THE COMMERCIAL EXPLOITATION OF PERSONALITY RIGHTS: CHALLENGES FACING THE KENYAN CELEBRITY

A thesis submitted in partial fulfillment of the requirements for Masters Degree in Laws (LL M), University of Nairobi

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DECLARATION

I do hereby solemnly declare that this piece of work, its form and content, is the result of my own initiative through research and that the same has never been presented to any institution for academic purpose to the best of my knowledge.

SIGNATURE .....

IRENE W. NDEGWA
[AUTHOR]

DATED: This 13th day of November, 2007.

I acknowledge that the above named student did carry out this research work under my supervision and I hereby recommend it for examination purposes.

SIGNATURE .....

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DATED: This 13th day of November, 2007.

DEDICATION

This Thesis is dedicated to my loving parents, Edward and Catherine Ndegwa without whom I would be nothing today. I thank you both for the tremendous sacrifices made and instilling in me the courage to pursue my dreams.

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ABBREVIATIONS & ACRONYMS

2d Cir.	Second Circuit (United States)
Beav	Beavans Reports
BGH	Federal Court of Justice of Germany
Cal L Rev	California Law Review
Ch	Chapter
C P R (3d)	Canadian Probate Reports third series
DJ	Disc Jockey
D L R (4th)	Dominion Law Reports fourth series (Canada)
EIPR	European Intellectual Property Review
Ent LR	Entertainment Law Review
ETMR	European Trade Marks Reports
F 2d	Federal Second District (United States)
Ga L Rev	Georgia Law Review
HCCC	High Court Civil Case (Kenya)
HIV/AIDS	Human ImmunoVirus/Acquired Immune Deficiency Syndrome
IAAF	International Association of Athletics Fund
IED	Institute for Education in Democracy
IP	Intellectual Property
JPTOS	Journal of the Patent and Trade Mark Office Society
La L Rev	Louisiana Law Review
MDGs	Millennium Development Goals
Nat. Arb. Forum	National Arbitration Forum
NARC	National Rainbow Coalition
N J C	New Jersey Courts
NY	New York
O R	Ontario Reports

P C	Privy Council
PL	Penn Law Review
PSAs	Public Service Announcements
PSI	Population Services International
RPC	Reports of Patent Cases
RSA	Republic of South Africa
SCA	Supreme Court of South Africa
SCR	Supreme Court Reports (Canada)
SOYA	Sportsman of the Year Award
TLR	Times Law Reports
TMA (K)	Trade Marks Act (Kenya)
UCLA Law Review	University of California Los Angeles
UK	United Kingdom
UK TMA 1994	United Kingdom Trade Marks Act of 1994
UK CPDA 1998	United Kingdom Copyright, Designs, and Patent Act of 1988.
UN	United Nations
UNICEF	United Nations Children's Fund
USA	United States of America
WFP	World Food Program
WIPO	World Intellectual Property Organisation

LIST OF STATUTES

California Civil Code (USA)

Constitution of Kenya

Copyright Act, Act No.12 of 2001 laws of Kenya

Copyright, Designs, and Patent Act of 1988 (UK)

German Constitution (Grundgesetz)

Industrial Property Act, Act No.3 of 2001 laws of Kenya

Lanham Act (USA)

Marks Merchandise Act 17 of 1941 (RSA)

Paris Convention on the Protection of Industrial Property 1883

Restatement (Second) of Torts (1977) (USA)

Restatement (Third) of Unfair Competition (1995) (USA)

Trade Marks Act, Chapter 506 laws of Kenya

Trade Marks Act of 1994 (UK)

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Elvis Presley Enterprises Inc v. *Sid Shaw Elvisly Yours* [1997] RPC 543 at 547.

Grütter v. *Lombard* [2007] SCA 2 (RSA).

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John Evan Gicheru v. *Andrew Morton and another* HCCC No. 214 of 1999.

Krouse v. *Chrysler Canada*, [1972] 2 O.R. 133.

Les editions Vice-Versa v. *Aubry* [1998] 1 S.C.R. 591, 577 D.L.R. (4th) 15.

Marlene Dietrich case BGH 1.12.1999 (1999).

