Journal of Intellectual Property Rights
Vol 29, July 2024, pp 265-275
DOI: 10.56042/jipr.v29i4.1196

Sabinus' 'Something Hooge': A Question of Privacy Right, Image Right or Intellectual Property Right?

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Received: 5th May 2023; revised: 9th May 2024

The paper examines the trio concepts of privacy, publicity and intellectual property rights as they interplay in determining if there is recourse to the perceived right of a celebrity to protect what he believes to be undue exploitation of his creation by commercial entities to the latter's economic advantage from the spectrum of a very interesting claim by Sabinus in 2022. The paper examines the extant positions of these three concepts of law and the relationship between them reflecting on the position of law in foreign jurisdiction. It observes that although there are convergent points, these concepts are independent of one another and may provide different protection for celebrities and creators to protect their creations. The paper also finds that even though the Nigerian courts recognises the need for the protection of publicity right under common law, it fails to recognise that the right has been available within the Nigerian legal system. The paper also finds that the current legal regime may be hostile to creators while recognising that there is also a need to balance the regime against illegitimate and gold-digging claims. The paper advocates for a recognition of image right to encourage protection of economic exploitation of publicity in Nigeria.

Keywords: Privacy, Publicity Right, Intellectual Property Right, Celebrity Rights, Trademarks

In separate letters both dated 27th of May, 2022, Chukwuemeka Emmanuel, a popular skit maker and comedian famously known as Mr. Sabinus through his lawyer Stanley Alike, threatened to sue Friesland Campina Wamco Nigeria PLC (Friesland), the manufacturers of Peak Milk, one of the foremost milk products in Nigeria for One Billion Naira for the use of the catchphrase 'something hooge' (a pun on something huge) in billboards advertising their products and also UAC Foods Ltd (UAC), the manufacturers of Gala, a sausage roll snacks with widespread patronage in Nigeria for 100 Million Naira for allegedly using a cartoonised version of his likeness.[1]

The letters got to mainstream and social media on 30 May 2022 and it generated several reactions and comments, especially on X (then Twitter), where the topics 'sabinus' and 'something hooge' were amongst the top trending topics in Nigeria.[2] While 'Sabinus' trended as a topic between 1:10 am and 5:10 pm ranging between the 6th and 10th trending topic in Nigeria, 'Something Hooge' trended between 4:10 pm and 7.10 pm ranging between the 5th and 10th trending topic in Nigeria on the 30 May 2022.

The claim against Friesland was substantiated on the fact that the Sabinus had registered a trademark on the name 'something hooge', and the former, without authorisation used the term for the promotion of their product on billboards.[1] Sabinus demanded a sum of 500 million Naira for the infringing use of the registered trademark and his intellectual property. Another 500 million Naira was demanded for damages for the 'trauma: emotional, physical, psychological and mental trauma'.[1]

Similarly, the comedian also substantiated his claims against UAC Foods by asserting that a popular posture of the comedian which is widely used as an internet meme with the phrase 'me calculating' was cartoonised by UAC and used to advertise their product on social media using the popular phrase 'me calculating'.[1] The claim against UAC was the unauthorised use of Sabinus' image on their Instagram handle and the demand for 100 Million Naira was made 'for the use of the picture which (the sum demanded) is the average fee our client (Sabinus) charges for his picture to be used for adverts and promotions'.[1] Sabinus' Manager, Nwabufor Michael was also interviewed on the subject and he remarked that the move by Sabinus was to hold brands accountable for use of intellectual property 'materials' without authorisation.[3]

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The claims by Sabinus can therefore be divided into three: intellectual property claim on the trademark registered on the phrase 'something hooge' which was allegedly used without authorisation by Friesland; damages for the unauthorised use of the image and likeness of Sabinus which implicitly, can be said to be damage caused by breach of privacy and thirdly, image right in the cartoonised impression of Sabinus which was used by UAC foods. The discourse on the subject on social media spaces have also pointed to these trio claims with some opinions stating that both companies infringed on the image right of Sabinus.

