in the personality? Part 1' *Entertainment Law Review*, (2007).
- Bird RC and Ponte LM, 'Protecting Moral Rights in United States and United Kingdom: Challenges and Opportunities Under U.K.'s New Performance Regulations' *Boston University International Law Journal* (2006).
- Cane P, *Tort Law and Economic Interests*, Oxford University Press, Oxford, 1994.
- Dyer R, *Heavenly Bodies: Film Stars and Society*, Basingstoke and London: Macmillan, London, 1986.
- Faber JL, "'Res Gestae". Indiana: a celebrity-friendly jurisdiction' 43, *The Journal of the Indiana States IMF Association* 9 (2000).
- Fisher W, *Theories of Intellectual Property: New Essays in the Legal and Political Theory of Property*, Cambridge University Press, Cambridge, 2001.
- Frazier T, 'Appropriation of Personality - A New Tort', 99 *Law Quarterly Review*, (1983).
- Fox L, 'A Brand New Image? Should Personality Rights be Recognised in the UK?' Published LLB Thesis, University of Kent, 2006.
- Gaik SJ, 'Protecting a Sports Celebrity's Goodwill in Personality in Australia' *Sports Law EJournal* (2008).
- Garima B, 'Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime' 6 *NALSAR Student Law Review* (2011).
- Grady M, 'A Positive economic theory of the right of publicity' 197 (1994).
- Gunten A, *Intellectual Property is Common Property: Arguments for the abolition of private intellectual property rights*, Buch and Netz, Switzerland.
- Hughes J, 'The philosophy of Intellectual Property' 77 *Georgetown Law Journal* (1988).
- Keitel D, 'Right of Publicity' 4 *Loyola of Los Angeles Entertainment Law Review* (1984).

Kwall RR, 'Preserving Personality and Reputational Interests Through Constructed Personas Through Moral Rights: A BluePrint for Twenty First Century' *University of Illinois Law Review*, (2001).

Keitel D, 'Right of Publicity' 4 *Loyola of Los Angeles Entertainment Law Review* (1984), 233.

Locke J, 'The Second treatise of government' in Peardon T (ed), Bobbs-Merrill Co, 1952.

McCarthy T, *The Rights of Publicity and Privacy*, West Publishing Company, Minnesota, 1992.

Madow M, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' 84 *California Law Review* (1993).

Murumba SK, *Commercial Exploitation of Personality*, Law Book Company, 1986.

Moskalenko K, 'The right of publicity in the USA, the EU, and Ukraine' 1 *International Comparative Jurisprudence* (2015).

Mumbua F, 'Should The Intellectual Property Laws Be Amended To Provide For A Distinct Legal Framework on Image Rights In Kenya?' Published LLB Dissertation, Strathmore University, January 2017.

Nimmer M, 'The right of publicity', 19 *Law and Contemporary Problems* (1954).

Prosser W, 'Privacy' 48 *California Law Review* (1960).

Penfold R, Batteson A and Dickerson J, 'How to defend image rights' *Management Intellectual Property* (2015).

Rein I, *High Visibility, Third Edition: Transforming Your Personal and Professional Brand*, McGraw Hill Professional, New York, 2006.

Smith BH, *The Commercial Appropriation of Personality*, Cambridge University Press, England, 2002.

Synodinou T, 'Image Right and Copyright Law in Europe: Divergences and Convergences' University of Cyprus Law Department (2014).

Warren S and Brandeis L, 'The right to privacy' 4 *Harvard Law Review* (1890).

Williamson J, *Decoding Advertisements: Ideology and Meaning in Advertising*, Marion Boyars, London, 1984.

Walsh C, 'The justifications underlying personality rights' *Entertainment Law Review* (2013).

Internet Sources

- 'Azmul Haque: India: Face Value: Personality Rights and Celebrity Endorsements' *Mondaq*, 2 September 2003, <http://www.mondaq.com/article.asp?articleid=22487> on 6 February 2018.
- 'Victor Nzomo: Quick Thoughts on Legal Protection for Image Rights of Professional Sportspersons in Kenya' *Centre for Intellectual Property and Information Technology Law*, 10 September 2015
<http://blog.cipit.org/2015/09/10/quick-thoughts-on-legal-protection-for-image-rights-of-professional-sportspersons-in-kenya/> on 2 December 2017.
- <https://www.morton-fraser.com/knowledge-hub/image-rights-explained> on 3 January 2018.
- 'FKF rule Oliech offside in image row with EABL' *Daily Nation*, 17 April 2012
<http://www.nation.co.ke/sports/football/FKF-rule-Oliech-offside-in-image-row-with-EABL-/1102-1388582-14bx3mz/index.html> on 16 January 2018.
- <http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights> on 11 January 2018.
- 'Dennis Oliech, FKF & EABL – Get it Together People!' *SportsKenya*, 19 April 2012
<http://sportskenya.blogspot.co.ke/2012/04/dennis-oliech-fkf-eabl-get-it-together.html> on 17 January 2018.
- 'Daniel Geey: Image Rights in UK Football explained' *Sports Group*, 3 December 2015,
<http://www.danielgeey.com/image-rights-in-uk-football-explained/> on 20 December 2016.
- <https://www.lawteacher.net/free-law-essays/criminology/personality-rights.php> on 14 November 2017.
- <https://www.morton-fraser.com/knowledge-hub/image-rights-explained> on 3 January 2018.
- 'Charles Nyende: FKF rule Oliech offside in image row with EABL' *Daily Nation*, 17 April 2012
<http://www.nation.co.ke/sports/football/FKF-rule-Oliech-offside-in-image-row-with-EABL-/1102-1388582-14bx3mz/index.html> on 16 January 2018.
- <http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights> on 11 January 2018.

