

**Should The Intellectual Property Laws Be Amended To Provide For A Distinct Legal
Framework on Image Rights In Kenya?**

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By
Fidelma Mumbua
071963

Prepared under the supervision of
Dr. Isaac Rutenberg

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DECLARATION

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

Signed:

Date:

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

Signed:

Dr. Isaac Rutenberg.

Table of Contents

DECLARATION	i
DEDICATION	iv
ACKNOWLEDGMENTS	v
LIST OF ABBREVIATIONS	vi
LIST OF STATUTES	vii
LIST OF CASES	viii
ABSTRACT	ix
1. CHAPTER 1: INTRODUCTION	10
1.1. Background Information	10
1.2. Statement of the Problem	12
1.3. Justification of the Study	12
1.4. Statement of Objectives	13
1.5. Hypotheses	14
1.6. Research Questions	14
1.7. Literature Review	14
1.8. Theoretical Framework	16
1.9. Assumptions	17
1.10. Research Design	17
1.11. Limitations	18
1.12. Chapter Breakdown	18
1.12.1. Chapter 1: Introduction	18
1.12.2. Chapter 2: Understanding the Concept of Image Rights	18
1.12.3. Chapter 3: A Comparative Analysis of the Image Rights Legal System Present in the USA and UK	19
1.12.4. Chapter 4: A Justification for Image Rights in Kenya's Intellectual Property Laws	19
1.12.5. Chapter 5: Conclusion and Recommendations	19
1.12.6. References/ Appendices	19
CHAPTER 2: UNDERSTANDING THE CONCEPT OF IMAGE RIGHTS	20
2.1. A Look into the Hegelian Personhood Theory in trying to understand the Context of Property in Image Rights	20
2.2. Proprietary Interest or Privacy Interest	23
CHAPTER 3: A COMPARATIVE ANALYSIS OF THE IMAGE RIGHTS LEGAL SYSTEM PRESENT IN THE USA AND THE UK	27
3.1. Image Rights in the US	27
3.1.1 The Origin of the Right of Publicity in the US	28

3.1.2 The Right of Publicity Vs the First Amendment	31
3.1.3 Right of Publicity under the Lanham Act	32
3.2 Image Rights in the UK	34
3.2.1 Copyright Law Protection of a Person’s Image in the UK	35
3.2.2 Trademark Law Protection of a Person’s Image in the UK	36
3.2.3 Tort of Passing off in the UK.....	37
CHAPTER 4: A JUSTIFICATION FOR IMAGE RIGHTS IN KENYA’S INTELLECTUAL PROPERTY LAWS	39
4.1 The Situation of Image Rights in Kenya.....	39
4.2 The Right of Publicity v Trademark Law	41
4.3 What Kenya Can Learn From the US and the UK.....	43
4.3.1 Lessons from the US.....	43
4.3.2 Lessons from the UK	44
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.....	46
5.1 Findings of the Study.....	46
<i>5.1.1 Chapter one Findings</i>	46
<i>5.1.2 Chapter Two Findings</i>	46
<i>5.1.3 Chapter Three Findings</i>	47
<i>5.1.4 Chapter Four Findings</i>	47
5.2 Recommendations	48
<i>5.2.1 Kenya should Adopt UK’s Approach to Image Rights Protection</i>	48
<i>5.2.2 Need for Judicial Recognition of Image Rights</i>	49
<i>5.2.3 Need to apply the Law of Passing off</i>	49
<i>5.2.4 Need for an Image Rights Clause in Contracts</i>	49
<i>5.2.5 Need for an Arbitral Tribunal</i>	50
5.3 Conclusion	50
BIBLIOGRAPHY	51
<i>Journals</i>	51
<i>Internet Sources</i>	52
<i>Legislation, Acts of Parliament</i>	54
<i>Institutional Authors</i>	55
<i>Self-Published Articles</i>	55

DEDICATION

To God for his endless Grace and Mercy especially as I was working on this dissertation and my family and friends for their endless support and words of encouragement during the tough times.

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LIST OF ABBREVIATIONS

EABL – East Africa Breweries Limited

KECOBO – Kenya Copyright Board

UK – United Kingdom

US – United States

LIST OF STATUTES

The Constitution of Kenya

The Copyright Act of Kenya

The Trademark Act of 1946 (The Lanham Act)

The First Amendment to the United States Constitution

The Fourteenth Amendment to the United States Constitution

The Copyright, Designs and Patents Act of 1988 (CDPA)

The Trademark Act of 1994 (UK)

The Trademark Act of Kenya

LIST OF CASES

Carson v 'Here's Johnny' Portable Toilets, Inc.

Comedy III Productions, Inc. v Gary Saderup, Inc.

Facenda v N.F.L Films, Inc.

Fenty v Arcadia

Grutter v Lombard

Haelan Laboratories Inc. v Topps Chewing Gum Inc., No.158 Docket 22564

Hoffman v Capital Cities/ABC, Inc.

Irvine v Talksport Ltd.

Kitosiosio Ole Kutuk v Safaricom

Martin Luther King, Jr. v American Heritage Products Inc.

Re: Elvis Presley Trademarks, Inc.

Schuyler v Curtis

Suzie Wokabi v Microsoft

Tarzan Trademark Case

Tealaso Lepalat v the German Embassy

White v Samsung Electronics America, Inc.

Zacchini v Scripps-Howard Broadcasting Co.

ABSTRACT

The laws of Kenya do not sufficiently cater for Image Rights and neither do the courts acknowledge it as a common law right. Disputes resulting from dishonest business practices such as the commercial appropriation of a person's image lack an appropriate forum in Kenya's formal justice. Image rights is an essential intellectual property right that shields a person from any unauthorized commercial use by third parties of his image in advertising, endorsing or merchandising their goods and services. This research paper sought to explore the scope of image rights including the theory of property that advocates for its justification, the proprietary interest it protects, examine its application in other jurisdictions where it is well established and lastly provide recommendations on its identification and implementation in Kenya.

The study was carried out through the literature review of various legal scholars well versed with image rights and intellectual property law as a whole and took a qualitative analysis. It found that image rights also known as the Right of Publicity evolved from the right of privacy, a right that was first talked about in 1890 which was meant to protect the privacy and intimate details of an individual from the prying eyes of the press. Over the years however it was discovered that celebrities have an economic value in their name and likeness and an appropriation on the same resulted in an economic injury instead of mental distress and for this reason, the US courts appreciated the economic interest present in one's image and introduced the right of publicity.

Chapter one of the study shall introduce image rights and discuss the current situation in Kenya outlining the objectives of the study and the research questions, chapter two explores the theoretical framework while chapter three conducts an examination of image rights frameworks in the US and the UK. Chapter four shall apply the findings of the comparative analysis identifying certain lessons that Kenya can borrow and lastly chapter five shall provide recommendations to resolve the gap in the Kenyan legal system.

1. CHAPTER 1: INTRODUCTION

1.1. Background Information

Image rights, sometimes referred to as rights of publicity, are the expression of a personality in the public domain; they have been interpreted to mean the inherent right of every human being to control the commercial value of their image, persona and identity¹. These rights are linked to a person's own image and physical appearance encompassing, but not limited to, their voice, likeness, mannerisms, face, silhouette and name². They give a person the ability to decide when, how and by whom their recognizable features can be captured, reproduced, published, distributed and under what circumstances³. These rights are mainly associated with sportsmen and women, celebrities and persons in the public domain and apply to both the natural and juristic person. The question of image rights arises where there is commercial appropriation of a person's identity, that is, an unauthorized or unconsented use of a person's image, name or likeness for commercial purposes such as advertising or promoting products or services by another.

In the Kenyan legal system there is no distinct legal framework providing for image rights. As a consequence persons who fall victim to commercial appropriation rely on other laws like the Constitution of Kenya, statutes on intellectual property, common law, tort law and consumer protection laws to seek causes of action and protection of these rights⁴. In *Haelan Laboratories Inc. v Topps Chewing Gum Inc.* the Court of Appeals for the Second Circuit rejected the defendant's argument that a man has no legal interest in the publication of his picture but has a right of privacy which is a personal and non-assignable right to protect his feelings from being hurt as a result of the publication. The court, however, was of the opinion

¹ Nzomo V: '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-to-image-rights-protection/> on 9 February 2016

² <http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights> on 9 February 2016

³ Pina Carolina, 'The Role of IP for Athletes and Image Rights' *WIPO/REG/IP/SPORT/SIN/14*, 25 November 2014 http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=291665 on 9 February 2016

⁴ Nzomo V: 'Quick Thoughts on Legal Protection for Image Rights of Professional Sportspersons in Kenya' *CIPIT Law 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 9 February 2016

that a right exists in the publicity value of a man's photograph and this right gives him the authority to grant to someone else an exclusive privilege to publish his picture.⁵

The first image rights legal issue raised by a Kenyan sportsman occurred in 2012 when AJ Auxerre striker Dennis Oliech demanded compensation for violation of his image. This was after a photograph showing Oliech, Parma midfielder McDonald Mariga and Sofapaka FC player Bob Mugalia, after the Harambee Stars scored their winning goal against Angola in a qualifier match for 2012 Africa Cup of Nations, was used by East Africa Breweries Ltd (EABL) in advertisements on several road-side billboards⁶. EABL however declined liability, arguing that they had a sponsorship deal with the Harambee Stars Management Board and a clause in their agreement gave the company the right to use the images of the members of the Harambee Stars team for promotional and advertising services.

Currently there are several pending cases in the Kenyan courts regarding the question of image rights. One of these is the *Kitosiosio Ole Kutuk v. Safaricom* case, where the plaintiff sued Safaricom claiming that the company had, without his authorisation or consent, used a photograph of him on their GSM Sim Cards which were being sold country wide. The plaintiff's lawyers reported to the presiding judge, Justice David Onyancha, that there was no contractual agreement between the plaintiff and the company nor was any compensation paid to him⁷. In *Tealaso Lepalat v. the German Embassy*, the plaintiff sued the German Embassy for using her photograph to promote the Lake Turkana Festival in her village without her consent; she alleged that her husband physically assaulted and divorced her for failing to consult him before allowing her photograph to be used for the promotion and therefore sought compensation for the physical and emotional damages she suffered. The Attorney General Githu Muigai, an interested party in the case, said that the court had no jurisdiction to hear the matter because the German Embassy enjoys immunity under the Privileges and

⁵ *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.*, No. 158, Docket 22564, United States Court of Appeals Second Circuit.

⁶ Nzomo V: '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-kenya-copyright-protection-of-image-rights/> on 10 February 2016

⁷ Nzomo V: 'Protection of Image Rights in Kenya: New Court Cases Against Microsoft, Safaricom and German Embassy' IP Kenya, 10 December 2014
<https://ipkenya.wordpress.com/2014/12/10/protection-of-image-rights-in-kenya-new-court-cases-against-microsoft-safaricom-and-german-embassy/> on 10 February 2016

Immunity Act and the German Government had to waive its immunity, for the Embassy to be sued in a Kenyan court⁸.

According to Kenyan law, authors (creators of artistic works) and/or persons who commission authors, enjoy certain intellectual property rights whereas individual persons, who are the subject of these artistic works, lack express defined rights to the works in which they appear. For example, the author of any artistic work, which falls under the scope of 'artistic works' provided for in the Copyright Act of Kenya, is duly protected by the Act through a copyright⁹ and the exclusive right to control the reproduction, translation, adaptation, distribution, communication and broadcasting of his literary or artistic work(s) in Kenya.¹⁰ The act also gives a scope of what infringement¹¹ of the author's copyright entails, the remedies¹² that can be sort and the duration¹³ of the copyright protection; it also goes ahead to state the circumstances where infringement cannot be claimed by the author.¹⁴ However no similar or corresponding rights exist for the subject of the artistic work.

1.2. Statement of the Problem

It can be seen from the few examples given above that there is a gap in the law which fails to address the legal rights of the subjects of artistic works, in this case image rights. There is no legal framework defining what image rights are, who owns image rights, when they are infringed upon or violated and what remedies are available to the person who claims infringement.

