THE PHOTOGRAPHER, THE SUBJECT, AND THE LAW: WHO OWNS THE RIGHTS TO RANDOMLY CAPTURED IMAGES?

1. INTRODUCTION

In our visually-driven world, the role of photography has never been more significant. As we engage in our daily business, attend events, or even relax with family and friends, the omnipresent lens of a camera can capture our likeness at any moment. While the issue is clear for images intentionally captured with a subject in mind, this raises a fundamental question: Who owns the rights to randomly captured images, generated by photographers in their pursuit of artistic conception?

The global position is that photographers own the copyright to the images they capture. This means they have the exclusive right to use, distribute, and sell the images. The subject of the photograph also has rights, particularly regarding their image and likeness. They can control how their image is used, especially in commercial contexts. If an image is used commercially, for example, in advertisements, the subject's permission is usually required. Without this permission, the photographer or the entity using the image could face legal consequences.

Bringing the topic home, Nigeria doesn't have specific legislation directly addressing image rights. However, general principles of privacy, personality rights, and intellectual property law apply, while the Nigerian Constitution , the Copyright Act and a few other laws provide some protection for personal rights and intellectual property. While both the photographer and the subject have rights over photographs, navigating these rights to establish the ownership of randomly captured photographs and control of their usage requires careful consideration of the relevant laws. On this note, let us now carefully delve into the topic.

2. CONCEPTION OF KEY TERMS

Copyright:

This is a type of intellectual property that grants the creators of original works exclusive rights to reproduce, publish, sell, or distribute their works. Under the Copyright Act , copyright protection is available for literary works, musical works, artistic works (including photographs), cinematography works, sound recording and broadcasts .

Image Rights:

These refer to the right to use, appropriate, and/or exploit a person's image in the public domain. The Bailiwick of Guernsey Ordinance , enables a personage to register their personality and its subsisting rights. Section 3 of the Ordinance describes the elements of an Image Right as control of the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristics or personal attributes of an individual.

Randomly captured Images:

As the name implies, this refers to images/photographs captured at random i.e. without the knowledge of the subject, and usually without prior planning of the photographer. It is commonly due to artistic inspiration of the photographer emanating from his surroundings.

3. **THE PHOTOGRAPHER'S PERSPECTIVE**

From a legal standpoint, the photographer, as the creator of the image, usually holds the copyright. This stems from the principle that copyright protection is afforded to the author of an original work. The Berne Convention for the Protection of Literary and Artistic Works , to which many countries, including Nigeria are signatories, enshrines this concept, giving photographers exclusive rights to reproduce, distribute, and display their images. Moreover, photographers invest their skills, creativity, and resources in capturing these images, thus, they possess a legitimate claim to the fruits of their labor. Randomly captured images, while perhaps unplanned, are still the product of the photographer's intentional act of taking a photograph.

The Nigerian Copyright Act is the principal legislation governing intellectual property rights in Nigeria, which include photography. It provides photographers with the legal basis to protect their original photographs from unauthorized use. Under the Act, the Nigerian Copyright Commission (NCC) is responsible for enforcing copyright laws in Nigeria . Photographers can register their works with the NCC to strengthen their legal claim to their work. In addition, it is advisable that photographers register their business with the Corporate Affairs Commission (CAC) to operate legally and additionally, to build a strong online presence through a website and social media platforms to reach a wider audience and cement their reputation, giving more strength to their claim over their intellectual property .

However, there are certain limitations to this right. After all, where one's rights end is where another's begin. The main restriction to photographers' claim over their work is the privacy of the subject(s) of these images. Photographers are required to obtain the consent of these subjects before their images can be publicized. The following are some other limitations :

a. **Public Safety and Security**: Photographers need to exercise discretion when capturing images in sensitive areas or events that may compromise public safety or security.

b. **Defamation**: Photographers must avoid disseminating images that could potentially harm an individual's reputation or falsely portray them in a negative light .

c. **Copyright and Intellectual Property**: Photographers should respect copyright laws and seek permission when using someone else' work or when photographing copyrighted material.

d. **Obscenity and Decency**: Photographers must adhere to societal standards of decency and avoid creating or distributing obscene or indecent i
mages.

Other laws regulating the rights of photographers over their images in Nigeria include:

i. **The Trademarks Act:** Section 5 grants individuals exclusive rights to the use of a trademark in connection with specific goods or services upon registration. This includes images and photography.

ii. **The Cyber-Crime Act** : This act criminalizes cyber-stalking, which includes unauthorized monitoring or taking pictures of individuals in private spaces. Photographers should be aware of their responsibilities and obligations under this act.

iii. **Nigerian Data Protection Act (NDPA)** : The NDPA was introduced to regulate the processing of personal data in Nigeria. Photographers should handle and store personal data with utmost confidentiality and obtain consent for its collection and use.

iv. **Advertising Regulatory Council of Nigeria (ARCON) Act:** Article 11 states that individuals' right to privacy shall be respected and their images shall not be used without prior consent. Article 24 states that the prior written consent of subjects must be obtained before the exposure of any advertisement.