The claims also bring to fore, the extant position of the Nigerian Courts on the protection of image right in Nigeria in the recently decided case of *Banire* v *NTA Star TV Network Ltd*[4] which this paper will examine in the light of the circumstance of this case. More importantly, this paper shall analyse the relationship between image right and the duo of privacy rights and intellectual property rights. This is borne out of the fact that image right have been associated with the duo rights and oftentimes as subsets of either of privacy rightsor intellectual property rights.

The paper therefore aims at examining the issues raised in the claims of Sabinus *vis-a-vis* the position of the Nigerian law on the protection of trademark and image or publicity right in the light of the Sabinus scenario as well as alternative scenarios. The paper will further consider the protection of privacy rights as it is associated with publications affecting the rights of public figures or celebrities as they are usually termed. The paper shall first examine the right of publicity as it is a very basic discourse on which the other issues shall be discussed and recommendations shall be made with respect to the current position on Nigerian law on the subject of publicity right.

Although this paper recognises that different jurisdictions use different terms for the right of a person to exploit the use of its image or personality for financial benefit, this paper shall use the terms 'publicity right', 'publicity right' and 'image right' fluidly and interchangeably as conventionally used by several authors writing on the subject.[5]

Relationship between Publicity Right and Privacy Rights

Like in most non-science disciplines, concepts are very hard to define in law as most authors usually limit the definition to their knowledge, experience and ultimately perspective. The concepts of publicity right, privacy rights and intellectual property rights too may have been given different definition based on the opinions of the defining author. Notwithstanding this premise, this paper identifies that of the three rights, the concept of publicity right is the opaquest even for law teachers and legal practitioners. This is so because unlike privacy and intellectual property rights, publicity right is not a popularly enforced right as many authors have theorised that only celebrities or at least famous people are entitled to publicity right.[6]

The unclear position of publicity right has led several authors as well as judicial authorities to attribute publicity right to a subset of privacy rights,[7] while some see the two concepts as opposites.[8] This paper will therefore focus more on the concept of the publicity right and examine if it is a fringe right protected as an extension of the duo rights of privacy and intellectual property.

The definition of the privacy right has posed problems for learned scholars and it has been theorised that the concept has no precise definition.[9] However, it is undeniable that the right to privacy has been protected by courts all over the world albeit in different context. The right has been interpreted in the past by courts to mean, the right to abortion,[10] right to accept or reject medical procedures,[11] right to confidentiality,[12] right to prevent unauthorised publication of pictures of persons,[13] and the right to prevent publication of unpublished works.[14] This context has also given rise to the increasingly discussed right to data protection.[15]

The protection of publicity right can be traced to privacy rights. The link was first established by Prosser who examined privacy rights from four aspects of privacy of which he identified one as p[ublicity] which places the plaintiff in a false light in the public eye; and another, as appropriation, which is the use of the plaintiff's name or likeness,for the defendant's advantage.[16] The later aspect of appropriation has been accepted by the court as an independent right of privacy,[17]and thus justifies the earlier assertion in this paper that publicity right can be seen as a subset of the right to privacy.

However, with the developments that came with the 20th and 21st Century, first with the evolution of the mass media in which information was assessable to the whole world through the use of satellite networks, sportspeople, music artists and movie actors garnered worldwide fan-base and this in-turn translated to a commodity used by big corporations

with business interest all over the world to advertise their products to these star-struck fans.

The technological development became even more intensified with the advent of the internet and the social media on the internet. Social media became an antithesis of privacy, where people disclosed private information of their lives to earn followership and subscription from others. Publicity, thus became a commercial asset mined by private individuals from business enterprise by using their 'star statuses' to improve or impress on the brand of the latter and getting compensated for it. Since some of these compensations are multi-million-dollar deals and covering several countries, it became imperative that courts protect these lucrative deals.