1.3. Justification of the Study

⁸ Wasura B: 'Attorney-General Shields German Embassy from Suit', Business Daily Africa, 17 February 2016

<http://www.businessdailyafrica.com/A-G-shields-German-embassy-from-suit/-/539546/2549394/-/v3v1xaz/-/index.html> on 17 February 2016

⁹ Section 22(1), *Copyright Act*, 2001

¹⁰ Section 26(1), *Copyright Act*, 2001

¹¹ Section 35(1), *Copyright Act*, 2001

¹² Section 35(4), *Copyright Act*, 2001

¹³ Section 23(2), *Copyright Act*, 2001

¹⁴ Section 26(1)(a-j), *Copyright Act*, 2001

This paper seeks to show the importance of the codification of image rights into the Kenyan legal system because they are associated with an individual's persona and identity, traits which are characteristic to the nature and reality of being a human person. The Constitution of Kenya provides that, 'Every human person has inherent dignity and the right to have that dignity respected and protected'¹⁵. It further provides that the state shall support, promote and protect the intellectual property rights of the people of Kenya¹⁶. On the question of the inherent nature of dignity, this study will adopt from Immanuel Kant, the idea that dignity should be approached as a dimension of the individual autonomy of the human person; treating people with dignity is to treat them as independent individuals who are able to choose their destiny and make their own choices.¹⁷ Relating this idea to 'image rights' an individual should have a say and the ability to decide when, where, how and by whom his/her image will be captured, reproduced, published and distributed especially where the image is to be used for commercial purposes. This study however, will largely focus on the idea of image rights viewed from the perspective of having proprietary interests rather than privacy interests.

1.4. Statement of Objectives

The main objective of this paper is to conduct a research on image rights as a property right under intellectual property law. The paper will also examine whether this right is best approached from a Privacy law point of view or Property law as a form of a property right. Finally with the help of theoretical frameworks and jurisprudence from other legal systems, with well-established precedent on image rights as a form of intellectual property, provide recommendations that can be used to fill the gap in the intellectual laws in Kenya.

¹⁵ Article 28, Constitution of Kenya (2010)

¹⁶ Article 40(5), Constitution of Kenya (2010)

¹⁷ McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' 19 *The European Journal of International Law* (2008), 660.

1.5. Hypotheses

This study puts forward the hypotheses that there is a gap in the intellectual property laws of Kenya, where image rights, which are essential to the human person in protecting the publicity value of his persona, are not codified nor legally recognised as a right by the Kenyan Courts. The redress of this situation will contribute to the development of intellectual property laws in Kenya which will further provide a distinct legal framework that Kenyan courts can rely on in settling cases on infringement of image rights and afford protection to the people who fall victim to commercial appropriation.

1.6. Research Questions

The following questions will be used to pursue the aforementioned objectives and to verify or disprove the hypotheses:

1. What is the current legal position of image rights in Kenya?
2. What are the possibilities for the recognition of image rights in the present statutory legal system on intellectual property in Kenya?
3. What are the consequences of the fact that there is no legal framework in Kenya to define and protect image rights? Should the current intellectual property laws be amended to provide for image rights? If so, what should be the objectives of such a provision and what might that it entail?
4. What will be the impact on society were a legal framework on image rights to be enacted?

1.7. Literature Review

Russell Clampitt by conducting a case study on *Carson v Here's Johnny Portable Toilets, Inc.*, expounds on the evolution of the scope of the right of publicity in the US jurisdiction. The United States District Court for the Eastern District of Michigan held that the right of publicity only extends to a 'name' or 'likeness' of a person.¹⁸ On appeal, the Sixth Circuit found the trial court's view on the right of publicity as too narrow stating that where a celebrity's identity is appropriated there is an invasion of the right of publicity whether his

¹⁸ Russell Clampitt, 'The Right of Publicity' *LOYOLA Entertainment Law Journal* (1985), 150.

name or likeness is used or not.¹⁹ Carson's achievements, court noted, had a value and were protected by the right of publicity. Relying on more case law to show the aspects of image rights, Russell shows that even the use of a celebrity's property (for example his car extended to a photograph)²⁰, silhouette²¹ or nickname without their authorisation amounts to violation of their right of publicity.

Melville Nimmer writes that the doctrine of the right of privacy as written on by Louis Brandeis and Samuel Warren is not enough to meet the demands of the nineteenth century where celebrities do not seek the type of privacy Brandeis and Warren advocated for.²² He further writes that these well-known personalities do not wish to hide behind the covers of privacy and have realised that their names, likeness and photographs have a monetary value which cannot be legally protected under the privacy doctrine or any other traditional legal theory.²³ Therefore the use of the right of privacy as a means of controlling the appropriation of their identity is not enough because by the fact of being celebrities they have waived their right of privacy through the extent of their profession.²⁴

In the United Kingdom (UK), Tatiana writes, the protection granted to image rights is piecemeal since it is based on a broad interpretation of tort law (passing-off) and the absence of an effective legal framework for protecting image rights is a failure on its legal system.²⁵ She further adds that just like copyright which is also an intangible asset, image rights have a patrimonial and extra-patrimonial interest and copyright law can serve as a model for its legal creation.²⁶ Tatiana brings forth the argument on the contrast between the privacy and proprietary interests of image rights where she states that this contrast acts as a barrier towards the official recognition of an independent image right which encompasses both the commercial and dignity aspects of an individual's identity.²⁷ She expounds on this stating that in Europe instead of adopting the US model on the right of publicity in recognizing image

¹⁹ Russell Clappitt, 'The Right of Publicity' *LOYOLA Entertainment Law Journal* (1985), 152.

²⁰ Russell Clappitt, 'The Right of Publicity' *LOYOLA Entertainment Law Journal* (1985), 153.

²¹ Russell Clappitt, 'The Right of Publicity' *LOYOLA Entertainment Law Journal* (1985), 154.

²² Nimmer B. Melville, 'The Right of Publicity' Duke University School of Law (1954), 203.

²³ Nimmer B. Melville, 'The Right of Publicity' Duke University School of Law (1954), 204.

²⁴ Nimmer B. Melville, 'The Right of Publicity' Duke University School of Law (1954), 204.

²⁵ Synodinou Tatiana, 'Image Right and Copyright Law in Europe: Divergences and Convergences' *Law Department, University of Cyprus* (2014), 181.

²⁶ Synodinou Tatiana, 'Image Right and Copyright Law in Europe: Divergences and Convergences' *Law Department, University of Cyprus* (2014), 181.

²⁷ Synodinou Tatiana, 'Image Right and Copyright Law in Europe: Divergences and Convergences' *Law Department, University of Cyprus* (2014), 183.

rights as an exclusive property right, the suggestion is that a tort of appropriation of personality should be acknowledged instead.²⁸

In South Africa, there is also no express legal recognition of image rights and neither is there a specific legislature affording protection to the celebrities who fall victim of appropriation.²⁹ In 2005 the South African Supreme Court of Appeal established a clear legal principle regarding the protection of image rights, where prior to that, these rights were recognized and protected under the common law right to privacy as well as the common law remedy for defamation.³⁰ The case was *Grutter v Lombard*, where the court held that the identity of a person is that unique feature which identifies him from the another and it manifests itself in different forms such a his personality, character, mannerisms, silhouette, likeness and so forth.³¹ The court further added that the right of privacy forms part of the concept of image rights and a consequence thereof the protection of a person's identity against appropriation cannot be separated from this right.³²

1.8. Theoretical Framework

This paper will apply the Personality development theory as derived from Friedrich Hegel's theory of property, in a bid to provide an understanding of image rights and show the importance of their incorporation in the Kenyan legal system as a form of intellectual property. Hegel viewed property as an extension of personality and the ownership of this property expanded the natural sphere of freedom of an individual beyond his body making it part of the material world.³³ Freedom in Hegel's context is seen as the ability of a person to form ideas and relate them to his particular needs and desires.³⁴ Some modern theorists have

²⁸ Synodinou Tatiana, 'Image Right and Copyright Law in Europe: Divergences and Convergences' *Law Department*, University of Cyprus (2014), 184.

²⁹ Sikwane Rachel and Gardner Zaid, 'A Brief Introduction to Image Rights in South Africa' pg. 1, www.ens.co.za on 19 March 2016.

³⁰ Sikwane Rachel and Gardner Zaid, 'A Brief Introduction to Image Rights in South Africa' pg. 2, www.ens.co.za on 19 March 2016.

³¹ Sikwane Rachel and Gardner Zaid, 'A Brief Introduction to Image Rights in South Africa' pg. 2, www.ens.co.za on 19 March 2016.

³² Sikwane Rachel and Gardner Zaid, 'A Brief Introduction to Image Rights in South Africa' pg. 2, www.ens.co.za on 19 March 2016.

³³ Priya Kanu, 'Intellectual Property and Hegelian Justification' *NUJS Law Review* (2008), 360.

³⁴ Papaioannou Theodoros, 'Can Intellectual Property Rights be Morally Justified? The Case of Human Gene Patents' *DIME Working Paper No 8* (2006), 8.

adopted and extended Hegel's concept of property and argue that there is a correlation between property rights and human rights addressing on liberty, identity and privacy.³⁵

This theory provides that intellectual property rights are a form of moral rights which are necessary for the development of an individual's personality.³⁶ It also shields intellectual property from utilitarianism, a theory that acknowledges property only to the extent that it maximizes utility or wealth, by recognising it as private property³⁷ which translates the freedom of a person and his personality into the external objective.³⁸ Therefore this theory will form the basis in the codification of image rights where it will address specific matters such as the scope, interests, ownership, infringements, violations and remedies of the rights.

1.9. Assumptions

This paper makes the following assumptions that due to the lack of a codified image rights system;

- Courts do not have a legal foundation to back up their judgment when cases of violation of image rights are brought before them.
- There is little or no precedent in the Kenyan courts as regards to violation or infringement of image rights thus uncertainty of the law.
- Image rights is a new, maybe even vague, subject in Kenya and as a result courts may be sceptical to recognise it as a form of intellectual property rights.

1.10. Research Design

This study will adopt a qualitative research approach and will settle on the empirical research design which will be used in testing this paper's hypothesis. Under this research design the study shall investigate on the historical development of image rights around the world especially in the United States of America, Europe (UK) and South Africa. The choice of this

³⁵ Priya Kanu, 'Intellectual Property and Hegelian Justification' *NUJS Law Review* (2008), 360.

³⁶ Papaioannou Theodoros, 'Can Intellectual Property Rights be Morally Justified? The Case of Human Gene Patents' *DIME Working Paper No 8* (2006), 8.

³⁷ Priya Kanu, 'Intellectual Property and Hegelian Justification' *NUJS Law Review* (2008), 362.

³⁸ Papaioannou Theodoros, 'Can Intellectual Property Rights be Morally Justified? The Case of Human Gene Patents' *DIME Working Paper No 8* (2006), 8.

research design is informed by the nature of the subject matter. Image rights is a new and vague legal concept in Kenya and therefore to understand what should constitute a codified legal framework, it will entail conducting a research on the legal and judicial approach in countries where it is well recognized.

1.11. Limitations

The major limitation will be finding information especially within Kenya. This is because there is less literature, in the Kenyan concept, written on image rights as well as no precedents on the same. There is only one known codified image rights instrument in the world which is ‘The Image Rights (Bailiwick of Guernsey) Ordinance, 2012’; a limitation exists as to whether borrowing such codification into the Kenyan jurisdiction would cause a negative effect on the freedom of expression and the public domain.³⁹

1.12. Chapter Breakdown

1.12.1. Chapter 1: Introduction

In the dissertation this chapter shall introduce the background information of the research problem which will include giving a brief introduction to image and expounding on their current status in Kenya. This section also states the objectives of the study which is exploring the gap in the legal system where there is no codification of image rights taking into account the effects of such a gap as well as providing the research questions of the study.

1.12.2. Chapter 2: Understanding the Concept of Image Rights

The personality development theory as developed from Hegel’s theory of property is the theory that shall be used in this research; it holds that intellectual property rights are a form of moral rights necessary for the development of an individual. The research methodology used shall be primarily qualitative.