These provisions are the first step in changing the direction of the law on 'image rights' in Nigeria.

For randomly captured images, it places a new burden on photographers to go the extra mile to obtain consent before any attempt can be made to display their artistic conceptions, which can help to deal with potential issues or concerns of the subjects and allow the art to enjoy an unobstructed publicity.

4. **THE SUBJECT'S PERSPECTIVE**

The subject of the photograph also has significant interest, especially regarding privacy and the right to control their image . In Nigeria, individuals have the right to control the commercial use of their likeness. This right is often referred to as the "right of publicity." It ensures that a person's image cannot be exploited without their consent, particularly for commercial purposes. Additionally, privacy concerns come into play when images are taken in settings where individuals have a reasonable expectation of privacy. Capturing and disseminating such images without consent can lead to legal repercussions, including claims for invasion of privacy .

Obtaining consent from subjects before using their images is both a legal and ethical best practice. This consent should ideally be in writing and outline how the image will be used . Respecting subjects' dignity and privacy helps build trust and avoids potential legal disputes. Subjects also have the right to challenge the use of their image if it misrepresents them or causes harm to their reputation. For instance, if an image is altered or used out of context in a way that is defamatory, the subject can seek legal recourse.

Subjects can and should also actively participate in the creative process, particularly in collaborative projects. This way, they can ensure their image is represented in a way that aligns with their preferences and values. Where they feel their rights have been violated can seek redress through legal channels. This can include filing a complaint with the Nigerian Copyright Commission, taking civil action for invasion of privacy, or defamation at the high court.

5. **LEGAL FRAMEWORK AND JURISDICTIONAL VARIATIONS**

The resolution of the conflicts between photographers' rights and subjects' rights often hinges on the specific legal framework of a jurisdiction. Although primarily applicable to the European Union, the principles of the General Data Protection Regulation (GDPR) have influenced global data protection practices, including in Nigeria. These principles emphasize the importance of obtaining consent before using personal data, including images. In Nigeria, the Copyright Act provides photographers with the legal basis to protect their original photographs from unauthorized use and protects photographs as original works of authorship.

Section 10 (1) of the Act provides that copyright protection for artistic works includes the right to reproduce, publish the work, include in an audiovisual, broadcast, communicate and make it available (including any adaptations) to the public. This means that photographers hold the copyright to their images, granting them exclusive rights to reproduce, distribute, and display their work.

However, subjects can invoke privacy (and data privacy) laws and the right of publicity to control the use of their images. While not explicitly codified in Nigerian law, the right of publicity is recognized to some extent . This right allows individuals (subjects) to control the commercial use of their likeness and prevents unauthorized exploitation for profit. Additionally, Section 37 of the Nigerian Constitution guarantees the privacy of citizens, including their homes, correspondence, and personal affairs. This can be invoked to protect individuals from unauthorized use of their images, especially in private settings.

Subjects whose rights have been violated can seek legal recourse through the Nigerian courts. This can include filing complaints with the Nigerian Copyright Commission or pursuing civil action for invasion of privacy or defamation. Here are a few notable cases related to image rights in Nigeria:

a. Iyanya, a popular musician, entered into a $350,000 endorsement agreement with Zinox Computers in 2013. This highlights the commercial value of image rights and how celebrities can leverage their public persona for economic benefits .

b. Erica Nlewedim, a reality TV personality, entered into multi million-dollar agreements to endorse Partner Mobile Nigeria in 2021 and became a brand ambassador for Swarovski Nigeria, underscoring the importance of obtaining explicit consent for the use of an individual's image in commercial contexts alongside the potential financial gain.

c. Chukwuemeka Emmanuel Ejekwu, a comedian popularly known as Mr. Funny or Oga Sabinus, in 2022, expressed his intention to sue UAC Foods for N100 million for using a cartoon-split image of himself (a caricature of the comedian) in a commercial advert for 'Gala' sausage roll without his consent . This is a good example of a subject enforcing his rights of privacy over his likeness and against unauthorized usage.

d. Banire v. NTA Star TV: This case is the only one among this list confirmed to have made it to court, even getting to the Court of Appeal after high court gave judgement in favour of NTA. The Appellant, Banire, in 2012 had a photo session with Virtual Media Network Limited. Also, a Channel License Agreement (CLA) existed between the Virtual Media Network Limited and the Respondent (NTA) in which the former supplied the latter with the Appellant's images to be used on the billboards, therefore she sued the Respondent for their unauthorized use of her image. The Court held that under Nigerian law, the category of rights known as image rights did not exist, and that where a dispute arose with respect to the ownership and exploitation of rights in a photograph in Nigeria, the owner is the photographer and not the subject, unless there is an agreement to the contrary . This forms the basis of the general rule on ownership of photographs in Nigeria, prior to the NDPA and the ARCON Act which require the subject's consent before publicizing an image.