All over the world, the protection of this genre of economic relationship or at least potential relationship were at first unknown in law but later protected at different times in different countries either by courts[18] or legal opinion of scholars.[16] In fact, several authors still argue that jurisdictions like the United Kingdom do not recognise publicity right and that what is protected is the right of privacy, passing off or copyright protection in the use of their images.[19]

This paper however argue that the major right protected in publicity right was identified in the American case of *Ali* v *Playgirl, Inc*,[20] where the famous boxer, Muhammad Ali sued the defendant, a company that publishes adult magazine for including a drawn character that resembles him. The Court in this case distinguished between right of privacy to protect the claimant from being portrayed in the light of the publication of the defendants and the right of publicity to prevent 'unjust enrichment by theft of goodwill' and 'damage on the marketable reputation' of the claimant. The essential focus of this right is therefore the protection of the marketable reputation of a person.

This point was further identified in the case of *McFarland* v *E & K Corp*,[21] where the Minnesota Court held that "(a) celebrity's identity, embodied in his name, likeness, and other personal characteristics, is the 'fruit of his labor' and becomes a type of property entitled to legal protection." The publicity right is therefore pecuniary in nature and can be deduced from the economic valuation of a person's public identity.

This paper posits that where a court enforces a right to protect the economic value of a person's identity, irrespective of the nomenclature or cause of action, it is the right of publicity. This is hinged on the opinion of Lord Hoofman in *Douglas & Ors*v *Hello! Ltd & Ors,*[22] a case where Hollywood actors, Michael Douglas and Catherine Zeta-Jones who had agreed on exclusive publication of their images with Ok magazine, sued to prevent publication of their images taken at a wedding by other magazines. The honourable Justice of the House of Lords declined to term the protection 'image right' but protected it for its commercial value and not privacy. According to Lord Hoofman:

'There is in my opinion no question of creating an "image right" or any other unorthodox form of intellectual property. The information in this case was capable of being protected, not because it concerned the Douglases' image any more than because it concerned their private life, but simply because it was information of commercial value over which the Douglases had sufficient control to enable them to impose an obligation of confidence.'

The case of *Douglas & Ors* v *Hello! Ltd & Ors* was clearly decided on the common law principle of passing off and breach of confidence, albeit the economic consideration was one of the major factors considered by the English House of Lords in arriving at the judgement.[23] The consequence of the decision is that a celebrity can ensure exclusivity of the use of his publicity prowess to his economic advantage distinct from his right to privacy.

It is expedient therefore to draw a distinction between the literal context of the right of publicity which may effectively be protection of privacy and a functional context of the right of publicity which is targeted at the economic advantage a person has as a result of the fame he has acquired in a certain territory which directly translate to the interest or subscription his personality may garner in that territory. It is also important to examine what can be termed as a person's identity that will qualify for protection under the right of publicity.

The Court in *McFarland* v *E & K Corp*[21] enumerated a person's identity as his name, likeness and other personal characteristics. As much as name and likeness sounds definitive, it poses more problem in the light of the subject of the right of publicity which are usually celebrities associated to a form of entertainment or another. Most musicians have a stage name they use alternatively to their name for their act, sportsmen also do have alias that have become synonymous to their name. To name a few, most people in the world will associate the name 'CR7' to Christiano Ronaldo; Michael Jordan is often referred

to as 'His Royal Airness'; Michael Phelps is famously known as 'Flying Fish'.

The problem of identifying name becomes more intense from the perspective that some of these celebrities may not have chosen some of these aliases. For example, Christiano Ronaldo is popularly referred to as 'Ororo' by his fans in Nigeria;[24] Didier Drogba was also popularly called 'Aderogba' also in South West, Nigeria. Can the players maintain a successful claim for a name, they had no paternityas in these areas, when the name has arguably the same effect as their names or more identifiable than 'CR7'?

Identifying the scope of the right of publicity becomes also more problematic when as in the subject scenario in this paper, the claim is not for the use of a name, real or alias but for an expression that the celebrity believes is associated with him. There are several instances where ordinary words, phrases or even signs have become so associated with a celebrity. For example, Muhammad Ali's famous phrase, 'I am the world's greatest'; D'banj's always referring to himself as '*ÈjaNlá*', which literally meaning 'big fish' to represent how big he perceives himself to be in the Nigerian music industry.

To paint a more obvious example where words or symbol may be associated to a person, this paper reflects on Bola Tinubu, the Nigerian president who uses a lemniscate symbol in all his caps, so much that the symbol is synonymous to him as much as his traditional title 'Jagaban'.Additionally, during the run to his party's presidential primary election, which he won, he used the phrase '*Èmilókàn*' which became attributed to him. These are 3 different identifiers as a alias, a symbol and a title which are all popularly identifiable with him.