³⁹ Nzomo V: ‘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-to-image-rights-protection/> on 19 March 2016.

1.12.3. Chapter 3: A Comparative Analysis of the Image Rights Legal System Present in the USA and UK

The research shall conduct a comparative analysis focusing mainly on the States that have well-developed legislative and judicial mechanisms in addressing violations of image rights. The research shall focus on the US and the UK jurisdictions to provide a basis from which Kenyan courts can borrow from.

1.12.4. Chapter 4: A Justification for Image Rights in Kenya's Intellectual Property Laws

This chapter shall apply the findings of the Comparative analysis and guided by the research questions, discuss the lessons Kenya can learn from the two jurisdictions.

1.12.5. Chapter 5: Conclusion and Recommendations

This is the concluding chapter of the study and it shall provide recommendations to the problems identified in the research questions and how they can be effectively applied into the legal system.

1.12.6. References/ Appendices

This section shall list down the references and appendices showing the sources of the research study ranging from journals, blog articles, case law, books and so forth.

CHAPTER 2: UNDERSTANDING THE CONCEPT OF IMAGE RIGHTS

This chapter analyses existing literature on image rights/right of publicity setting a background for the analysis of an effective legal system on image rights in Kenya. First, this chapter will discuss the relevant legal theory that gives a justification for image rights as an intellectual property right. Secondly, this study appreciates that there are various legal arguments for image rights under both private law and Property law thus it will offer a discussion on both scenarios however, it acknowledges the argument for image rights having a proprietary interest.

2.1. A Look into the Hegelian Personhood Theory in trying to understand the Context of Property in Image Rights

According to Hegel, property is the essence of personality and this he based on his perception that an individual possesses an internal and external existence; the former being their will and the latter their sphere of freedom.⁴⁰ Hegel argued that when one extends their sphere of freedom by putting their will into external objects and making it their property, they attain self-actualization which results to the identity of a free person.⁴¹ This argument thus introduces the Personhood theory which aims at showing the relationship between property and personality.

Hegel explains that the mind, is an individual who knows his individuality as an absolute free will and who possesses an inward sense of freedom (which is just an abstract). This freedom becomes fulfilled and particularized when exercised on an external thing⁴² and additionally forms both the substance and goal of rights. The individual exercises the external sphere of his freedom through possession of the external thing or object and from this bodily action of possession, his will is immediately recognized as existing.⁴³

⁴⁰ Priya Kanu, 'Intellectual Property and Hegelian Justification' *NUJS Law Review* (2008), 361.

⁴¹ Priya Kanu, 'Intellectual Property and Hegelian Justification' *NUJS Law Review* (2008), 361.

⁴² G.W.F Hegel, 'Philosophy of Mind' Translated by William Wallace (2001), para 488.

⁴³ G.W.F Hegel, 'Philosophy of Mind' Translated by William Wallace (2001), para 491.

When a person places his will on a thing, Hegel argues, it becomes his property and the person has the arbitrary power to withdraw his will from it and transfer the thing to another person, who in turn exercises his will over the thing making it his property⁴⁴; thus the aspect of contract is introduced. According to Hegel, a contract exists when two persons exercising their will, enter into an agreement where there is an actual surrender of the property or a part of it and the other person accepts it and this contract becomes binding regardless of performance by either person.⁴⁵

The Hegelian personhood theory acts as the best property theory to argue for an intellectual property right since it focuses more on the personality of the individual claiming a proprietary interest over an intellectual property; Hegel and Kant similarly argue that an essential element for the satisfaction of human needs is the availability of private property rights.⁴⁶ It is argued that private property rights are created by the law as a sign of respect to the assumption that there exists bonds between humans and objects that are essential for human flourishing.⁴⁷

Over the years, different philosophers have argued for the recognition of private property rights when they are seen as an essential requirement to promote human flourishing through fostering fundamental human interests.⁴⁸ Applying this notion to intellectual property, first requires identifying the fundamental human interests that need to be promoted; Legal scholar Carol Rose emphasizes that property rights ease the self-realization of one as a social being and engaging in commerce assists in shaping their social environment.⁴⁹ Jeremy Waldron, advocating for privacy, claims by owning private property rights, a person gets to enjoy their own space and intimacy by themselves or with the company of others secluded from the prying eyes or interferences of the general world.⁵⁰

⁴⁴ G.W.F Hegel, 'Philosophy of Mind' Translated by William Wallace (2001), para 492.

⁴⁵ G.W.F Hegel, 'Philosophy of Mind' Translated by William Wallace (2001), para 493.

⁴⁶ Fisher William, 'Theories of Intellectual Property' *New Essays in the Legal and Political Theory of Property*, Cambridge University Press (2001), 4.

⁴⁷ The Berkman Klein Centre for Internet & Society, 'William Fisher, CopyrightX: Lecture 2.3, Fairness and Personality Theories: Personality', YouTube, 16 January 2015 - < <https://www.youtube.com/watch?v=hsAcrcveg6k> > on 7 December 2016.

⁴⁸ Fisher William, 'Theories of Intellectual Property', *New Essays in the Legal and Political Theory of Property*, Cambridge University Press (2001), 20.

⁴⁹ The Berkman Klein Centre for Internet & Society, 'William Fisher, CopyrightX: Lecture 2.3, Fairness and Personality Theories: Personality', YouTube, 16 January 2015 - < <https://www.youtube.com/watch?v=hsAcrcveg6k> > on 7 December 2016.

⁵⁰ Fisher William, 'Theories of Intellectual Property', *New Essays in the Legal and Political Theory of Property*, Cambridge University Press (2001), 20.

Authors like Margaret Radin and Justin Hughes delve further into the most influential variant, as first explored by Hegel and Kant, that private property rights are pivotal to self-realization as an individual where the ability to own and control objects enables a person to assert their will onto it thus being recognised as free agents.⁵¹ Lastly, touching on identity as an essential need for private property rights, Radin contends, these rights promote selfhood which depends on the ability of a person to predict their future life plan; destruction of creations based off of one's identity threatens the author's reputation and majorly his sense of self.⁵² In contrast, the latter need better suits authors of unique artistic creations as compared to a person's image, however the variant may still be sought when one seeks to argue for the sense of self and identity as a means of protecting their image. Therefore privacy, self-realization as an individual and identity are the fundamental interests that can form a basis in arguing for private property rights under the personhood theory.

Having established an existence of property rights in intellectual products, the notion of moral rights is introduced. Moral rights are a set of legal entitlements that are afforded to authors and artists of intellectual/creative works recognizing and protecting their interests in such works even after transferring the copyright to other persons or parting with the physical work(s).⁵³ However with the main focus of this paper being image rights, it shall not dwell on moral rights for they relate to the authors of creative/literary works rather than the subject(s) thereof.

In developing guidelines that can be used to shape a proper intellectual-property system, Justin Hughes, borrowing from Hegel's *Philosophy of Right* asserts, a person's persona deserves an ample amount of legal protection because it forms an essential part of their personality.⁵⁴ This view is echoed by Martin Holmes who propounds that a person's image, which acts as the object of protection under the right of publicity, is the most personal intellectual product in all the forms of intellectual property law and as a result the right of

⁵¹ The Berkman Klein Centre for Internet & Society, 'William Fisher, CopyrightX: Lecture 2.3, Fairness and Personality Theories: Personality', YouTube, 16 January 2015 - < <https://www.youtube.com/watch?v=hsAcrveg6k> > on 7 December 2016.

⁵² The Berkman Klein Centre for Internet & Society, 'William Fisher, CopyrightX: Lecture 2.3, Fairness and Personality Theories: Personality', YouTube, 16 January 2015 - < <https://www.youtube.com/watch?v=hsAcrveg6k> > on 7 December 2016.

⁵³ Hansmann Henry and Santilli Marina, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' 26 No. 1 *the Journal of Legal Studies* (1997), 95.

⁵⁴ Fisher William, 'Theories of Intellectual Property' *New Essays in the Legal and Political Theory of Property*, Cambridge University Press (2001), 4.

publicity should grant powerful legal protection to the people who claim it.⁵⁵ Rothman, also associating one's image to their personality, describes the right of publicity as a property right in one's personality⁵⁶ and more precisely introduces a shift from 'publicity-holders' to 'identity-holders' in her argument for the inalienability of the right of publicity.

The right of publicity is a development under the intellectual property laws that recognises the economic value of a celebrity's image and enables him hold a right in his identity. Celebrities rely on their names and likeness to propel their careers, gain more recognition and status in the media and to advertise or market any projects, movies, charity or shows they are involved in. Consequently, the right to publicity is essential for it assigns a property right to their image and likeness allowing them to monetize their identity and assert a right over it.⁵⁷

The next part of this chapter shall look into the question of what interest is a person's image best protected under an image right; is it the proprietary interest or the privacy interest? This paper puts major focus on celebrities because their image forms an important part of their personality as well as their personal and public life.

2.2. Proprietary Interest or Privacy Interest

The right of publicity is a descendant from the right of privacy, the latter legal entitlement being first introduced in 1890 by Samuel Warren and Louis Brandeis in their article *The Right to Privacy*. These legal scholars believed that the intellectual and emotional life comprising thoughts, emotions and sensations of the human person demanded legal protection just as his physical person.⁵⁸ In arguing their course, they relied on the right 'to be let alone', a legal entitlement they trusted existed under common law, to address the trend that existed at the time which involved the press publishing private facts and private

⁵⁵ Holmes L. Martin and Gervais Daniel, 'Fame, Property & Identity: The Purpose and Scope of the Right of Publicity' 25 *Fordham Intellectual Property, Media and Entertainment Law Journal* (2015), 184.

⁵⁶ Rothman E Jennifer, 'The Inalienable Right of Publicity' 101 *the Georgetown Law Journal* (2012), 187.

⁵⁷ Holmes L. Martin and Gervais Daniel, 'Fame, Property & Identity: The Purpose and Scope of the Right of Publicity' 25 *Fordham Intellectual Property, Media and Entertainment Law Journal* (2015), 183.

⁵⁸ Warren D. Samuel and Brandeis D. Louis, 'The Right to Privacy' 4 *Harvard Law Review* (1890), 195.

photographs of people without their knowledge⁵⁹. This they maintained, was an abuse of the person causing emotional harm which according to them was a compensable injury.⁶⁰

Solitude and privacy, claimed Warren and Brandeis, are essential to the individual for they enable him take a retreat from the general world which is complex and intense as a result of the advancing civilization; a breach to one's privacy can subject them to anguish and mental suffering of a greater degree than an a mere bodily injury.⁶¹ Nimmer, conversely states that this perception of privacy would not be applicable in the present time especially with the tremendous growth in the advertising, motion picture, television and radio fields.⁶² In addition, celebrities by the mere fact of their status do not wish to hide underneath the privacy blanket rather they are more concerned with the wide exposure, popularity and media coverage they receive which in turn boosts their career and status.

What is more, in addressing the issue of commercial appropriation, Keitel propounds, 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.⁶³ Under the right of privacy which is held by private citizens, the general rule for misappropriation cases is that the harm suffered is more personal than economical and this harm cannot be assigned to another person nor descended to the plaintiff's estate.⁶⁴ In a similar manner, Warren and Brandeis asserted that the invasion into the private life of an individual results in an emotional harm which forms a ground for a privacy claim in court and such invasion can be expanded by courts to cover the commercial appropriation of a private person's identity.⁶⁵ This right however, terminates upon the death of the private person and cannot be claimed by his heirs or surviving relatives as was decided in *Schuyler v Curtis*; the court also added that the surviving heirs of a deceased person are not entitled to any court relief based on the grounds of invasion of the deceased's

⁵⁹ McKenna P. Mark, 'The Right of Publicity and Autonomous Self-Definition' 67 *University of Pittsburgh Law Review* (2005), 227.

⁶⁰ McKenna P. Mark, 'The Right of Publicity and Autonomous Self-Definition' 67 *University of Pittsburgh Law Review* (2005), 228.