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Williams v. *Hodge* (1887) 4 TLR 175.

INTRODUCTION

An article appeared in a local daily newspaper that read in part:

"Conjestina tells the paparazzi: Stop it!"[1]

The article carried her stern warning against persons who were making money by photographing her and thereafter selling these photos without her consent while others had printed wall calendars bearing her photos, again without her consent, for sale. She said she was informing her legal advisor to take the necessary action. This, in a nutshell, is the problem known as the unauthorised commercial appropriation of personality.

In the 1970s, a well known Kenyan footballer J.J. Masiga's face was almost synonymous with Crown Paints because of an advertisement he appeared in. In the 1980s the Vitimbi comedians endorsed a local insecticide *Raid* with the punch line, "Inaua mende fo fo fo!"[2] Later, the legendary Kenyan long distance runner and athlete *par excellence* Kipchoge Keino was used as the face of Kilometric, a biro pen that compared his supremacy in long distance running with the pen's durability. Today, most advertisements in the Kenyan and African market consist of their own local celebrities. From the endorsements of everyday products like toothpaste[3] to promoting Public Service Advertisements (PSAs)[4], it is clear that Kenya has its own breed of superstars who have serious influence on the consumer(s) and target market and this translates into big business.

But as seen in Conjestina's case not all local celebrities are getting their due rights and their personalities have been commercially appropriated and exploited by others without their consent. This is a problem that is definitely not limited to Kenya alone. Gaetano Jjuko Kaggwa, popularly known as "Gae" a Ugandan national who gained fame on the

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[1] Correspondent, *SideShow Magazine, Saturday Nation*, January 14, 2006 at 20. Conjestina Achieng is the sensational Kenyan female pugilist who was rapidly rising in the world of boxing. She has garnered a great many admirers from her pugilistic skills and her braggadocio in and out of the ring.

[2] A Swahili phrase which means "It kills cockroaches daed dead dead!"

[3] In Kenya, Close-Up toothpaste has used local musicians Nameless, Wahu and Necessary Noize in their advertising campaigns.

[4] A good example of this in Kenya is the PSA "*Chanukeni Pamoja*" a Swahili slogan meaning "Be Enlightened Together" which used an array of local celebrities including comedians Redykulas to advocate for HIV/AIDS voluntary counseling & testing (VCT) programs.

success of Big Brother Africa, a reality television programme had his name branded to men's underwear and sold in Uganda without his consent and he could do nothing about it.[5]

Such exploitation is not limited to the small-scale trader at the local town centre but is also perpetrated by multinational corporations. In 1998 when *Nike* sponsored two Kenyan long distance runners, Philip Boit and Henry Bitok to become cross-country skiers and participate in the Winter Olympic Games, *Nike* was simply capitalizing on the great reputation of Kenya's long distance runners.[6] The company invested heavily in the two athletes for two years, designing uniforms in the colours of the Kenyan flag and trotting them out for the media. They became a brilliant business coup for *Nike* as its spokeswoman Martha Benson was quoted as saying, "...they are definitely a marketing benefit".[7]

1. Statement of the Problem

My thesis sought to bring to light the legal issues that emanate from the fact that Kenya and Africa as a whole have a fast growing number of serious superstars- superstars who live off their well crafted images, personalities, names and likeness-whose personas are being commercially appropriated/exploited without their knowledge or consent and they have no legal remedy once they learn of this act. In chapters 2 and 3 I used various anecdotes to enlighten the reader on the growing trend in Kenya towards a celebrity culture, which, while not fully realised is slowly emerging.

My research in chapter three showed that the legal system in Kenya does not recognise this branch of Intellectual Property (IP) law that seeks to give a person a right to the exploitation and protection of his/her image, voice, likeness and name in the same way that IP law would give copyrights to a musician or an author, trademark rights to a

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[5] Moses Serugo, "Two Years After Big Brother", *The Monitor* (Kampala) December 16, 2005 at 15.
[6] Michael Wilbon, "Just Do It? Just Let Them Be", *The Washington Post* Wednesday, February 11, 1998 at C1.
[7] *Ibid.*

company for its logo or product name and patent rights to an inventor. (In my thesis I have regularly use the word "persona" to refer to voice, image, likeness and name interchangeably.)

