

### Image Rights: Charting New Paths

#### Introduction

In contrast to the American legislative recognition of image rights, English courts have traditionally refused to consider actions relating to the protection of an individual's image, holding that under English law, an individual does not have the right to protect his image. However, developments in English law in the last decade and a half have somewhat added new dimensions to the issue.

#### Development of Image Rights Law

Generally, in common law jurisdictions including Nigeria, image rights are neither recognized nor directly protected. However, in the United States of America, many states have some form of legal codification, and protection of image rights, more commonly known as Publicity Laws and the degree of recognition of the right varies from state to state. Image rights developed out of the right of privacy, specifically to protect four types of tort, namely: (x) the intrusion upon a person's seclusion as to gather private facts; (y) the public disclosure of private and embarrassing facts about a person; (z) publicity of false or misleading representations that place a person in a false light; and (xx) the appropriation of a person's name or likeness for another's commercial benefit. For context, image rights are related to the fourth category and, under US law, image rights has been construed as the right to prevent the commercial use of one's identity without consent.

In contrast to the American legislative recognition of image rights, English courts have traditionally refused to consider actions relating to the protection of an individual's image, holding that under English law, an individual does not have the right to protect his image. However, developments in English law in the last decade and a half have somewhat added new dimensions to the issue. In **Irvine v Talksport (2003) 2 All ER 881 CA**, ("Irvine"), the court extended the tort of passing off in endorsement cases to allow personalities protect their image and other distinctive attributes. Laddie J rejected the long-standing common field of activity requirement on the basis that it severely limited the application of the tort of passing off and recognised that there was a sufficient amount of goodwill in a celebrity's image capable of being protected but stopped short of saying that this amounted to image rights. This was a landmark decision because, for the first time, the English courts recognised that celebrities generally, are trading entities in the field of providing personal endorsements.

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In the more recent case of **Robyn Fenty & Ors v Arcadia Group Brands Ltd & Ors** [2015] EWCA Civ 3, (“**Rihanna**”) the English Court of Appeal upheld the decision of the High Court which found that the use of Robyn Fenty’s (the musician popularly known as Rihanna) image on t-shirts sold in the defendant’s stores, Topshop, amounted to the tort of passing off as it was likely to mislead a proportion of the public into believing that Rihanna endorsed the products sold.

In fact, the High Court in Rihanna’s case, stressed that there was no such thing as image rights under English law but stated that the courts would, on a case by case basis, consider the goodwill attached to a celebrity’s image in cases of false endorsement. The two cases highlighted above have created a watershed in English law, in that, the tort of passing off, it seems (depending on the nature of the case), enables celebrities to indirectly protect the commercial use of their images.

## Passing Off in Nigeria

The common law tort of passing off has been successfully established as a cause of action in Nigeria, particularly in relation to the traditional claims of misrepresentation by a competitor in the course of trade relating to tangible products or services and goodwill residing in businesses in which these products and services are traded. Where misrepresentation has occurred outside of these traditional scenarios, other claims in economic tort have been established, notably, the tort of unjust enrichment and breach of confidence. One of the key elements in establishing a cause of action in passing off is proving ‘*damage or potential damage to the business in respect of which a claimant has goodwill*,’ which has been understood to connote direct commercial loss to a business dealing in goods and/or services. The expansion of the scope of the tort of passing off under English law may have the antecedent effect of persuading Nigerian courts to also recognise in a celebrity, a recognisable and protectable goodwill.

For a claim in passing off to be successful, three requirements must be met. Firstly, there must be goodwill in the good or service. Secondly, there must be misrepresentation which thirdly causes actual damage. In the Rihanna case, the court held that damage caused to her included loss of sales to her own merchandising business and loss of control over her image and reputation. Depending on how prominent the celebrity is, this can amount to a significant monetary loss.

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In the event that Nigerian courts are not minded to extend the tort of passing off in this way, an alternative cause of action is to sue for breach of the constitutional right to privacy. As earlier mentioned, the principle of law on publicity rights developed in the United States as an offshoot of the right to privacy, and as such individuals who wish to protect their image rights should be able to come under this umbrella and with well-constructed arguments may persuade the court to construe the constitutional right to privacy as a right not limited to the intrusion of one's private life but extends to the appropriation of a person's name or likeness for another's commercial benefit.

## Commercial value in Nigerian celebrities

The burgeoning interest in celebrity culture in Nigeria means that today, celebrity endorsements remain one of the most attractive advertising tools for large corporations in Nigeria. Indeed, the paradigm shift to celebrity endorsements on products has successfully created a fertile ground for the development of Nigerian Entertainment and Media Law. Increasingly, the developments in common law have resulted in widespread recognition for the protection of image rights. Celebrities are endorsed because their images have quantifiable goodwill which companies can leverage on in consideration for money. Therefore, false endorsements can potentially reduce the value attached to the goodwill which has been developed in the celebrity's image.

As the popularity of Nigerian celebrities begins to extend beyond the shores of Nigeria, the opportunity for endorsements with international brands has become a real possibility. International brands are a lot more sensitive to the image and public perception of celebrities selected to endorse their products and will therefore insist on their ability to enforce their proprietary rights. Thus, judicial consideration of image rights under the tort of passing off in Nigeria will be a welcome development for such international brands.

## Conclusion

In précis, the tort of passing off is generally restricted to goods and services. Taking guidance from the development of the tort of passing off under English Law, Nigerian courts may be persuaded to extend the tort of passing off to the protection of image rights. As we have seen above, in determining goodwill, the Irvine and Rihanna cases demonstrate that given the peculiarities of modern culture, it is important that the law catches up and protects what is, a legitimate right, albeit in the limited application of the tort of passing off in false endorsement cases. As yet, no image rights litigation has been tested before a Nigerian court, but it is only a matter of time before celebrities start charting new paths.

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