Steve Cornelius have even pondered even if acquired attributes of individuals such as handwriting, autographs, skills, qualifications, opinions, customs and habits can be protected as forming personality subject to protection.[25] The question of whether right of publicity should be ascribed to marks, signs and phrases which associated with certain public personalities will be examined later in this paper when the paper attempts to provide solution to the main question, that is, the possibility of success of Sabinus' claims in Court.

Relationship between Publicity Right and Intellectual Property Rights

Intellectual property rights are at the most basic definition, the right to protect innovations and creativity. This is very obvious in the industry required to prove originality in copyright,[26] the novelty, innovative step and non-obviousness needed to qualify an invention for patents,[27] the novelty required in the creation of industrial designs.[28] The creativity and innovation question becomes obscure when it comes to the protection of trademarks.

Although trademark requires a mark to be distinct as it is usual for registration to distinguish between unique entrants, however, trademark does not focus on creativity or originality in new registrations as trademark allows for the protection of bland concepts like a name of a person or combination of letters or words with or without meaning, colour or combination of colours. The main attribute of a mark that qualifies it for protection is its association to a trade, product or services.

It is however arguable that trademark protection may be related to creativity in the subject product but this argument is easily defeated by the fact that valid trademark can still be available to arbitrary but adaptive names or marks[29]; and it is not limited to only goods but is now extended to services. Another argument for protection of innovativeness can be inferred from the elements needed to prove that trademark has been infringed rather than the criteria for registering one.

In the British case of *Parker Knoll* v *Knoll International*,[30] it was decided that a mark must have acquired a secondary meaning to have a causative impact on customer behaviour. Infringement of trademarks can only happen if the infringing mark is similar and used in the same course of the trade in which the mark is registered or being used.[31] The protection for trademark is thus restricted to the specific trade, the trademark is being used or registered.

Some American Courts have interpreted the protection of publicity as a form of intellectual property right.[32] Also, the British Highest Court in the *Douglas & Ors* v *Hello! Ltd & Ors,*[22] likened image right to an unorthodox protection of intellectual property right. It is the opinion of this paper that copyright is obviously unrelated to image right and it will prove too narrow a scope to view publicity right as a subset of intellectual property when publicity right focuses on the whole spectrum of virile identities and ability of a person to promote a trade.

An attempt to view publicity right as an extension of intellectual property right may also fail on the premise that, elementarily, Intellectual property rights are primarily of two forms, copyright and industrial

property, the latter further divided into the trio of patents, trademark and industrial design. Although modern developments of these rights have distorted the rigid categorisation of intellectual property as some of the later developed rights under this genre are categorised alongside the traditional form, for example, performance right or related rights are usually categorised as a form of copyright.

Also, while some of the newly developed rights, for example, protection of integrated circuit and plant varieties fit into industrial property. It may prove essentially difficult to find an appropriate category for publicity right under any of the forms of intellectual property. Although this paper acknowledges that there are some associated rights that do not ordinarily conform to the classifications or forms of intellectual but they are incidental to protection of intellectual property, examples of which are the protection of trade secrets, competition laws and protection of traditional knowledge.

It is also accepted by this paper that there are also non-conforming rights may be antithetical to the main purpose of intellectual property, for example, the protection of traditional knowledge allows for some limitations to protection of plant varieties, these rights are associated directly to rights recognised as intellectual property rights. In the case of publicity right, however, it is unthinkable to associate it directly with any intellectual property right.

Oftentimes, authors have while discussing trademarks (and relatedly, the common law principle of passing off that protects brands) or publicity have wandered into the discussion of the right of publicity, as there is a remarkable similarity in the object of both forms of right which is promotion of brands for economic patronage of same.[17] While a trademark relates a product to a brand, publicity gives a notion of acceptance or patronage of the product. It is important to identify that publicity right are only available to natural persons while trademark is available to all juristic persons. Also, trademark is usually required to be registered to be protected as a registered trademark[33] while where protected, publicity right require no such registration.