The problem as I have shown, extends beyond local celebrities to some of the most powerful personalities in the world and I embarked on a short case study of two such personalities: the late Princess Diana in chapter two and Nelson Mandela in chapter three. Perhaps then, the question asked, was whether or not my study was justified as Kenya has more pressing legal problems at the moment besides "harping" for legal rights for its "lesser known" celebrities. This thesis has endevoured to prove that Kenyan celebrities are coming of age and the protection of their various persona should be seen as a legitimate and real legal problem.

As I illustrated in chapter two most celebrities in Kenya overcome tremendous odds to reach to the top. Real rags to riches story such as Conjestina Achieng', Paul Tergat and others who rely on their talents to earn a living and they should be entitled to a legal recourse should their persona be exploited without their consent. The most annoying fact is that the "entrepreneurs" ride on the wave of popularity of the celebrity and cash in without his/her knowledge and as soon as the popularity diminishes, they lie in wait for the next big star. Despite the fact that serious effort is put in by most of these celebrities to create, nurture and maintain their images into a commodity, to trade in that commodity without their consent is in my view, a serious intellectual property question. If this thesis has been written for the benefit of only one of these celebrities, it will have accomplished its purpose.

2. Research Questions

a) Does the available legal framework in Kenya afford sufficient protection to a celebrity's right to exclusive right to control commercial use and exploitation of his/her image, voice, name and likeness?

b) What measures are needed for Kenya to implement such protection under its law?

3. Research objectives

The main objectives of the study were:

a) To identify the prevalence and growth of the use of famous persona's with special emphasis to Kenya in commercial arenas.
b) To identify and critique the existing legal framework of Intellectual Property laws in Kenya as regards the problem of commercial appropriation of a persona.
c) To draw parallels to relevant international jurisdictions and their legal protection of commercial appropriation of a persona .
d) To suggest reforms (if necessary) to our Kenyan laws from such investigation and present justified recommendations.

4. Justifications for the Study

While still at it infancy, it is an arguable fact that a celebrity "culture" has been born in Kenya. It is alive, vibrant and more so, influential. As shown in chapter two, the influence of such personalities has extended to every sphere of the economy be it economic, social, cultural or even political. Celebrities in Kenya are not only being used to endorse products but also social ideals, causes and even political parties!

This is a select group of persons who that wield influence and since their persona is the main reason for their fame, whether deserved or not, it should be capable of some form of legal protection. Kenyan celebrities have been named ambassadors to international Organisations such as the World Food Programme, they have been part of delegations to search for a solution to the end to the Darfur crisis, they have been instrumental in rallying election votes, just to name a few.

It is against such a backdrop of what these celebrities contribute to Kenya, apart from providing entertainment in song, dance or comedy and apart from accolades when they win the country medals in sports. They have, whether consciously or not, created commodities from their persona. Whether such commodification is justified or not was

not the subject of this thesis. Only that we must investigate whether it needs protection from unauthorised exploitation. The time has come for the law to awaken to the fact that there is a need to give protection from such exploitation.

6. Research Methodology

The primary methods of research were the library and media, which included the press and archival research. The main library I used was the Faculty of Law Library, Parklands Campus. This is because I was able to access relevant textbooks, journals and law statutes governing my chosen research topic and received great assistance from the bibliographical materials, textbooks and statutes.

This project also employed the use of Innovative Lawyering library and the personal collection of books belonging to Dr Ben Sihanya. As my supervisor, access to his personal collection of books and his guidance in choosing the same was key and instrumental in the developing my project.

The research involved a lot of seeking for information from the Internet. The Internet was the guide in acquiring more information on the subject and also in acquiring information that has not yet been reduced to writing and thus not available in books. The use of the above sources was employed due to the fact that this is an area of law that is consider contemporary and thus the need for current affairs to be subjects of discussion. The Internet broadened my perspectives and assisted in the creation of novel ideas throughout my writing and thus I was able to capture dynamism. I would not have been able to capture with such clarity the Nelson Mandela problem in chapter three without the resources of the Internet.