⁶¹ Warren D. Samuel and Brandeis D. Louis, 'The Right to Privacy' 4 *Harvard Law Review* (1890), 196.

⁶² Nimmer B. Melville, 'The Right of Publicity' 19 *Law and Contemporary Problems* (1954), 203.

⁶³ Keitel David, 'Right of Publicity' 4 *Loyola of Los Angeles Entertainment Law Review* (1984), 233.

⁶⁴ Keitel David, 'Right of Publicity' 4 *Loyola of Los Angeles Entertainment Law Review* (1984), 233.

⁶⁵ McKenna P. Mark, 'The Right of Publicity and Autonomous Self-Definition' 67 *University of Pittsburgh Law Review* (2005), 228.

privacy which further intrudes in their personal feelings concerning the memory of their deceased.⁶⁶

On the other hand, the right of publicity, as described by Professor Thomas McCarthy, is the inherent right every individual has over the commercial use of his image and likeness and which concurrently empowers him to exercise economic control over its exploitation.⁶⁷ Moreover McCarthy further adds that this right is a totally different and separate legal right from the right of privacy and is conceptually recognized as a property right making it transferable and descendible with the latter feature enabling this right to be sought even after the death.⁶⁸ Harm suffered in the scenario of a publicity claim is measured by the commercial injury to the economic value of the plaintiff's identity and in determining damages payable, the court considers the market value of the plaintiff's image, the profits generated by the infringing party and the damage suffered to the licensing opportunities of the plaintiff's image.⁶⁹ For this reason, the right of publicity is often claimed by or on behalf of celebrities, persons who by virtue of their status have an economic value on their human persona.

Public perception is presumed to be the main test in determining who qualifies as a celebrity and who doesn't; the traditional categories outlining who a celebrity is includes actors, artists, sportsmen, authors, politicians, musicians, dancers, models, television personalities and persons who have captured the public's attention⁷⁰ nonetheless, the celebrity status is not just limited to these exact categories. In *Martin Luther King, Jr. v American Heritage Products Inc.*, the Georgia Supreme Court held that when interpreting who a celebrity is, it should be viewed from a wider perspective to include other groups of persons not included in the traditional categories.⁷¹ For instance, the court when comparing King's status as a public figure well known for his civil rights activism and prominence in religion, to a movie actress, maintained that both persons should be afforded equal legal protection to their image.⁷² The court further held that the right of publicity gives more protection to the proprietary interest,

⁶⁶ <http://law.justia.com/cases/federal/appellate-courts/F2/194/6/460610/> on 8 December 2016.

⁶⁷ Ahmad Tabrez and Swain R. Satya, 'Celebrity Rights: Protection under IP Laws' 16 *Journal of Intellectual Property Rights* (2010), 9.

⁶⁸ <http://markoesler.com/legal/right-of-publicity/> on 8 December 2016.

⁶⁹ <http://markoesler.com/legal/right-of-publicity/> on 8 December 2016.

⁷⁰ Ahmad Tabrez and Swain R. Satya, 'Celebrity Rights: Protection under IP Laws' 16 *Journal of Intellectual Property Rights* (2010), 7.

⁷¹ Ahmad Tabrez and Swain R. Satya, 'Celebrity Rights: Protection under IP Laws' 16 *Journal of Intellectual Property Rights* (2010), 7.

⁷² Keitel David, 'Right of Publicity' 4 *Loyola of Los Angeles Entertainment Law Review* (1984), 231.

existing in the exclusive use of a celebrity's image and likeness which forms an essential part of his identity, as compared to the mental interest.⁷³

The fame associated with celebrities is very attractive to producers and manufacturers of products who may rely on this fame to market and advertise their products. Consequently, celebrities cannot invoke the right of privacy to shield themselves from commercial appropriation because by virtue of their fame, they waive their right of privacy by intentionally situating their life in the public realm.⁷⁴ This waiver may be in whole or in part but this does not prevent the celebrity from claiming it for another purpose; the waiver allows for the invasion of privacy but only to the extent at which the celebrity lets his life and personal affairs be publicised.⁷⁵ Therefore the celebrity still maintains the right of privacy on his non-professional life and on his personal affairs that he wishes to remain private.⁷⁶

⁷³ Keitel David, 'Right of Publicity' 4 *Loyola of Los Angeles Entertainment Law Review* (1984), 230.

⁷⁴ Nimmer B. Melville, 'The Right of Publicity' 19 *Law and Contemporary Problems* (1954), 204.

⁷⁵ <http://law.justia.com/cases/federal/appellate-courts/F2/194/6/460610/> on 8 December 2016.

⁷⁶ Nimmer B. Melville, 'The Right of Publicity' 19 *Law and Contemporary Problems* (1954), 205.

CHAPTER 3: A COMPARATIVE ANALYSIS OF THE IMAGE RIGHTS LEGAL SYSTEM PRESENT IN THE USA AND THE UK

This chapter shall investigate other jurisdictions that legally recognize and protect image rights under their intellectual property laws and have an established image rights system that courts can rely on when publicity claims arise. The focus of this comparative study shall be the US and UK.

3.1. Image Rights in the US

In the United States image rights are legally known as the right of publicity; a right that an individual has over the commercial value of his name and likeness. The US has a strong image rights system that recognises the right as an exclusive property right and affords it protection under various laws including the federal trademark law (The Lanham Act), federal unfair competition law, dilution law, state trademark and unfair competition law and with the most powerful legal protection being the state right of publicity law.⁷⁷ What the latter law provides is that, the right of publicity varies from state to state because it is a state-law based right therefore every state has the authority to determine the boundaries of its recognition.⁷⁸ The enforceability of this right is not dependent on it specifically being a statutory right because, it is also recognized as an exclusive right under common law as much as in statutory law⁷⁹; currently 38 states recognize the right under common law while 22 recognize it under statute law.⁸⁰

⁷⁷ Leaffer Marshall, 'The Right of Publicity: A comparative Analysis' Articles by Maurer Faculty, 2007, 1357.

⁷⁸ <http://rightofpublicity.com/statutes> on 14 December 2016.

⁷⁹ Crocker P. David, 'Rights of Publicity in the US and UK' Blog: Developments in Law, Technology and Business, 25 June 2013 -<<http://www.davidcrocker.com/2013/06/25/the-quick-and-the-dead-rights-of-publicity-in-the-us-and-uk/>> on 14 December 2016.

⁸⁰ <http://rightofpublicity.com/statutes> on 14 December 2016.

Following the above stated laws, celebrities in the US are provided with two options when protecting their image from commercial exploitation; the first is protection under the Lanham Act and the second is protection under the state right of publicity laws.⁸¹ Publicity claims brought before courts tend to have different purposes as a result the aforementioned laws each have differing elements that have to be proved by the plaintiff for a publicity claim to succeed in court.⁸² In exploring the image rights system in the US, this part shall discuss the origin of the right of publicity then address the conflict between this right and the First Amendment and lastly the protection afforded to this right under the Lanham Act.

3.1.1 The Origin of the Right of Publicity in the US

The right of publicity can be traced back to 1953 when it was first mentioned by Judge Jerome Frank in the case *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.*; the judge described it as an economic right that gave an individual a right in the publicity value of his photograph, granting him the exclusive privilege of publishing his picture and additionally such grant could validly be made in gross.⁸³ Based on the facts of the case the issue between the conflicting parties was more of an unfair competition claim rather than a publicity claim and therefore in granting the plaintiff relief of damages suffered as a consequence of the infringement, the court recognised an economic right in one's personality which they called the right of publicity.⁸⁴ They characterized it as a de facto property right⁸⁵ in one's personality, independent of the right of privacy⁸⁶ and whose limitations are not similar to those of privacy claims.

⁸¹ Schlegelmilch Jonathon, 'Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America's Lead' 1 *Gonzaga Law Review Online* (2016), 104.

⁸² Schlegelmilch Jonathon, 'Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America's Lead' 1 *Gonzaga Law Review Online* (2016), 104.

⁸³ Leaffer Marshall, 'The Right of Publicity: A comparative Analysis' Articles by Maurer Faculty, 2007, 1360.

⁸⁴ Bergmann Susanne, 'Publicity Rights in the United States and Germany: A Comparative Analysis' 19 *Loyola of Los Angeles Entertainment Law Review* (1999), 481.

⁸⁵ Leaffer Marshall, 'The Right of Publicity: A comparative Analysis' Articles by Maurer Faculty, 2007, 1360.

⁸⁶ Bergmann Susanne, 'Publicity Rights in the United States and Germany: A Comparative Analysis' 19 *Loyola of Los Angeles Entertainment Law Review* (1999), 481.

Prior to the legal recognition of the right of publicity, the right of privacy was the legal protection afforded to any person, including celebrities and/or public figures, who had their name or likeness commercially appropriated.⁸⁷ Such claims were brought in court as tortious wrongs since the right of privacy was not viewed as a property right.⁸⁸ As a consequence of being recognised as a property right in the *Haelan case*, the right of publicity developed into a well-recognised intellectual property right, assignable between celebrities and third parties especially in contracts. Such contracts included those between celebrities and business brands which were based on the former's image and these contracts enabled these brands to enforce the right of publicity against their competitors in the event that they commercially appropriated the celebrity's image.⁸⁹

In *Zacchini v Scripps-Howard Broadcasting Co.*, a reporter of the respondent recorded in entirety the plaintiff's human cannon ball performance which was later broadcasted for the entire fifteen seconds in its evening news program without seeking Zacchini's consent.⁹⁰ The petitioner brought an action against the defendant alleging unlawful appropriation of his 'professional property'.⁹¹ The US Supreme Court acknowledged that by protecting the petitioner's (or a performer's) right of publicity, it provides an incentive that motivates him to invest in more performances that will be of interest to the public.⁹² The respondent, the court opined, was not immunized from liability by the First and Fourteenth Amendment when they broadcast the petitioner's entire performance without seeking his authorization; moreover, added the court, the constitution doesn't immunize press and media who televise a copyrighted work, from liability to the copyright owner.⁹³ The court finally concluded that, entertainment news is important news and as such the public should not be deprived of the

⁸⁷ Hylton J. Gordon, 'Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v Topps Chewing Gum' 2001, -<
<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1156&context=facpub>; > on 13 December 2016.

⁸⁸ Hylton J. Gordon, 'Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v Topps Chewing Gum' 2001, -<
<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1156&context=facpub>; > on 13 December 2016.

⁸⁹ Hylton J. Gordon, 'Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v Topps Chewing Gum' 2001, -<
<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1156&context=facpub>; > on 13 December 2016.

⁹⁰ <https://supreme.justia.com/cases/federal/us/433/562/case.html> on 13 December 2016.

⁹¹ Baird G. Douglas, 'Human Cannonballs and the First Amendment: Zacchini v Scripps-Howard Broadcasting Co.' 30 *Stanford Law Review* (1978), 1185.

⁹² <https://supreme.justia.com/cases/federal/us/433/562/case.html> on 13 December 2016.

⁹³ <https://supreme.justia.com/cases/federal/us/433/562/case.html> on 13 December 2016.

enjoyment of the petitioner's performance however the commercial and economic stake in the latter's performance should be recognized and well compensated.⁹⁴

From the inception of the right of publicity, various legal scholars and courts were sceptic about its application; for instance William Prosser asserted that the right of privacy could be categorized into four distinct torts which could be accepted by courts under a privacy invasion claim. Two of these torts which are 'publicity that places the plaintiff in a false light in the public eye' and 'appropriation of plaintiff's name or likeness for commercial purposes', relate to publicity claims under the right of publicity and Prosser argued that the courts would accept these torts as an invasion of the right of privacy.⁹⁵

Celebrities are used as symbols of individual aspirations, especially by people who look up to them, and cultural values.⁹⁶ Emphasizing on the importance of cultural values and popular culture, Michael Madow and Rosemary Coombe are sceptic about the right of publicity stating that this right, promotes a *de facto* control mechanism on the meaning of popular culture resulting in its (popular culture) top-down management thus limiting on the development of alternative and oppositional cultural practice.⁹⁷ Madow's perception of the right of publicity is an example of the deconstructionist arguments on intellectual property protection which contend that recognizing some forms of intellectual property rights result in the suppression of personal expression by limiting access to important cultural symbols.⁹⁸ Thus legal scholars subscribing to these arguments propose for the limitation of intellectual property so as to open up more cultural space.⁹⁹

⁹⁴ <https://supreme.justia.com/cases/federal/us/433/562/case.html> on 13 December 2016.