The divergent point however is the subject of both protections. A trademark is a mark, registered or not which shows the origin of a product,[34] and it serves the purpose of preventing the public from patronising a similar goods but from a different source (Lord Mangdale MR explained the rationale for trademark in the *Perry* v *Truefitt* as 'A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end').[35]

Publicity has a different subject which is endorsement of a product by a celebrity with the purpose of encouraging patronage from people it has influence on. The protection of trademark is usually to prevent confusion of similarity in the use of a mark by similar goods or services, the publicity right targets prevention of perception of patronage by a popular person of a goods or services.

Under the Common Law, unregistered trademark is protected under the principles of passing off. The English Court developed these principles to help protect the goodwill of a business, trade or services;[31] and to prevent unfair advantage, a person who uses the goodwill of another to promote or misrepresent its business, trade or services.[7] The English Court extended the principle of passing off to the use of the image of a celebrity in *Rihanna Fenton's case*,[36] thus seemingly re-establishing a link between trademark and publicity right. The Court was however explicit that image right was not recognised in England.

It is also tempting to associate publicity or image right with the copyright protection of images. However, the subject of copyright protection in images is not the person depicted in the image but the person that fixes same. Simply stated, it is primarily a photographer that has a right in copyright and not the person that was photographed, but this may however be subject to contract. Even if it is argued that, there is a protection offered for performance in protected or unprotected media. This argument is easily defeated as it is quite evident that performance right as relating to media is only protected in musical, cinematographic works and broadcasts.[37]

Having established that the protection of publicity right differs from right to privacy and intellectual property rights, the paper will therefore examine the protection of this genre of right under the extant Nigerian legal system.

Protection of Publicity Rightin Nigeria

The question of publicity right was the crux in the case of *Banire* v *NTA Star TV Network Ltd*,[38] where it was argued on appeal that in a publicity right case, the issue to decide is whether a significant section of the public would be misled into believing incorrectly that

the Appellant (the claimant at the Trial Court) has endorsed the goods and services of the Respondent (Defendant). The counsel of the Appellant also made an argument that the decision of the Trial Court to decide the case on copyright, which was not applicable in the case wrought injustice on the claimant.

The fact of the case is that of two different relationships with a media entity, Virtual Media Network (VMN) at the middle of both relationships. The appellant while in the employ (and later a freelancer) of VMN was captured in certain photograph by the latter; some of these pictures were then used by the Respondent who had a separate agreement with VMN. The appellant sued for the infringement of image right and claimed a damages of 50 million Naira. At the Trial Court, the Court did not decide the case on publicity right but on privity of contract and copyright. This led to the appeal before the Court of Appeal.

The Court of Appeal held that image right are related to the torts of passing off as both require the same elements to be proven. The elements enumerated by the Court of Appeal are:

(i) Sustained and quantifiable goodwill which can be leveraged on in the consideration for money;

(ii) A third party has misrepresented to the public of the patronage of the goodwill;

(iii) The misrepresentation caused or is capable of causing damages such as reduction in the value attached to the goodwill.

The Court also made clarifications on who can claim image right as not only celebrity but it is open to ordinary persons. However, the Court with all due respect, took two steps backwards when it held that image right is unknown to Nigerian Law and the only recourse that may be open to the appellant is the right to privacy. The Court upheld the decision of the Trial Court on the basis that if the Trial Court had not reduced the claim to copyright, there would have been no subject matter to sustain the suit. This paper will not look into the intricacies of deciding the matter from the viewpoint of copyright, it is important to note that the attitude of Nigerian courts have been very conservative and deliberately limited to the function of interpreting the law. In the case of *INEC* v *Musa*,[39] the Supreme Court of Nigeria held that:

'*While there is a vibrant debate as to whether the Judge should make law, it will be against the principle of separation of powers for the Judge to make law where the intention of the lawmaker is clear. Perhaps the Judge could be involved in making the law, if the intention of the lawmaker is not clear and he is in a difficult position in the circumstance of the case before him. In such a circumstance, since he cannot adjourn the matter for the legislature to make a law to place the situation on his hands, he could make the law*.'