I wanted to collect additional data using interviews by trying to get at least three personal interviews with three local celebrities in different fields such as sports, music and the media. Unfortunately this proved impossible, as the identified targets were not available to do such interviews. I attended various promotional fairs, sporting events and concerts to evaluate by observation exactly how much influence a celebrity has on the business

and target market. My final leg took me back again to desk research where I studied the legal approach to this problem in international jurisdictions and their case laws to analyze how Kenya could perhaps learn or even adopt certain issues in its quest to addressing this problem.

7. Hypothesis

I worked with the hypothesis that there are no laws in Kenya that govern a celebrity's right to exclusive control of commercial use and exploitation of his/her image, voice and likeness. At the end of my research I wish to state that my hypothesis stands.

8. Theoretical Framework

I investigated three theories in my argument to give celebrities rights over their persona.

8.1 The Lockean Theory

One of the basic moral argument for the existence of protection to one's persona and perhaps the most common, is the Lockean natural rights theory that one is entitled to "reap the fruits of one's own labours."[8] John Locke was the first to elaborate a philosophical argument for private property rights based on individual labour.[9] Simply stated, Locke's argument was that everyone has a "property [right] in his own person" and hence in the "labour of his body" – a right, that is, to exclude others from the possession of his body and to control the disposition of his labour.[10]

According to this argument, a celebrity, professional athlete or public person is entitled to reap the rewards of her endeavours, which, in this context, means to profit from the exploitation of his or her image or persona by third parties. As such, it has been argued that a celebrity deserves all the rewards they can gain because they have worked hard and created a persona that has value. Thus, the argument goes, if this right is not recognised,

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[8] See John Locke, 1690, *The Second Treatise of Government,* available at http://libertyonline.hypermall.com/Locke/second/second-5.html

[9] *Ibid.*

[10] *Ibid.*

people will not work as hard to create valuable personalities and society will suffer as a result.[11] This theory however faces a challenge as it is submitted that celebrities generally do not create a commercially marketable public image or personality in the way some of the main proponents of the moral arguments suggest.[12] In modern-day reality however, fame, fortune and celebrity status are achieved by more complex processes, in which an individual's personal efforts and labours are not indispensable factors.

An individual can work hard and put considerable time and effort into the development of her skills and talents, but fame and an overall image that are worth marketing only come about by the contingent association of many different factors such as sufficient attention in the media, the needs of contemporary society at a given time, and the needs, purposes or interests of the given audience.[13] As such, an individual cannot simply *make* herself famous. Fame is thus said to be a "relational" phenomenon, something that is conferred by others.[14] As such, it can be asserted that the natural right to "the fruits of one's labour" should not pertain in cases of appropriation of personality.

8.2 The Economic theory

More modern forms of utilitarian analysis look to the law and economics school for a justification of property rights in personality. According to the standard allocative efficiency argument,[15] Richard Posner argues that allowing an individual a property right in a photograph used for advertising purposes will ensure that it will be purchased by the advertiser who finds it to be most valuable. Making the photograph the communal property of all advertisers would not achieve this goal since "the multiple use of the

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[11] Michael Madow, "Private Ownership of Public Image: Popular Culture & Publicity Rights," 81 Cal L Rev (1993) at 184.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] Richard Posner, *Economic Analysis of Law* (1986), Little Brown, Boston, 3rd edition at 31. This theory is generally applied, in a community where there are no private property rights. Where, for example, a parcel of land is held in common, with no restrictions on the use of the land, any rational utility-maximising herdsman will allow his cows to graze freely. Since there is no cost per cow, each herdsman will carry on adding cows regardless of the real social cost, leading to over-exploitation of the land, until it becomes worthless. However, if the land lies in private ownership, allowing the exclusion of all others except on payment of an appropriate fee, then the private owner will have an incentive to allow the optimal number of cows to graze on the land.

identical photograph to advertise different products would reduce its advertising value, perhaps to zero".[16] Hence the line of argument that allowing property rights in personality leads to more efficient use of a celebrity's persona.