⁹⁵ Koo Andrew, 'Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard' 4 *Buffalo Intellectual Property Law Journal* (2006), 8.

⁹⁶ Franke Gloria, 'The Right of Publicity Vs. The First Amendment: Will One Test Ever Capture the Starring Role?' 79 *Southern California Law Review* (2006), 945.

⁹⁷ Hughes Justin, 'Recoding Intellectual Property and Overlooked Audience Interests' 77 *Texas Law Review* (1999), 930.

⁹⁸ Hughes Justin, 'Recoding Intellectual Property and Overlooked Audience Interests' 77 *Texas Law Review* (1999), 930.

⁹⁹ Hughes Justin, 'Recoding Intellectual Property and Overlooked Audience Interests' 77 *Texas Law Review* (1999), 930.

3.1.2 The Right of Publicity Vs the First Amendment

The *Zacchini case* prompted the national recognition of the right of publicity since it was the only publicity case that reached the US Supreme Court.¹⁰⁰ This case further expounded the controversy between the right of publicity and the First Amendment which enshrines and protects the freedom of speech and of the press; ‘congress shall make no lawabridging the freedom of speech or of the press...’¹⁰¹ The Fourteenth Amendment which provides that, ‘no state law shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States’,¹⁰² also poses a legal strain between the right of publicity and the First Amendment especially if it is read and applied together with the latter, it immunizes any act where a person’s image is used for purposes of news reporting, commentary, entertainment and works of fiction that are incidental to commercial uses.¹⁰³ Since the right of publicity is more a state law right than a federal law right, defendants can base their claim under the First and Fourteenth Amendment arguing that their act, of using the plaintiff’s image, is privileged by the fact that they are reporting on incidents that are of a legitimate public interest.¹⁰⁴

One of the values promoted by the First Amendment is the “preservation of the uninhibited marketplace of ideas”¹⁰⁵ and the advancement of individual development and the right of self-expression.¹⁰⁶ Consequently this makes it a limitation to the right of publicity resulting in tension between the two legal claims; various tests have therefore been set and applied by courts in an attempt to strike a balance between these two claims.¹⁰⁷ An example is the ‘actual malice’ test which was applied in *Hoffman v Capital Cities/ABC, Inc.*; the court held

¹⁰⁰ Koo Andrew, ‘Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard’ 4 *Buffalo Intellectual Property Law Journal* (2006), 9.

¹⁰¹ https://www.law.cornell.edu/constitution/first_amendment on 13 December 2016.

¹⁰² <https://www.law.cornell.edu/constitution/amendmentxiv> on 13 December 2016.

¹⁰³ Koo Andrew, ‘Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard’ 4 *Buffalo Intellectual Property Law Journal* (2006), 4.

¹⁰⁴ Koo Andrew, ‘Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard’ 4 *Buffalo Intellectual Property Law Journal* (2006), 9.

¹⁰⁵ Koehler L. Jennifer, ‘Comedy III Production, Inc. v. Gary Saderup, Inc.: Finding a Balance between the Right of Publicity and the First Amendment Right of Freedom of Speech’ 18 *Santa Clara High Technology Law Journal* (2001), 165.

¹⁰⁶ Leaffer Marshall, ‘The Right of Publicity: A comparative Analysis’ Articles by Maurer Faculty, 2007, 1363.

¹⁰⁷ Koo Andrew, ‘Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard’ 4 *Buffalo Intellectual Property Law Journal* (2006), 11.

that, ‘any commercial aspects that are ‘inextricably entwined’ with expressive elements and as such cannot be separate of the fully protected whole, fall under the protection of the First Amendment.¹⁰⁸ Accordingly the plaintiff, court added, must prove the defendant’s intention to create a false impression of his identity, in the minds of the users of the expressive work(s).¹⁰⁹

In *Comedy III Productions, Inc. v Gary Saderup, Inc.*, the Supreme Court of California recognized a different test that looked at “whether the expressive work adds significant creative elements transforming it into something more than a mere celebrity’s likeness or imitation”.¹¹⁰ This test, referred to as ‘transformative test’, borrowed from copyright law’s fair use doctrine and the court’s main investigation was whether the expressive work reflected a different character and purpose thus conveying a new meaning and message from that communicated in the plaintiff’s identity.¹¹¹ Amidst all the efforts in trying to reconcile the dispute between the right of publicity and the First Amendment, there has been no judicial consensus.¹¹²

3.1.3 Right of Publicity under the Lanham Act

The Lanham Act also referred to as the Trademark Act of 1946 is a US Federal Statute that was enacted by congress in 1946; it establishes a national trademark registration system and provides protection to owners of registered trademarks against use of similar marks resulting in consumer confusion or dilution by blurring or by tarnishment.¹¹³ The primary purpose of the Lanham Act is to protect consumers from misinformation and trademark owners from false association with or endorsement of particular products or services.¹¹⁴ There is no federal

¹⁰⁸ Koo Andrew, ‘Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard’ 4 *Buffalo Intellectual Property Law Journal* (2006), 12.

¹⁰⁹ Koo Andrew, ‘Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard’ 4 *Buffalo Intellectual Property Law Journal* (2006), 12.

¹¹⁰ Koehler L. Jennifer, ‘Comedy III Production, Inc. v. Gary Saderup, Inc.: Finding a Balance between the Right of Publicity and the First Amendment Right of Freedom of Speech’ 18 *Santa Clara High Technology Law Journal* (2001), 162.

¹¹¹ Koo Andrew, ‘Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard’ 4 *Buffalo Intellectual Property Law Journal* (2006), 13.

¹¹² Leaffer Marshall, ‘The Right of Publicity: A comparative Analysis’ *Articles by Maurer Faculty*, 2007, 1364.

¹¹³ https://www.law.cornell.edu/wex/lanham_act on 13 December 2016.

¹¹⁴ Schlegelmilch Jonathon, ‘Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America’s Lead’ 1 *Gonzaga Law Review Online* (2016), 104.

recognition of the right of publicity in the US¹¹⁵ and the Lanham Act does not directly provide for it either, however, celebrities can rely on this Act to protect unauthorized use of the name and likeness especially in cases of false endorsement. Section 43(a) of the Act provides that;

‘Any person who, on or in connection with any goods or services...uses in commerce any word, term, name, symbol or device or any false designation of origin, false misleading description of fact, or false or misleading representation of fact which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person...shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.’¹¹⁶

Since the Lanham’s Act main goal is to protect consumers from deception, a celebrity who invokes the aforementioned claim on false endorsement, has to prove to the court that the consumer’s initial perception is that the celebrity has an endorsement or sponsorship agreement with the defendant to promote his products and services.¹¹⁷ Despite the interests being protected by the Act being different from those of the right of publicity, celebrities are adamant on using section 43(a) of the Lanham Act, especially in federal courts, in claims for false endorsement.¹¹⁸

Moreover, the scope and protection of the right of publicity under the Lanham Act has been broadened by courts to accommodate celebrities who intend to protect their image under the Act.¹¹⁹ For instance in *Facenda v N.F.L. Films, Inc.*, the Pennsylvania court, citing *White v. Samsung Electronics America, Inc.*, determined that section 43(a) of the Lanham Act is applicable in cases of false celebrity endorsements; it stated that, “a celebrity is entitled to vindicate property rights in his or her identity under this section of the Lanham Act, because

¹¹⁵ Schlegelmilch Jonathon, ‘Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America’s Lead’ 1 *Gonzaga Law Review Online* (2016), 105.

¹¹⁶ Section 43 (a) (1) (A), *Trademark Act of 1946* (Lanham Act) (2013).

¹¹⁷ Solomon A Barbara, ‘Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity’ 94 *The Trademark Reporter* (2004), 1206.

¹¹⁸ Solomon A Barbara, ‘Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity’ 94 *The Trademark Reporter* (2004), 1206.

¹¹⁹ Schlegelmilch Jonathon, ‘Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America’s Lead’ 1 *Gonzaga Law Review Online* (2016), 105.

he has an economic interest in his identity akin to that of a traditional trademark holder”.¹²⁰ The court went on further to add an explanation by the Court of Appeal for the Sixth Circuit which held,

“in order to prevail on a false advertising claim under section 43(a), a celebrity must show that use of his or her name is likely to cause confusion among consumers as to the “affiliation, connection, or association” between the celebrity and the defendant’s goods or services or as to the celebrity’s participation in the “origin, sponsorship, or approval” of the defendant’s goods or services. See 15 U.S.C. s 1125(a) (1) (A).”¹²¹

3.2 Image Rights in the UK

There is no worldwide recognition of the right of publicity and neither is there a globally set standard for its protection.¹²² In contrast to the United States, there is no statutory or common law recognition of the right of publicity, or a distinct right on a person’s name and likeness that protects him from unauthorized commercial use of his image in the UK.¹²³ As pointed out by Justice Birss in *Fenty v Arcadia*,

“It is important to state at the outset that this case is not concerned with so called ‘image rights’. Whatever may be the position elsewhere in the world and however much various celebrities wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image (*Douglas v Hello*) [2007] UK HL21”.¹²⁴

This absence, however, of distinct legal recognition of image rights does not imply that there is no set legal routes that celebrities can take in protecting their persona from commercial

¹²⁰ *Facenda v N.F.L. Films, Inc.* (2007), The District Court for the Eastern District of Pennsylvania in the United States.

¹²¹ *Facenda v N.F.L. Films, Inc.* (2007), The District Court for the Eastern District of Pennsylvania in the United States.

¹²² Leaffer Marshall, ‘The Right of Publicity: A comparative Analysis’ *Articles by Maurer Faculty*, 2007, 1367.

¹²³ Stallard Hayley, ‘The Right of Publicity in the United Kingdom’ 18 *Loyola of Los Angeles Entertainment Law Review* (1998), 565.

¹²⁴ *Robyn Rihanna Fenty and 2 others v Arcadia Group Brands Limited (T/A Topshop) and another* (2013), The United Kingdom High Court of Justice Chancery Division Intellectual Property.

appropriation; copyright law, trademark law and the tort law are some of the laws that celebrities in the UK assert their publicity claims.¹²⁵

3.2.1 Copyright Law Protection of a Person's Image in the UK

UK copyright law does not afford protection to a person's name, likeness or image¹²⁶ however it provides minimal protection to a celebrity's image in specific circumstances. The Copyright, Designs and Patents Act of 1988 (CDPA) provides that,

“A person who for private and domestic purposes commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have copies of the work issued to the public, the work exhibited or shown in public or the work communicated to the public; and a person who does or authorises the doing of any of those acts infringes that right.”¹²⁷

Relying on the above mentioned provision, a celebrity who has a copyright on an expressive work reflecting his image, has the legal capacity to stop any unauthorized commercial use of said work especially if a “substantial portion of the work” has been used.¹²⁸ However, this copyright protection, is only afforded to the expressive work (photograph, drawing, painting, e.tc.) not the subject of the work, this being the celebrity.¹²⁹ In *Re: Elvis Presley Trademarks, Inc.*, the court echoed this notion when they stated that,

“... Similarly, *Elvis Presley* did not own his appearance. For example, during his life he could not prevent a fan from having a tattoo put on his chest or a drawing on his car which looked like the musician simply on the basis that it was his appearance which was depicted. For the same reason under our law, Enterprises does not own the likeness of Elvis Presley. No doubt it can prevent the reproduction of the drawings and photographs of him in which it owns copyright, but it has no right to prevent the reproduction or exploitation of any of the myriad of photographs, including press

¹²⁵ <http://thestudentlawyer.com/2014/07/23/celebrities-video-games-uk-stars-enjoy-right-publicity/> on 16 December 2016.