It is however the humble opinion of this paper that the honourable court ought to have seized the opportunity to reform the Nigerian Law in a situation where there is lack of statutory provision providing for the protection of image right in Nigeria. This is premised on three reasons. Firstly, the Nigerian entertainment industry is increasingly gaining notoriety in the world and the economic viability of this industry is following the same trajectory. There is a need to protect the economic interest in the personality of persons in the entertainment industry and by extension, any other person, to prevent unauthorised use of 'patronage' of these persons.

The second is hinged on correcting the norm in the unauthorised use of the personality of celebrities in the promotion of businesses and events in Nigeria. This norm is so deep that even celebrities most often than not, usually do not take any step to stop this sad trend.[40] Arguably, this may be due to the uncertainty of a success in a suit for protection of their publicity right.

The final and most important reason is the age-long equitable principle that equity will not suffer a wrong to be, without remedy. This is distilled from the Latin maxim of *ubi jus, ibiremedium*, which translates literally to 'where there is a right, there is a remedy'. It has been argued thatthe remedy is a fundamental right.[41] The principles of common law and equity is an integral part of the legal system in Nigeria.[42] In fact, most causes of action in torts and contract are still derived from this source of law. In the absence of a statute protecting the wrong of infringing on publicity right, it is submitted that the Nigerian courts have the jurisdiction to extend the principle of common law and equity in appropriate situations where there is no statutory provision.

The Court of Appeal in the reviewed case did identify that there is no statutory provision for the protection of image right in Nigeria. It also identified the difference between intellectual property rights, privacy and publicity right. The honourable court also acknowledged that the principles of passing off, which is part of the principles of common law and equity in Nigeria, applies to publicity right and have been extended to protecting this right in the United

Kingdom. It is therefore very curious why the court failed to apply this in Nigeria but stated unequivocally that the publicity right is unknown under Nigerian Law.

Notwithstanding the opinions expressed in this paper, it is crystal clear that the publicity right is unprotected in Nigeria and the implication is that a celebrity cannot prevent his personality from being protected from economic exploitation even where same threatens his ability to leverage his fame when entering an endorsement deal.

Reviewing the Case of Sabinus *vis-a-vis* the Existing Position under Nigerian Law

Not with standing the decision of the Nigerian Court of Appeal that image right is unknown in Nigeria, which quite settles the right of a celebrity suing for unauthorised exploitation of his/her image in Nigeria, the case of Sabinus in the above-described scenario raises some questions that may require further clarifications as the claims in the correspondence written to the two companies alleged by Sabinus for infringement was not only based on publicity right but also on trademark. This paper having examined and taken a position on publicity right in Nigeria will therefore examine the right to trademarks in Nigeria with regards to the claim of Sabinus.

It is important to dismiss copyright as an appropriate recourse for the alleged infringement of Friedsland for the use of the term 'something hooge'. As much as copyright is automatic and does not require any registration formality to enjoy, the qualification for copyright do not cover words or phrases.[43]

Therefore the phrase will fail the originality test required and therefore will not qualify under copyright. It is therefore important to focus and examine if trademark may avail Sabinus respite for the alleged infringement with respect to the phrase.

To bring the trademark discourse into proper perspective, it is important to note that Sabinus is a comedian, actor and an online skit-maker while his alleged infringers are manufacturers of consumer's goods. It is therefore important to examine whether these companies in their line of businesses can infringe on the right of Mr. Sabinus, even where he has registered a valid trademark.

Sections 2 and 3 of the Trademarks Act provides for protection of trademark in Nigeria and Section 4 limits the application of trademarks in Nigeria to specific goods and classes of goods. This is further emphasised by Section 5(2) of the Act which provides for the exclusivity of the use of a registered trademark by the registrant but with limit to the goods in which it is registered.[44] It provides that:

'2. Without prejudice to the generality of the right to the use of a trade mark given by such registration as aforesaid, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using it by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either-

(a) as being use as a trade mark; or

(b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.'

The Nigerian courts have also given effect to this limitation of protection as was held in the case of *Holdent International Limited* v *Petersvilie Nigeria Limited,*[46] where the Court of Appeal held that exclusivity of trademark is in relation to a particular goods.