The difficulty in this theory is that it is not an argument *for* private property so much as an argument *against* common property.[17] More specifically, the advertising value of an individual's photograph is not founded on competition among bidders for a scarce resource; rather it is founded on the law which artificially creates a scarcity by giving the individual a property right in its use, a very different proposition from that which applies to truly scarce resources such as land.[18] Thus, if celebrity is viewed essentially as a social creation, there will always be a supply of existing and newly created personalities to exploit.

Moreover, even in the unlikely scenario of advertisers effectively running out of celebrities to use, this is not analogous to the exhaustion of a finite and non-substitutable resource such as land.[19] Advertisers would simply resort to other techniques in marketing their wares. Ultimately, it should be borne in mind that one are not trying to allocate property rights in personality in the most efficient way possible, but, rather, are trying to justify the very existence of such rights in the first place. This is why I advocated the personality rights theory.

8.3 The Personality Rights theory

Hegel, in his work *The Philosophy of Right*,[20] constructs a detailed dialectical account of man and society. He states:

> "Since property is the embodiment of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end possession is requisite."[21]

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[16] *Ibid.*
[17] Richard Posner, "The Right of Privacy" 12 GaLRev (1978) at 411–4.
[18] *Ibid.*
[19] *Ibid.*
[20] Georg Wilhelm Friedrich Hegel, *Philosophy of Right (1952)* Clarendon Press, Oxford, 1st edition.
[21] *Ibid* at 51.

Hegel posits that possession can be had by "directly grasping it physically", "forming it" and "merely marking it as ours"[22] and his most important caveat for present purposes is that property, the subject of will, can only be "external by nature".[23]

He notes that:

> "Therefore those goods, or rather substantive characteristics, which constitute my own personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible. Such characteristics are my personality as such."[24]

Thus if a thing can be conceived of as external, it is capable of being property, and if a person inputs their will into such an item, they should have a recognized property right in order to facilitate their development. Celebrity personas are external, and not part of the self as conceived by Hegel. As such they are external, and capable of being objects subject to will and ownership. Celebrities should be able to put their will into the external reflection of their personality, that which is recognized by others in society.

This reflection is external to the true essence of their self, and as such is capable of receiving their will.[25] Crucial to this thinking is the assertion that celebrity personas are "external by nature."[26] The persona is the one type of potential intellectual property which is generally thought of as *not* being a result of labour as seen in the earlier Lockean theory. Even if the persona is considered to be a product of labour, people would work on their personas without any property rights being necessary to motivate them.

Therefore, the instrumental labour justification is not necessary. In contrast, the persona is the ideal property for the personality justification.[27] No intermediary concepts such as "expression" or "manifestation" are needed: the persona is the reaction of society and a personality.[28] Property rights in the persona give the individual the economic value derived most directly from one's personality. As long as an individual identifies with his

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[22] *Ibid* at 54.
[23] *Ibid* at 65.
[24] *Ibid* at 66.
[25] L. Rauch, *The Philosophy of Hegel* (1965) Monarch Press, New York, at 101.
[26] *Ibid* at 115.
[27] *Ibid* at 116.
[28] *Ibid* at 118.

personal image, he will have a personality stake in that image. Many modern day scholars have agreed with this theory. S. K. Murumba states thus:

> "Whatever weaknesses there may be in the Hegelian theory of private property as an extension of personality this is one instance in which it is probably vindicated. For we are talking here, not about an individual projecting his personality upon external things to constitute them property, but of a person exercising control over his *own* personality."[29]

And Alice Haemmerli notes:

> "If such a theory holds true for objects like wedding rings or houses (or indeed any other object through which self-determination is expressed), it should apply *a fortiori* when the 'object' in question is a person's own image or external manifestation of her identity (by definition connected to the person it represents). Most people-and many will agree-celebrities, in particular, experience a special, even unique, attachment to their own images or other objectified attributes, and feel that those things are inextricably associated with their identities."[30]

I found that the Hegelian justification for property in celebrity image to be coherently sound, and it provided a solid base from which to determine the limits of the right in a principled basis. The separateness of commercial, recognizable persona and the true, private self of celebrities supports the use of Hegelian philosophy in this context. Ultimately, the three theories have granted some form of protection for the celebrity persona be it through the labour aspect, economics or a personality right to an external persona. I however prescribed to the Hegel theory as it was crucial to show the justification for a personality right to exist.