6. **ETHICAL CONSIDERATIONS**

The discourse surrounding the ownership of randomly captured images by photographers in Nigeria encompasses multifaceted ethical dimensions. In Nigeria, as in many other countries, the right to privacy is paramount. Capturing images without obtaining explicit consent can infringe on an individual's privacy, leading to feelings of intrusion and discomfort . The relationship between photographers and their subjects often involves a power imbalance, especially when the subjects are unaware of being photographed. This imbalance is even more pronounced in vulnerable groups such as children and the elderly. Ethical photography therefore requires a conscientious effort to respect the autonomy and dignity of all individuals, ensuring that these power dynamics do not lead to exploitation or harm .

With the advent of technology, the manipulation of images has become commonplace; while this can enhance artistic expression, it also raises ethical concerns about authenticity and truth. Photographers must consider the implications of altering images, ensuring that any modifications do not deceive or mislead viewers. They should be accountable for their actions and transparent about their methods . Photographers often walk a fine line between creative freedom and ethical responsibility. While artistic expression is important, it must not come at the expense of an individual's rights or dignity. Ethical photographers in Nigeria should strive to balance these aspects, ensuring that their creative work respects and upholds both legal and ethical principles.

Let us examine a few scenarios on ethical dilemmas photographers can face:

• A photojournalist photographs victims of violence or disaster: the images can raise awareness and evoke empathy, but they may also exploit the suffering of individuals. Should the photographer prioritize the public interest or the dignity and consent of the subjects?

• A photographer captures images of children in various settings: photographs of minors can raise concerns about safety, consent, and exploitation. How should photographers obtain appropriate consent and protect the interests of children?

• Photographers travel to disaster-stricken areas to capture images of destruction and despair: while these images can bring attention to critical issues, they may also be seen as taking advantage of vulnerable communities. Is it ethical to document suffering for the sake of awareness?

• Another very good example is in the fashion and advertising industry; models and celebrities in Nigeria often face ethical dilemmas when their images are used without formal contracts and without their permission, leading to potential exploitation and reputational harm.

These examples illustrate the complex ethical considerations that photographers face, underscoring the need for legal protections such as clear agreements especially in the commercial use of images when looking at the case of Banire v NTA supra, an already established judicial precedent. It is clear also that beyond legalities, ethical considerations play a crucial role. Navigating these dilemmas requires a thoughtful and empathetic approach, thus, photographers should always prioritize the dignity and rights of the subjects. In Nigeria, their right to privacy is the main thing the subjects of randomly captured photographs can hold onto against the photographer's ownership and use of the photographs, therefore, obtaining their consent fosters trust and respect between the photographer and the subject; It also helps in avoiding potential conflicts and misunderstandings.

7. **CONCLUSION**

On the question of who owns the rights to randomly captured images, according to Nigerian Law and Courts, so far, it is the photographers who hold the rights; this is due to the insufficiency of legal protection for the rights of subjects of photographs in Nigeria and is a glaring representation of this fact. However, in reality, the 'ownership' of rights to randomly captured images is a nuanced issue that balances the photographer's creative rights with the subjects' right to privacy and control over their likeness. While the photographer holds the copyright and in Nigeria, majority of the rights over images, the subjects nonetheless possess significant rights that should not be overlooked as they determine to a very large extent what the photographer can do with these images, despite being the bonafide owner.

Navigating this landscape for both parties requires an understanding of legal principles and ethical considerations in entering into photography-related agreements. However, for truly 'randomly captured images', in a country whose laws are not so comprehensive, striking this balance is essential to respecting both the artistry and ownership of photography as well as the rights of individuals to the greatest extent possible.

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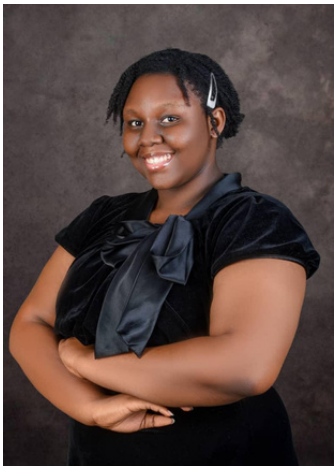
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