The implication of this provision is that a person can only be held liable for infringement of a trademark in the very limited scope of the nature of goods. However, the case in perspective has nothing to do with goods as Sabinus was only alleging the use of the words 'something hooge' which he claims to have been registered in the class of 'banking and real estate services.' It is therefore pertinent to first examine whether marks are protected in relation to services.

The Trademarks Act of Nigeria is silent on protection of marks used in relation to services. However, by virtue of Section 45 of the Act, the Minister is empowered to make regulations to classify goods for the purpose of registration for trademarks. In 2007, the Minister for Commerce and Industry amended the Trademarks Regulation to include protection of marks used for services.[46] Specifically, services are listed as Class 35 to Class 45 under the

fourth schedule to the Trademarks Regulations, 2007 with Class 36 covering, insurance, financial affairs, monetary affairs and real estate affairs, the last being the class Sabinus reportedly registered his trademark.

However, in a judgement of the Federal High Court in the case of *Ramhead Industrial & Commercial Co. Ltd* v *Ekulo International Ltd*,[47] the Court held that trademarks are only marks used in relation to goods and therefore excludes service marks. This case seems to be the solitary case with respect to the validity of service marks in Nigeria and has since it has not been appealed, the power of the Minister to include service marks as protected under the Trademark Act is *ultra vires*.

Interestingly however, the Trademark Act was amended by Section 69 of the Business Facilitation (Miscellaneous Provisions) Act[48] and it was amended to the effect that '"goods" includes services'. Section 67 of the Trademark Actwas further amended to define trademark as

'(a) a mark used or proposed to be used in relation to goods or services for the purpose of indicating a connection between the goods or services and a person having the right, either as a proprietor or as a registered user, to use the mark, whether with or without any indication of the identity of that person, and may include shape of goods, their packaging and combination of colours ...'[57]

It is therefore very clear that the Trademark expressly intends marks used in connection to services to be protected as valid trademarks. It is the argument of this paper therefore, that the recent amendment of the Trademark Act supersedes the decision of the Federal High Court on the proprietary of the Minister to make Regulations which affects the substance of the Trademark Act. This paper further argues that the amendment has erased the dichotomy between trademarks and servicemarks in Nigeria.

The important question to ask, in the light of the amendment to the Trademark Act is whether, Friesland in particular was in breach of the service mark of Mr Sabinus. Section 5(2) of the Act which is already above provides for three qualifications before a mark can be said to be infringed, these are:

(i) Using an identical or similar mark, likely to deceive or cause confusion;

(ii) In relation to the goods or services which is being registered.

(iii) Used as a trademark, in an advertising circular or any other advertisement issue.

The phrase used by Friesland, 'something hooge' is exactly the one registered by Sabinus as his trademark. Even though, the trademark was not used in labelling the product (peak milk) of the alleged infringer, the phrase was used in advertising this product and thereby fulfilling the third qualification. However, these qualifications must all be present before a trademark can be deemed infringed. It is therefore important to identify if there is any relationship between banking and real estate services under which Sabinus registered his trademark and milk manufacturing, the industry under which Friesland manufactures its good.

Firstly, while it is apparent that banking and real estate are services and milk manufacturing is goods, it is also important to state that banking and real estate services are listed under class 36 of the while milk manufacturing is captured under class 29.[49] Therefore, it is crystal clear that the class under which the trademark is registered is quite distinct from the class of the goods which is being complained of. It is also safe to argue that since there is no relationship between these classes of goods and services, it follows that the first qualification, likelihood of deception, may not be easily proved by Sabinus.

It is also important to reiterate that the object of trademark is to prevent confusion between two products in similar trades, so as to appropriately distinguish their origin.[50] Trademark protection also serves to protect reputation of a registered brand to attract patronage as was held in the English case of *IRC* v *Muller & Co's Margarine*[51] that trademark; '… has the power of attraction sufficient to bring customers home to the source from which it emanates'.