9. Literature Review

The published literature in this area was scant and limited as this is a largely undeveloped area of intellectual property. I however was in agreement with the writings of the few authors who have written on this topic or on a much broader theme as related to the more traditional intellectual property rights such as copyright and trade mark law.

Huw Beverley-Smith in her book *The Commercial Appropriation of Personality (2002),* Cambridge University Press, Cambridge at page 115 says that problem of appropriation

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[29] S. K. Murumba, "Commercial Exploitation of Personality" (2000) 5 Loyola Entertainment Law Review at 132.

[30] Alice Haemmerli, "Whose Who? The Case for a Kantian Right of Publicity" (1999) Duke L.J., November, 414 at 424.

of personality that may be damaged by unauthorised commercial exploitation must be understood in the wider context. The writer has seen that any legal system gives priority to claims for physical injury and in earlier times these injuries were the law's primary concern. However, she posits that, as society and modern living conditions change, there are claims for other kinds of harm including the appropriation of personality. She is of the opinion that with the increasing commodification of the human image any legal system should take account of the fact that a person's name or features (image, voice, likeness) are also valuable economic assets.

The celebrated writer William Cornish in his book *Cases and Materials on Intellectual Property* (2004) Sweet & Maxwell, United Kingdom 4th Edition while not dealing with the subject at hand will be invaluable in the copyright and trade mark related issues. In chapter 3 as he deals with copyright, he has also touched on the issue of authorship, ownership and dealings in regard to images. Authorship he has clearly explained belongs to the person who takes such photograph and the ownership and subsequent dealings of such image belongs to such author not the subject. This was exactly what I critiqued in this thesis that most celebrities are only subjects and not authors of these photographs/drawings thus giving a legal standing for the author to exploit their personas unilaterally.

In chapter 5 Cornish deals with trade mark law which is relevant as in thesis we investigate the registration of celebrity names and even images as trade marks. He has highlighted a benchmark case in the United Kingdom *Elvis Presley* vs *Sid Shaw* and the difficulties encountered with regard to such registration: the test of distinctiveness and the function of a trade mark as a source of the origin. This case was quite relevant in my research and features in chapter two and the reader saw the impact it had in subsequent cases where a celebrity seeks such trade mark registration and fails the test.

Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter in their book, *Privacy, Property and Personality (2005)* Cambridge University Press, New York at chapter 1 attest to the difficulties that this area of law has received. They begin by conceding that fame has an attractive force that lends itself well to commercial exploitation. But that

commercial exploitation of aspects of personality does not fit easily into the established categories traditional intellectual property law because although fame is a commodity it is not, in itself, the object of a generally accepted intellectual property right.

The authors make a useful comparison that while copyright subsists in original works, the attractive force of a media star 's image may or may not be the result of original ideas or hard work. Also, while the gist of trade mark law is the protection of distinctive signs against misrepresentation, the unauthorised commercial exploitation of personality is a misappropriation, which does not necessarily result in any confusion. The authors have in their research found that courts in various jurisdictions have struggled to find a legal basis for, and an adequate level of protection against, the commercial exploitation of aspects of personality and many legal problems surrounding the commercial exploitation of personality remain unresolved.

The **WIPO Report on Character Merchandising**, December 1994, at page 13 stated that no country has enacted *sui generis* legislation on this area. Furthermore, there exists no international treaty dealing specifically with that topic. The report states that any person or entity must rely on different forms of protection and, consequently, different legal texts. 13 years later, the situation is still the same despite the growth of a worldwide celebrity culture.

9. Research Constraints

In my research the main research constraint was the difficulty in the availability and acquisition of information on this topic. Most of the western world especially the United States of America has a very well developed jurisprudence on the rights to one's persona. However, in Africa, especially Kenya the scenario is and was quite different. Kenya has seen a growth of celebrity hood only in the last decade and thus the industry is at its infancy. It was therefore a challenge not only to find relevant research material but also anecdotal evidence to assist in my research.