¹²⁶ Stallard Hayley, ‘The Right of Publicity in the United Kingdom’ 18 *Loyola of Los Angeles Entertainment Law Review* (1998), 567.

¹²⁷ Section 85 (1) (a) (b) (c), *Copyright, Designs and Patents Act* (1988).

¹²⁸ Lapster J. Alain, ‘How the Other Half Lives (Revisited): Twenty Years since *Midler v Ford* A Global Perspective on the Right of Publicity’ 15 *Texas Intellectual Property Law Journal* (2007), 279.

¹²⁹ Lapster J. Alain, ‘How the Other Half Lives (Revisited): Twenty Years since *Midler v Ford* A Global Perspective on the Right of Publicity’ 15 *Texas Intellectual Property Law Journal* (2007), 279.

photographs and drawings in which it does not own the copyright simply by reason of the fact that they contain or depict a likeness of Elvis Presley.”¹³⁰

For this reason, only a limited number of unauthorized commercial uses of a celebrity’s persona can be brought under copyright claim in the UK courts; this protection only extends in the scenario where the celebrity authorizes the creation of an expressive work depicting his image, thus owning copyright and have this work is copied in whole or in substantial part.¹³¹ Lastly a celebrity can protect their autographs and biography under copyright law.¹³²

3.2.2 Trademark Law Protection of a Person’s Image in the UK

Trademark law in the UK, just as copyright law affords minimal protection to a person’s image and likeness. The Trademark Act of 1994 defines a trademark as,

‘...any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.’¹³³

In spite of the aforementioned provision recognising personal names as a sign qualifying for trademark protection, in reality courts are reluctant to grant trademark protection to celebrity’s names especially those who they perceive to have garnered a higher level of fame.¹³⁴ Courts assert that by virtue of their fame, the names of such famous celebrities become less distinctive thus passing into the common language¹³⁵; in the *Tarzan Trade Mark Case*, the English Court of Appeal refused the application to trademark the name ‘Tarzan’ stating that, “the more famous a personality becomes and as his or her name or nickname

¹³⁰ Schlegelmilch Jonathon, ‘Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America’s Lead’ 1 *Gonzaga Law Review Online* (2016), 111-112.

¹³¹ Schlegelmilch Jonathon, ‘Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America’s Lead’ 1 *Gonzaga Law Review Online* (2016), 112.

¹³² Stallard Hayley, ‘The Right of Publicity in the United Kingdom’ 18 *Loyola of Los Angeles Entertainment Law Review* (1998), 568.

¹³³ Section 1(1), *Trade Marks Act* (1994).

¹³⁴ Schlegelmilch Jonathon, ‘Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America’s Lead’ 1 *Gonzaga Law Review Online* (2016), 113.

¹³⁵ Stallard Hayley, ‘The Right of Publicity in the United Kingdom’ 18 *Loyola of Los Angeles Entertainment Law Review* (1998), 569.

passes into common usage, the less likely it is that he or she will be entitled to claim an exclusive right to the name.”¹³⁶

3.2.3 Tort of Passing off in the UK

Since the UK courts are still hesitant to recognise image rights in an individual’s identity and persona, people who fall victim to commercial appropriation are left to seek other legal avenues to seek relief for the pecuniary damages they suffer from such exploitation. An example of such legal avenues is Tort law specifically the tort of passing off. This tort fits as an appropriate tort in the absence of the image rights, since the UK law recognizes and protects character merchandising against unfair competition for both real and fictional characters and it does this under a legal action of passing off.¹³⁷ This comes as a contrast to the United States which has recognised the right of publicity as an intellectual property right protecting both the character¹³⁸, name, likeness, mannerisms and other indicia of identifying a person; a right that celebrities can depend on to protect their image from false and unauthorized merchandising.

In the renowned case of *Irvine v Talksport Ltd.*, the court acknowledged the common fact that celebrities have an interest in the exploitation of their names and likeness through product endorsement.¹³⁹ Judge Hugh Laddie, went on to list two interrelated facts that a plaintiff had to prove for a false endorsement claim, under the tort of passing off, to succeed, “first, that at the time of the acts complained of he had a significant reputation or goodwill. Second, that the actions of the defendant gave rise to a false message which would be understood by a not insignificant section of his market that his goods have been endorsed, recommended or are approved of by the claimant.”¹⁴⁰ The U.S. law of passing off, in comparison to the UK’s, examines the likelihood of confusion based on the consumers’ confusion as to the existence

¹³⁶ Stallard Hayley, ‘The Right of Publicity in the United Kingdom’ 18 *Loyola of Los Angeles Entertainment Law Review* (1998), 569.

¹³⁷ Synodinou Tatiana, ‘Image Right and Copyright Law in Europe: Divergences and Convergences’ *Law Department*, University of Cyprus (2014), 188.

¹³⁸ Synodinou Tatiana, ‘Image Right and Copyright Law in Europe: Divergences and Convergences’ *Law Department*, University of Cyprus (2014), 188.

¹³⁹ Leaffer Marshall, ‘The Right of Publicity: A comparative Analysis’ *Articles by Maurer Faculty*, 2007, 1368.

¹⁴⁰ *Irvine and another v Talksport Ltd.* (2002), The United Kingdom Supreme Court of Judicature Chancery Division.

of a sponsorship agreement or the affiliation or connection ¹⁴¹of the plaintiff to the defendants products or services.

¹⁴¹ Leaffer Marshall, 'The Right of Publicity: A comparative Analysis' Articles by Maurer Faculty, 2007, 1368.

CHAPTER 4: A JUSTIFICATION FOR IMAGE RIGHTS IN KENYA'S INTELLECTUAL PROPERTY LAWS

This chapter provides an argument for the recognition of image rights in the Kenyan scenario. Borrowing from the findings of the comparative analysis, this chapter shall discuss the lessons Kenya can learn from the two jurisdictions and best apply it according to its suitability.

4.1 The Situation of Image Rights in Kenya

Currently in Kenya, there is no statutory recognition of image rights and almost no case precedent that directly examines or addresses on the same. Yet, in the event of unauthorized commercial use of a person's image, the victims of such activities rely on the integration of rights and causes of actions under various laws including the Constitution, defamation, consumer protection and IP laws to protect their image and seek damages.¹⁴²

One of the known cases on commercial appropriation is *Suzie Wokabi v Microsoft*; the plaintiff brought a suit against the defendant after finding out they were using a photo showing "her hands and son Maceo's foot" on their Billboards without her authorization.¹⁴³ Suzie said she had been approached by Muthoni Njomba, a renowned Kenyan make-up artist, to use her and her son as models for her artwork where pictures of her hands and son's foot were taken by a professional photographer.¹⁴⁴ She later found out from her husband that these photos were used for advertisement under Microsoft billboard captioned 'Art Deeper with Windows 8'; Njomba dismissed the claims that she had sold the photos and contended that "the photographer had the right to whatever he wished with the photos."¹⁴⁵ The plaintiff sought compensation for being used as models and considering her fame, reputation and recognisability, an accompanying statement from the Microsoft Company that her

¹⁴² Nzomo V: '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-to-image-rights-protection/> on 5 January 2017.

¹⁴³ Mukami Victoria: 'Kenyan Woman Sues Microsoft for Using her Photos', *TechMoran*, 28 July 2014 <http://techmoran.com/kenyan-woman-may-sue-microsoft-using-photos/> on 5 January 2017.

¹⁴⁴ Mutegi Lilian: 'Business Woman to Sue Microsoft over Photos' *CIO East Africa*, 27 July 2014 <http://www.cio.co.ke/news/top-stories/business-woman-to-sue-microsoft-over-photos> on 5 January 2017.

¹⁴⁵ Mukami Victoria: 'Kenyan Woman Sues Microsoft for Using her Photos', *TechMoran*, 28 July 2014 <http://techmoran.com/kenyan-woman-may-sue-microsoft-using-photos/> on 5 January 2017.

constitutional right to property was violated.¹⁴⁶ However, little is known on how far this case went as there is no legal report or follow up on whether the matter was finalized in court.

A recent violation of image rights is between Kenyan based rapper Wangechi and Tecno Mobile Company whereupon the rapper stated that in June 2016 the China based mobile company was using her image, in an AD campaign to advertise their latest release Tecno Camon C9, in all their social media platforms an action, she claimed, that came out as her endorsing the product.¹⁴⁷ She took to social media posting, “Tecno Kenya...did not seek my approval or consent for it neither did they pay for the use of my image and likeness... As an artist our image and likeness is our source of livelihood it is our bread and butter. It is not okay to misuse and take away from us when we work so hard to build ourselves.¹⁴⁸” Notwithstanding the stated facts, it is not known whether the rapper will file a civil suit against the Mobile Company claiming economic injury and seeking damages on the same.

This and many other unsettled and unreported image rights cases, showcase a situation in Kenya where due to the absence of a distinct legal framework providing for these rights, celebrities often fall victim to commercial appropriation and lack an effective and suitable legal redress to base their publicity claims. This study opines that based on the current situation, there is a less likelihood of image rights being recognized especially under statute law since there is no available evidence showing such discussions taking place in parliament. However in 2015, the Kenya Copyright Board (KECOBO) in its newsletter issue 18, addressed the question of image rights in Kenya putting forth an argument in its favor claiming that specific legal protection should be afforded specifically to celebrity’s image.¹⁴⁹

¹⁴⁶ Mutegi Lilian: ‘Business Woman to Sue Microsoft over Photos’ *CIO East Africa*, 27 July 2014 <http://www.cio.co.ke/news/top-stories/business-woman-to-sue-microsoft-over-photos> on 5 January 2017.

¹⁴⁷ Sakina Mildred: ‘Who Owns the Rights to a Photo? The Case of Wangechi vs Tecno’, *HAPA KENYA*, 2 September 2016 <http://www.hapakenya.com/2016/09/02/who-owns-the-rights-to-a-photo-the-case-of-wangechi-vs-tecno/> on 5 January 2017.

¹⁴⁸ Kimani Wanjiru: ‘Rapper Wangechi versus Tecno Mobile’ *Varcity*, 5 September 2016 <https://www.varcity.co.ke/rapper-wangechi-versus-tecno-mobile/> on 5 January 2017.

¹⁴⁹ Nzomo V: ‘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-to-image-rights-protection/> on 5 January 2017.

The Executive Director Dr. Ouma asserts that copyright law in Kenya offers minimal protection to a person's image; by commissioning a photographer to take his/her picture, the subject can claim a moral right on the photo thus controlling the use of their image by third parties.¹⁵⁰ Additionally he points out Contract law as another means of protecting one's image rights whereby a 'personality rights clause' is included in a contract setting out the terms in which third parties may use a person's image.¹⁵¹ This clause can specify on relevant matters such as the product or service being advertised or endorsed, the consideration, duration and the platforms upon which the photo shall be used. Lastly, Dr. Ouma prescribes the Image Rights Ordinance 2012 of the Bailiwick Guernsey as an example that Kenya should follow since this legislation provides for registration of personalities and images.¹⁵² This however is up for discussion on its applicability in the Kenyan state.

4.2 The Right of Publicity v Trademark Law

The right of publicity and trademark law are not identical forms of intellectual property law, rather they are analogous but legally separate rights from each other. The right of publicity can be placed on the same platform as unfair competition since they both emerge as a cause of action when a dishonest practice contrary to honest practices is performed in the event of commercial activities¹⁵³. The right of publicity is claimed if it happens that there is an unauthorized and improper commercialisation of a person's image for trade purposes¹⁵⁴ while unfair competition in intellectual property exists if there is a failure to correct published misinformation regarding a product offered on the market thus giving a misrepresentation on its quality.¹⁵⁵

¹⁵⁰ Kenya Copyright Board, Copyright News Issue 18, 2015, 3-4.

¹⁵¹ Kenya Copyright Board, Copyright News Issue 18, 2015, 3-4.

¹⁵² Kenya Copyright Board, Copyright News Issue 18, 2015, 3-4.

¹⁵³ http://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/Protection_against_unfair_competition on 8 December 2016.

¹⁵⁴ Greenberg Marc and Lovitz L. Michael, 'Right of Publicity and the Intersection of Copyright and Trademark Law', 2012 -

<<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1485&context=pubs>> on 8 December 2016.