Can Sabinus then claim that Friesland advertently used his registered mark, 'something hooge', a phrase which is very connected to him to gain the patronage of his fans? It is the thought of this paper that the answer to that question will be very cosmetic to his action, as it is the phrase that was trademark and not his personality. It will also be impossible to draw a relationship between the class under which he registered his mark and the product of the alleged infringer.

However, a perusal of the fourth schedule of the Trade Mark Regulation shows that there is a class listed for advertisement, and it is the opinion of this paper that Mr. Sabinus would have stood a better chance if his trademark was registered under that

class. The position of this paper is that since Section 5(2) as qualified that a trademark can be deemed to have been infringed if it is used in an advertisement issue, the qualification of being similar trade would not be significant as the subject of infringement would have been advertisement. It will also be possible to infer confusion or likelihood of deception if a trademark registered under the class of 'advertisement' is used to advertise any product.

Having argued that it is most unlikely that an action in trademark will succeed against Friesland, this paper now examines if Mr. Sabinus has a plausible cause of action against UAC for allegedly using a cartoon image of him. The question is obviously not that of trademark as there is no indication that Mr. Sabinus registered a trademark of his likeness under any class of goods. It is therefore important to identify if there is another intellectual property right, Sabinus can utilise to seek reparation for the unauthorised use of his intellectual property against both Friesland and UAC.

Copyright will be the obvious choice as the act complained of are in literary and artistic works and therefore fall under the purview of copyright. As explained above, the copyright in an image, save any contractual obligations or limitations, belongs to the person who fixes the image in a tangible medium. Therefore, it is very unlikely that copyright will be a successful recourse for Sabinus.

It is also plausible to consider examining whether competition laws will apply, but this consideration is easily lost by the fact that it is unknown if Sabinus has entered into any endorsement agreement with any direct competitors of Friesland or UAC in the food industry. Even if there exist any such agreement, it is the opinion of this paper that the right of action will be with such a competitor and not Mr. Sabinus.

Giving the failure to establish any likelihood of success in an intellectual property claim, the only recourse seems to be under the right to privacy. This recourse also provides its own unique question: Can Sabinus claim privacy for works already in the public domain? It is elementary that privacy right majorly concerns a person's right to his personality and not her/his work. However, privacy can be intercepted where the portrayal of a person's work affects her/his personality.

As earlier noted, Prosser identified publicity as one of the aspects of privacy from the perspective of portraying a person in the bad light to the public.[15] In as much as this perspective has no commercial basis, it provides the context for the question posed with respect to privacy in these scenarios. In the two scenarios, the portrayals were used in purely commercial sense with no direct inference to Sabinus. It will thus be highly unlikely that Sabinus will be able to prove that any of the use of the advertisement was targeted at portraying him in a bad light to the society.

Conclusion

This paper's major objective was to theoretically analyse the pertinent issues arising from the claims of Mr. Sabinus over the alleged infringing use of his work and image by Friesland and UAC in their respective advertisement. The discourse led to the examination of the rights that emanates from the use of trademark, image or inference of patronage of a celebrity. It is also the finding of this paper that the right afforded to celebrities and creators to protect the economic exploitation of their image may be non-existent in Nigeria.

Also, flowing from the above discussion, Sabinus may be unsuccessful to prove that either Friesland or UAC has breached any of his economic or personal rights and instituting a case on the present scenario may be more of an academic exercise than a plausible successful litigation. The paper however shows a need for more judicial pragmatism in providing reliefs where there is a dearth in statutory provision. The Nigerian entertainment industry is growing both fiscally and internationally and there is therefore the need to provide protection for the intangible assets of celebrities as obtainable in other countries.

Image or publicity right of celebrities need to be protected as this quantifies the financial worth of a celebrity at a given time. Proactiveness of justices in areas where there are no statutory reliefs will also develop the jurisprudence of Nigerian legal system. It is the opinion of this paper that Nigerian courts should afford protection for celebrities against unauthorised use of their image especially when same is used by the infringer for an economic gain. This protection can be accommodated under the principles of common law which the Court of Appeal recognised to have similar elements with the common law torts of passing off. It is also the postulation of this paper that the principle of *ubi jus ibiremedium* justifies the recognition of publicity right for celebrities in Nigeria.

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