My research was however boosted by the fact that today Kenya has a vibrant and diverse media industry that will make the access to such information much easier and more credible. Apart from the television shows, there is a plethora of glossy magazines and even pull-outs in daily newspapers available in the Kenyan market that have given widespread coverage to the rising celebrity culture. Their contents were extremely useful in this study.

As seen in my literature review, the literature in this area was limited and thus not solely sufficient in my research. To complement my research, I was to conduct interviews with about 3 local celebrities in different fields. This would have greatly assist me in acquiring more information that has not been reduced to any publication and also getting their point of view on this subject. However securing interviews with the proposed celebrity proved impossible as some demanded a fiscal exchange for such interview while others preferred I deal with their agents or managers who upon learning it was academic work I was pursuing, decided not to honour the proposed interview.

11. Chapter Breakdown

Chapter One

I began by providing a working definition of what appropriation of personality is and who a celebrity is. I then took the reader through a brief historical background of this problem to show how famous persona (name, image, voice or likeness) have been used since time immemorial for commercial as well as non-commercial purposes. In this chapter I also highlighted the two distinct interests that a celebrity will attach to such persona: Economic and dignitary interests. In doing so, I introduced the reader to the wider concept of personality and its dual nature to lay appropriate groundwork showing that this is a bigger problem than having a few t-shirts being sold bearing the unauthorised image of a certain celebrity. In this chapter a good example was of Wangari Maathai's persona being appropriated on the Internet.

Chapter Two:

To advocate for any form of legal protection to a celebrity's persona, I had to convince the reader that the Kenyan celebrity is indeed worthy of such protection- that this is a growing force that wields influence, clout and power in all spheres of society. In the first part of this chapter I did so with the use of anecdotes and took the reader through the discovery of how powerful our local celebrities have become. I then showed exactly how such fame can be easily exploited internationally and receive no protection under the common law (which is the system of law prescribed to in Kenya) by using an international icon: the late Princess Diana. This was to lay the foundation for my next chapter as I began to tackle the problem in-depth.

Chapter Three

My case study came to life in this chapter. Mr. Nelson Mandela was the African personality and celebrity whom I extensively used to highlight this as an African problem, no longer relegated to the Western world alone. It is here that I also showed the strides made by the South African law to address this issue and at the same time I undertook my critique of our Kenyan laws *in extenso*. By tying these two issues together, the reader developed a sense of exactly what our laws need to change to address this problem.

Chapter Four

I summarised and highlighted the succinct issues discussed and discovered in the preceding chapters. While using the backdrop of what key international jurisdictions have done, I proposed certain solutions to this problem, which came in the form of reforms to the already existing laws or recommendations to expand the same to incorporate salient changes to our laws and the existing legal framework to address the issue.

CHAPTER ONE

THE ESSENCE OF PERSONALITY

1.1 Introduction

The essence of the problem of appropriation of personality may be put very simply: if one person (A) uses in advertising or merchandising or any other venture, commercial or otherwise, the name, voice or likeness of another person (B) without his or her consent, to what extent will that person (B) have a remedy to prevent such an unauthorized exploitation? The practice of using valuable attributes of personality in advertising or merchandising or any other venture, commercial or otherwise, is common stay in today's world as we will find out shortly. In this chapter, we will be introducing the reader to the problem while identifying and discussing the two interests that exist in personality: economic and dignitary interests.

1.2 Historical background

The practice of appropriating personality has a long history. As early as 1843 in the United Kingdom (UK), *Mr Cockle's Antibilious Pills* were recommended by, amongst others, 10 dukes, 5 marquesses, 17 earls, 16 lords, an archbishop, 15 bishops and the attorney general, before it was realised that the advertisers were fabricating most of their product endorsements.[1] Ironically many of these persons were comparatively unknown until the advertisers conferred an enhanced measure of celebrity upon them, leading the public to identify with them solely in their capacity as endorsers of the advertisers' products.[2]

With the advent of the Industrial Revolution and the proliferation of consumer products, manufacturers and advertisers sought new ways to market and differentiate their wares from those of their rivals. Queen Victoria of England seems to have enjoyed the dubious

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1 Thomas Richards, *The Commodity Culture of Victorian England: Advertising and Spectacle*, (1990) Verso Publishers, London, at 22 and 84.