¹⁵⁵ http://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/Protection_against_unfair_competition on 8 December 2016.

A trademark is a distinctive mark that distinguishes certain products and services from other products and services offered in the market; it's an intellectual property right that protects a businesses' commercial image and brand and also represents the goodwill of the business as accumulated from its conception. One of the basic function of a trademark is that it enables consumers to identify one seller's products from those of others, signify the singularity of the producer of the products and indicate an equal level of quality in all the products bearing the trademark.¹⁵⁶

By protecting the goodwill of a business, trademarks promote a reduction in transaction and search costs and incentivize quality of products through accountability.¹⁵⁷ Accordingly one of the similarities between trademark law and the right of publicity is that they protect the brand/image of the business and the celebrity consecutively and can be asserted in cases of misappropriation. A trademark can be asserted when there is a possibility of tarnishment of the plaintiff's goodwill due to the association of his products with the infringing party's product of inferior quality.¹⁵⁸ Trademark infringement exists when a product of similar use as the plaintiffs, bears a similar mark as the plaintiff's product and as a result there exists a likelihood of confusion which might result in the infringing part unfairly benefitting from the plaintiff's brand.

The right of publicity in a similar fashion seeks to protect the economic value present in a celebrity's persona because just as a business's goodwill, this value is developed by investing time, effort, money¹⁵⁹ and building skill to maintain one's image. The right of publicity can further be invoked when a celebrity's image is used, without his authorized consent, to

¹⁵⁶ Holmes L. Martin and Gervais Daniel, 'Fame, Property & Identity: The Purpose and Scope of the Right of Publicity' 25 *Fordham Intellectual Property, Media and Entertainment Law Journal* (2015), 201.

¹⁵⁷ Holmes L. Martin and Gervais Daniel, 'Fame, Property & Identity: The Purpose and Scope of the Right of Publicity' 25 *Fordham Intellectual Property, Media and Entertainment Law Journal* (2015), 199.

¹⁵⁸ Greenberg Marc and Lovitz L. Michael, 'Right of Publicity and the Intersection of Copyright and Trademark Law', 2012 - <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1485&context=pubs> on 8 December 2016.

¹⁵⁹ Greenberg Marc and Lovitz L. Michael, 'Right of Publicity and the Intersection of Copyright and Trademark Law', 2012 - <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1485&context=pubs> on 8 December 2016.

promote a product thereafter causing the consumers to suspect a sponsorship deal exists and fostering a false association.¹⁶⁰

4.3 What Kenya Can Learn From the US and the UK

It is an appreciated fact that a celebrity is a person who has attained a level of fame, reputation and recognition in his surrounding environment thus amassing a lot of media attention.¹⁶¹ Alaine Lapter points out that the Right of Publicity protects the market value of a celebrity's image and their economic incentive; failing to protect their images results in them losing the incentive to surpass in their selected field thus affecting the economy as a whole.¹⁶² For this reason the legal protection of the economic value in the image of a celebrity in the US is just as important as that of a Kenyan celebrity. Nevertheless, in implementing such protection, consideration should be given to the various factors that set jurisdictions apart from each other and how best this protection will benefit the celebrity, the freedom of speech and expression and public interest.

4.3.1 Lessons from the US

To begin with if Kenya were to recognise image rights as property rights falling under intellectual property law, it would likely borrow from the United States which has one of the best established frameworks on image rights under both statute law and common law. For instance the State of California recognises this right both statutorily and as a common law right. Section 3344 of the California Civil Code states that,

‘ any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchase of products, merchandise, goods and

¹⁶⁰ Greenberg Marc and Lovitz L. Michael, ‘Right of Publicity and the Intersection of Copyright and Trademark Law’, 2012 - <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1485&context=pubs> on 8 December 2016.

¹⁶¹ Korotkin Lindsay, ‘Finding Reality in the Right of Publicity’, 34 *Cardozo Law Review* (2013), 292.

¹⁶² Schlegelmilch Jonathon, ‘Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America’s Lead’ 1 *Gonzaga Law Review Online* (2016), 103.

services, without such persons prior consent...shall be liable for any damages sustained by the person or persons injured as a result thereof.’¹⁶³

Kenya following by this example may choose to legislate an entire statute specifically providing for image rights and include provisions stipulating, the elements of a person’s image that can be protected by an image right and what cannot, what constitutes as infringement, what type of redress exists for a victim of this rights’ violation and lastly the test courts can rely on in determining the economic injury suffered and in calculating damages payable thereof.

Unlike the US courts which give a broader interpretation of the Lanham Act to encompass publicity claims under Trademark infringement, a limitation exists for the Kenyan courts because the Trademark Act of Kenya gives a narrow description of what can be trademarked in Kenya limiting the infringement of trademarks to that description. It states that, ‘A trademark shall be registered in respect of particular goods or services, which shall be classified in...accordance with the International Classification of Goods and Services...’¹⁶⁴

4.3.2 Lessons from the UK

On the other hand, the UK just like Kenya, does not recognise a distinct right in a person’s image protecting them from commercial appropriation. One of the presumed reasons for this reluctance is that if such a right were to be recognised it would act as a threat to the freedom of expression.¹⁶⁵ However, relying on other UK laws a person can protect their name and likeness from false merchandising and false endorsement. If Kenyan courts hold the same opinion on image rights as the UK courts, then they can opt to apply the Law of Passing off in cases of false merchandising and false endorsement in Kenya.

As regards to ‘false endorsement’, the case *Irvine v Talksport Ltd.*, showed the English Courts acknowledge that two or more parties don’t have to be in competition for a ‘false endorsement’ involving a celebrity to be held unlawful, it requires however, for the parties to

¹⁶³ <http://codes.findlaw.com/ca/civil-code/civ-sect-3344.html> on 5 January 2017.

¹⁶⁴ Section 6, *Trademark Act* (2012).

¹⁶⁵ Synodinou Tatiana, ‘Image Right and Copyright Law in Europe: Divergences and Convergences’ *Law Department, University of Cyprus* (2014), 186.

be engaged in a “common field of activity”.¹⁶⁶ Consequently, Kenyan courts can use the *Irvine case* as a precedent when examining cases on ‘false endorsements’ and appreciate the interest celebrities have when their names and likeness are commercially exploited. Cases on ‘false endorsement’ protect both the interest of the consumers of the product and the celebrity; protection afforded to the consumer is against deception through misinformation while for the celebrity, the goodwill and economic value that they have nurtured in their image over the years of their respective career e.g. football.¹⁶⁷

In *Fenty v Arcadia*, which set a precedent on ‘false merchandising’ in the UK, the Court stated that for a tort of passing off to succeed, it must be proven to the Court that the goods or services of a retailer are represented in a manner that shows some connection or association with another trader.¹⁶⁸ The court further added that the plaintiff must also show that they have a relevant goodwill and that such dishonest commercial activities exhibit a false representation, which has an impact on the buyer’s decision, of the plaintiff being responsible as to the quality of the goods sold.¹⁶⁹ Similarly this case can act as a precedent for matters touching on ‘false merchandising’ in the Kenyan market especially where the celebrity is has a higher level of fame and recognition and can influence the decisions of consumers in the market.

¹⁶⁶ Synodinou Tatiana, ‘Image Right and Copyright Law in Europe: Divergences and Convergences’ *Law Department*, University of Cyprus (2014), 188.

¹⁶⁷ Leaffer Marshall, ‘The Right of Publicity: A comparative Analysis’ *Articles by Maurer Faculty*, 2007, 1372.

¹⁶⁸ <http://ipkitten.blogspot.co.ke/2015/01/court-of-appeal-confirms-that-sale-of-t.html> on 5 January 2017.

¹⁶⁹ <http://ipkitten.blogspot.co.ke/2015/01/court-of-appeal-confirms-that-sale-of-t.html> on 5 January 2017.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

This is the concluding chapter of the research paper. This chapter appreciates that the objectives of the study have been achieved thus shall discuss the findings of the research and guided by the research questions, outline the recommendations and conclusions of the research.

5.1 Findings of the Study

5.1.1 Chapter one Findings

Chapter one introduced the notion of image rights where it defined them as the right every individual has over the commercial value of their image, likeness and identity. This right is mainly attributed to public figures and celebrities who as a consequence of their profession and career, are put in a publicised platform that exposes them to a lot of media attention, popularity and recognition. This right is therefore essential in protecting the interests these persons have over their image especially when it is used to advertise or promote products without their authorized consent. The case is different however in Kenya since these rights are not legally recognized either by statute or as a common law right and for this reason cases of commercial appropriation often go unsettled for lack of precedent and reasonable redress avenues that will best compensate such persons' who fall victim to such dishonest commercial practices.

5.1.2 Chapter Two Findings

In discussing the privacy and property aspect of image rights, the findings of chapter two presented an argument for the proprietary interest in the Right of Publicity especially as analysed under the Hegelian Personhood theory. This theory highly advocates for private property rights asserting that these rights are essential to the fulfilment of fundamental human needs. The name, image, persona and identity of a person are the intangible individualistic aspects of him as an individual setting him apart from other individuals, therefore owning private property rights over these personality features, translates to owning an intellectual

property right over one's identity. Accordingly, owning a private property right over one's identity, especially when their image and persona is their source of livelihood, protects them from any sort of commercial appropriation by others and advances their social and economic wellbeing promoting creativity.

5.1.3 Chapter Three Findings

Comparing the US and the UK, the research paper finds that both jurisdictions have distinct frameworks set up to safeguard the image rights. The US has a more advanced legal system compared to the UK, for it recognizes the right as a state- right and a common law right. The State Right of Publicity laws however differs from State to State mainly as regards to the indicia of identity that qualify for protection under the right, the laws applicable and the extent of protection considering the First Amendment.

The UK, on the other hand does not recognize any right that protects a person's image from any commercial appropriation. However it provides other legal avenues that celebrities can rely on in protecting the commercial interests in the image. For instance Copyright law comes in handy in situations where celebrities commission an author to create an expressive work based off of their image and the author in turn uses the image without their consent for commercial activities such as advertising. The Law of Passing off is the most reliable law in the UK for protecting image rights as it provides precedent that courts use especially in cases of 'false merchandising' and 'false advertising'.

5.1.4 Chapter Four Findings

Chapter four explored the Kenyan situation and found out that due to the unavailability of precedents on image rights, courts are unable to proceed with cases of violations of these rights. This leads to the victims of commercial appropriation to result to other laws seeking for damages and compensation on their economic injury and due to the narrow interpretation of these laws, justice is not served adequately.

One of the consequences of not having a legal framework that addresses image rights violations in Kenya is that celebrities become victims of dishonest business practices performed by well established brands in the country. For instance, commercial appropriation of celebrities in Kenya goes unnoticed by the victims for a long period of time because these brands hide under the pretence of hosting online competitions or congratulatory remarks. The

former scenario is observed in the case of Kenyan Rapper Wangechi v Tecno Kenya, where the Mobile Company argued that Wangechi's picture was one of the submissions of an online competition they were running on social media for a chance to win their latest phone. The other scenario was between Julius Yego and East Africa Breweries Limited (EABL) where the former party used the athlete's silhouette and name in promoting their product on Facebook and later claimed that they were congratulating him for the gold he had won. Another consequence resulting from the absence of an image rights system is that Kenyan Courts lack precedents to rely upon when presented with a publicity claim.

5.2 Recommendations

This research paper provides the following recommendations to address the issue of Image Rights in Kenya;

5.2.1 Kenya should Adopt UK's Approach to Image Rights Protection

Considering the current situation in Kenya in relation to image rights, one can easily conclude that statute provisions for image rights are not likely to be implemented, based on the facts discussed in chapter four, because image rights are still a vague topic in Kenya. Unlike the US, Kenya still has a long way to go before it can fully appreciate the aspect of image rights as a legal protection to a person's image and this makes the US's approach in image rights protection unsuitable for Kenya.