'FKF rule Oliech offside in image row with EABL' *Daily Nation*, 17 April 2012
<http://www.nation.co.ke/sports/football/FKF-rule-Oliech-offside-in-image-row-with-EABL-/1102-1388582-14bx3mz/index.html> on 17 January 2018.

'Dennis Oliech, FKF & EABL – Get it Together People!' *SportsKenya*, 19 April 2012
<http://sportskenya.blogspot.co.ke/2012/04/dennis-oliech-fkf-eabl-get-it-together.html> on 17 January 2018.

'Brian Moseti: Oliech, Mariga, Mugalia take EABL to court' *Futaa* 28 Feb
<http://www.futaa.com/article/18002/oliech-mariga-mugalia-take-eabl-to-court> on 2 January 2018.

'Odindo Ayieko: Auxerre's Oliech gives Kenyan players voice in image rights' *Business Daily*
30 May 2012
<https://www.businessdailyafrica.com/Life/society/Auxerres-Oliech-gives-Kenyan-players-voice-in-image-rights--/3405664-1416820-view-printVersion-46p99v/index.html> on 12 January 2018.

'Charles Nyende: Oliech threatens to dump Kenya' *Nation Media Group*, 27 March 2012
<https://www.nation.co.ke/sports/football/Oliech-threatens-to-dump-Kenya-/1102-1374818-egl576z/index.html> on 15 January 2018.

'Gilbert Wandera: FKS Seeks FIFA Help Over Oliech Image Rights Issue' *Standard Group Limited*,
18 April 2012
<https://www.standardmedia.co.ke/lifestyle/article/2000056491/fkf-seeks-fifa-help-over-oliech-image-rights-issue> on 14 January 2018.

'Victor Nzomo: Intellectual Property and Sports in Kenya: Copyright Protection of Image Rights?' *CIPIT Law Blog* 13 June 2012
<https://ipkenya.wordpress.com/2012/06/13/intellectual-property-and-sports-in-kenyacopyright-protection-of-image-rights/> on 14 January 2018.

'Brian Jibbo: EABL, FKF Should Know People...And Sports Image Rights' *Futaa* 27 March
<http://www.futaa.com/article/19884/eabl-fkf-should-know-peopleand-sports-image-rights> on 16 January 2018.

‘Dennis Odera: Julius Yego vs EABL (The Battle of YEGOLD)’ LinkedIn 1 September 2015 <https://www.linkedin.com/pulse/julius-yego-vs-eabl-battle-yegold-dennis-odera> on 16 January 2018.

‘Professor Pierre Mohren: Intellectual Property Rights in Developing Countries’ Unu-Merit 10 December 2013 <https://www.merit.unu.edu/intellectual-property-rights-in-developing-countries/> on 17 January 2018.

‘Anil Bakari: Ezekiel Kemboi should patent his victory jig’ Standard Group Limited 25 August 2013 <https://www.standardmedia.co.ke/lifestyle/article/2000091852/ezekiel-kemboi-should-patent-his-victory-jig> on 17 January 2018.

‘Copyright in Choreographic Works’ Report prepared for the Sub-Committee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, <https://www.copyright.gov/history/studies/study28> on 18 January 2018.

‘Victor Nzomo: Deep Heat in Image Rights Suit from Kenyan Athlete: Joseph Kibunja v. Rohto Mentholatum & Harleys’ CIPIT Law Blog, 5 January 2017 <http://blog.cipit.org/2017/01/03/deep-heat-in-image-rights-suit-from-kenyan-athlete-joseph-kibunja-v-rohto-mentholatum-harleys/> on 20 January 2018.

Legislation, Acts of Parliament

1. Constitution of Kenya (2010)
2. Copyright Act of 2001
3. Sports Registrar Regulations, 2016
4. Code Civil (France)
5. Trade Practices Act (Commonwealth of Nations)

Institutional Authors

1. Kenya Copyright Board, Copyright News Issue 18, 2015.
2. Marc H. Greenberg, “Right of Publicity and the Intersection of Copyright and Trademark Law” The 6th Annual Intellectual Property Law Institute, Pennsylvania, 29 March 2012.