However, just like the UK courts, Kenyan courts are reluctant to appreciate or recognise a right in a person's name or likeness and this makes the UK's approach in protecting a person's commercial value in their image perfect for the Kenyan scenario. UK's approach is suitable for Kenya because though they have not passed any legislation on image rights they still take into account the need for protecting a person's image from unlawful commercial use especially that which might mislead or misinform consumers. The UK is keen in protecting a celebrity's image from 'false merchandising' and 'false endorsement' and this *modus operandi* can form a foundation for Kenyan courts to become more receptive of image rights cases.

From the above discussion, Kenyan courts should first appreciate the commercial value existing in a person's image especially a celebrity and acknowledge that this aspect of a person's image can be appropriated for unlawful purposes. Additionally they should apply a

broader interpretation to the Kenyan laws providing for unfair competition and the tort of passing off to encompass dishonest commercial practices performed against celebrities or public figures which would tarnish their image or diminish their goodwill.

5.2.2 Need for Judicial Recognition of Image Rights

This study has already established the importance of protecting the commercial value of a person's image; this protection is best afforded if it is recognised as a right by the courts of a country in this case Kenya. Image rights like Trademark law, protect the goodwill of the person which is an essential asset that is developed over the years. A celebrity's image forms an essential part of his goodwill for instance taking into consideration sportsmen, they have to put in so much hard work, skill, time and patience in building their talent. As a result they produce good results such winning an Olympic Medal or the World Cup and as such their efforts should be well recognised and their reputation well protected. Taking this into account, the Kenyan courts should recognise this intangible asset in a person's identity and afford it sufficient protection.

5.2.3 Need to apply the Law of Passing off

The tort of passing off in Kenya is mainly applied in cases of unfair trade practices involving business brands and juristic persons in the business sector. There is no evidence showing the use of this law in resolving disputes of commercial appropriation of a person's image in Kenya. Since celebrities play a big role in Kenya's economy especially in the Sports and Entertainment fields, it would be best if the courts applied the law of Passing off in cases of 'false merchandising' and 'false endorsement', providing them with a judicial platform to seek justice for the economic injury suffered and prevent further appropriation.

5.2.4 Need for an Image Rights Clause in Contracts

Before entering into any agreements or contracts with established brands or in the case of sportsmen, any clubs, celebrities should certify that the contracts have an image rights clause that recognises the economic value of their image and lays out the terms that are of the best interest of the celebrity. This right should be guaranteed by the contract and the Brands,

bound by the contract, should seek the celebrity's consent before using their image for any other purpose other than that agreed upon in the contract.

5.2.5 Need for an Arbitral Tribunal

Having appreciated the need for image rights clauses, parties to such contracts should also agree on the mode of dispute resolution in the event that any dispute occurs. Alternative dispute resolution mechanisms are essential in cases of contractual relationships where the parties don't want to spend so much expenses in court proceedings and wish to retain their relationship. Additionally, since the Kenyan courts lack judicial precedent on image rights, arbitration is the next best dispute resolution mechanism for it saves on time, is much cheaper and takes into account the interest of both contractual parties. Therefore establishing a national arbitral tribunal to handle cases of image rights violation can be a beginning to recognise and appreciate the individual and economic importance of this intellectual property right.

5.3 Conclusion

To conclude this research paper has met its objective which was to conduct an investigation on image rights as a form of intellectual property right and in doing so has established that this right has a proprietary interest into the identity of a person. It has met the hypothesis that there is a gap in the Intellectual Property Laws of Kenya owing to the absence of the provision for image rights and if legally recognised, it will generate a development of into the property laws of the country.

BIBLIOGRAPHY

Journals

1. McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' 19 *the European Journal of International Law* (2008).
2. Russell Clampitt, 'The Right of Publicity' *LOYOLA Entertainment Law Journal* (1985).
3. Nimmer B. Melville, 'The Right of Publicity' Duke University School of Law (1954).
4. Synodinou Tatiana, 'Image Right and Copyright Law in Europe: Divergences and Convergences' *Law Department*, University of Cyprus (2014).
5. Priya Kanu, 'Intellectual Property and Hegelian Justification' *NUJS Law Review* (2008).
6. Papaioannou Theodoros, 'Can Intellectual Property Rights be Morally Justified? The Case of Human Gene Patents' *DIME Working Paper No 8* (2006).
7. G.W.F. Hegel, 'Philosophy of Mind' Translated by William Wallace (2001).
8. Fisher William, 'Theories of Intellectual Property', *New Essays in the Legal and Political Theory of Property*, Cambridge University Press (2001).
9. Hansmann Henry and Santilli Marina, "'Authors' and Artists' Moral Rights: A comparative Legal and Economic Analysis', *the Journal of Legal Studies* (1997).
10. Holmes L Martin and Gervais Daniel, 'Fame, Property & Identity: The Purpose and Scope of the Right of Publicity', *Fordham Intellectual Property, Media and Entertainment Law Journal* (2015).
11. Rothman E Jennifer, 'The Inalienable Right of Publicity', *the Georgetown Law and Journal* (2012).
12. Warren D. Samuel and Brandeis D. Louis, 'The Right to Privacy', *Harvard Law Review* (1890).
13. McKenna P. Mark, 'The Right of Publicity and Autonomous Self-Definition', *University of Pittsburgh Law Review* (2005).
14. Keitel David, 'Right of Publicity' *Loyola of Los Angeles Entertainment Law Review* (1984).

15. Ahmad Tabrez and Swain R. Satya, 'Celebrity Rights: Protection under IP Laws' *Journal of Intellectual Property Rights* (2010).
16. Schlegelmilch Jonathon, 'Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America's Lead' *Gonzaga Law Review Online* (2016).
17. Bergmann Susanne, 'Publicity Rights in the United States and Germany: A Comparative Analysis' *Loyola of Los Angeles Entertainment Law Review* (1999).
18. Baird G. Douglas, 'Human Cannonballs and the First Amendment: Zacchini v Scripps-Howard Broadcasting Co.' *Stanford Law Review* (1978).
19. Koo Andrew, 'Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard' *Buffalo Intellectual Property Law Journal* (2006).
20. Franke Gloria, 'The Right of Publicity Vs. The First Amendment: Will One Test Ever Capture the Starring Role?' *Southern California Law Review* (2006).
21. Hughes Justin, 'Recoding Intellectual Property and Overlooked Audience Interests' *Texas Law Review* (1999).
22. Koehler L. Jennifer, 'Comedy III Production, Inc. v. Gary Saderup, Inc.: Finding a Balance between the Right of Publicity and the First Amendment Right of Freedom of Speech' *Santa Clara High Technology Law Journal* (2001).
23. Solomon A Barbara, 'Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity' *The Trademark Reporter* (2004).
24. Stallard Hayley, 'The Right of Publicity in the United Kingdom' *Loyola of Los Angeles Entertainment Law Review* (1998).
25. Lapster J. Alain, 'How the Other Half Lives (Revisited): Twenty Years since Midler v Ford, A Global Perspective on the Right of Publicity' *Texas Intellectual Property Law Journal* (2007).
26. Korotkin Lindsay, 'Finding Reality in the Right of Publicity' *Cardozo Law Review* (2013).

Internet Sources

1. Nzomo V: '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-to-image-rights-protection/> on 9 February 2016.

2. <http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights> on 9 February 2016.
3. Pina Carolina, 'The Role of IP for Athletes and Image Rights' *WIPO/REG/IP/SPORT/SIN/14*, 25 November 2014
http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=291665 on 9 February 2016.
4. Nzomo V: 'Quick Thoughts on Legal Protection for Image Rights of Professional Sportspersons in Kenya' *CIPIT Law 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 9 February 2016.
5. Nzomo V: '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-kenya-copyright-protection-of-image-rights/> on 10 February 2016.
6. Nzomo V: 'Protection of Image Rights in Kenya: New Court Cases Against Microsoft, Safaricom and German Embassy' IP Kenya, 10 December 2014
<https://ipkenya.wordpress.com/2014/12/10/protection-of-image-rights-in-kenya-new-court-cases-against-microsoft-safaricom-and-german-embassy/> on 10 February 2016.
7. Wasura B: 'Attorney-General Shields German Embassy from Suit', *Business Daily Africa*, 17 February 2016
<http://www.businessdailyafrica.com/A-G-shields-German-embassy-from-suit/-/539546/2549394/-/v3v1xaz/-/index.html> on 17 February 2016.
8. Sikwane Rachel and Gardner Zaid, 'A Brief Introduction to Image Rights in South Africa', www.ens.co.za on 19 March 2016.
9. The Berkman Klein Centre for Internet & Society, 'William Fisher, CopyrightX: Lecture 2.3, Fairness and Personality Theories: Personality', YouTube, 16 January 2015 -< <https://www.youtube.com/watch?v=hsAcrveg6k> > on 7 December 2016.
10. <http://law.justia.com/cases/federal/appellate-courts/F2/194/6/460610/> on 8 December 2016.
11. <http://markroesler.com/legal/right-of-publicity/> on 8 December 2016.
12. http://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/Protection_against_unfair_competition on 8 December 2016.
13. Greenberg Marc and Lovitz L. Michael, 'Right of Publicity and the Intersection of Copyright and Trademark Law', 2012 -

- <<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1485&context=pubs>
> on 8 December 2016.
14. <http://rightofpublicity.com/statutes> on 14 December 2016.
 15. Crocker P. David, 'Rights of Publicity in the US and UK' Blog: Developments in Law, Technology and Business, 25 June 2013 -
<<http://www.davidcrocker.com/2013/06/25/the-quick-and-the-dead-rights-of-publicity-in-the-us-and-uk/>> on 14 December 2016.
 16. Hylton J. Gordon, 'Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v Topps Chewing Gum' 2001, -<
<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1156&context=facpub>
ub; > on 13 December 2016.
 17. <https://supreme.justia.com/cases/federal/us/433/562/case.html> on 13 December 2016.
 18. https://www.law.cornell.edu/constitution/first_amendment on 13 December 2016.
 19. <https://www.law.cornell.edu/constitution/amendmentxiv> on 13 December 2016.
 20. https://www.law.cornell.edu/wex/lanham_act on 13 December 2016.
 21. <http://thestudentlawyer.com/2014/07/23/celebrities-video-games-uk-stars-enjoy-right-publicity/> on 16 December 2016.
 22. Mukami Victoria: 'Kenyan Woman Sues Microsoft for Using her Photos', *TechMoran*, 28 July 2014 <http://techmoran.com/kenyan-woman-may-sue-microsoft-using-photos/> on 5 January 2017.
 23. Mutegi Lilian: 'Business Woman to Sue Microsoft over Photos' *CIO East Africa*, 27 July 2014 <http://www.cio.co.ke/news/top-stories/business-woman-to-sue-microsoft-over-photos> on 5 January 2017.
 24. Sakina Mildred: 'Who Owns the Rights to a Photo? The Case of Wangechi vs Tecno', *HAPA KENYA*, 2 September 2016 <http://www.hapakenya.com/2016/09/02/who-owns-the-rights-to-a-photo-the-case-of-wangechi-vs-tecno/> on 5 January 2017.
 25. Kimani Wanjiru: 'Rapper Wangechi versus Tecno Mobile' *Varcity*, 5 September 2016 <https://www.varcity.co.ke/rapper-wangechi-versus-tecno-mobile/> on 5 January 2017.
 26. <http://codes.findlaw.com/ca/civil-code/civ-sect-3344.html> on 5 January 2017.
 27. <http://ipkitten.blogspot.co.ke/2015/01/court-of-appeal-confirms-that-sale-of-t.html> on 5 January 2017.

Legislation, Acts of Parliament

1. The Constitution of Kenya (2010).

2. The Copyright Act of 2001.
3. The Trademark Act of 1946 (the Lanham Act).
4. The Copyright, Designs and Patents Act (1988).
5. The Trademarks Act (1994) (UK).
6. The Trademark Act of Kenya.

Institutional Authors

1. Kenya Copyright Board, Copyright News Issue 18, 2015.

Self-Published Articles

1. Leaffer Marshall, 'The Right of Publicity: A Comparative Analysis' Articles by Maurer Faculty (2007).