2 *Ibid*, at 84.

distinction of being one of the first people whose image was commercially exploited on a grand scale in England.[3] During her Jubilee celebrations of 1887 hundreds of advertisers flooded the market with one of several forms of the Queen's image in order to sell such items as perfumes, powders, pills, lotions, soap, jewellery and cocoa.[4] In 1907, in the United States of America, Thomas Edison the famous inventor had his name and likeness used on a medicine label without permission.[5] He successfully sued and this was one of the first cases to find that commercial misappropriation of another's identity "infringes on an economic interest." Using traditional property language, the court stated thus:

> "If a man's name be his own property, as no less an authority than the United States Supreme Court says, it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner rather than to the person seeking to make an unauthorized use of it."[6]

These examples show that the practice of appropriation of personality has been in existence for a long time and yet, as will be seen in this thesis, it has hardly received any legal recognition.

1.3 The evolution

As I embark on my study, the word "celebrity" will be invoked constantly and therefore it is necessary to define this term. What is a "celebrity"? The definition by C. Wright Mills seems appropriate:

> "The celebrities are The Names that need no further identification. Those who know them so far exceed those of whom they know as to require no exact computation. Wherever they go, they are recognized, and moreover, recognized with some excitement and awe. Whatever they do has publicity value. More or less continuously, over a period of time, they are the material for the media of communication and entertainment. And, when that time ends – as it must – and the celebrity still lives – as he may – from time to time it may be asked 'Remember him?' That is what celebrity means."[7]

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[3] *Ibid* at 85.

[4] *Ibid* at 86. Apart from the Queen, in the late nineteenth and early twentieth centuries, the names and images of well-known persons termed as celebrities such as Benjamin Franklin, the French actress Sarah Bernhardt, German Count Zeppelin and the American inventor Thomas A. Edison were used to advertise, respectively, watches, perfumes, cigars and medicinal products.

[5] Edison v. Edison Polyform and Mfg. Co., 67 A. 392, 394 (N.J. C. 1907). Edison invented the light bulb.

[6] *Ibid.*

[7] C. Wright Mills, *The Power Elite* (1956) Oxford University Press, New York at 71-2. Available at the C. Wright Mills homepage http://www.faculty.rsu.edu/felwell/Theorists/Mills and http://www.thirdworldtraveler.com/Book_Excerpts/PowerElite.html. Last accessed July 7, 2006.

Mills himself attributes the rise of the modern celebrity to the emergence of New York café society around the 1930s, when there was a mixing of different classes of people that permitted different hierarchies of wealth, class, descent and publicity to interact.[8] To Mills, it does not matter too much what celebrities are good, or the best, at.[9] That is the same opinion I hold throughout this thesis. It matters not whether the fame is deserved or not. What we are interested in is what the law says regarding the protection of such persona.

This is because in some cases, third parties seem almost solely responsible for the commercial value of a person's identity. It is not always that a persona is created by the subject himself. For example, in 1960, a Cuban photographer Alberto Korda took a photo of revolutionary leader Che Guevara at the funeral of guerillas who had died in the explosion of a Belgian freighter.[10] The photographer took the picture by happenstance, capturing Guevara wearing a starred-beret as he gazed for a moment into the distance.[11] The photo was first published in 1967 and has since become one of the most broadly diffused images of all times, plastered to support social causes and personal revolts of all types.[12]

Che Guevara's case is instructive because Che's fame has continued to grow since his death, obviously without promotional efforts on his part.[13] Guevara's case also illustrates the inherently cumulative process by which one gains social currency. Not only might Che not have chosen to associate himself with everything he has been made to endorse since his death, he simply would not have been able to actively promote so many causes and products.[14]

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[8] *Ibid*

[9] *Ibid*

[10] http://en.wikipedia.org/wiki/Che_Guevara_(photo)

[11] A copy of the said photo is annexed as "Appendix A".

[12] Correspondent, "Che Guevara photographer dies" at http://news.bbc.co.uk/1/hi/world/americas/1352650.stm. Last accessed May 5, 2006. The Maryland Institute of Arts called the photograph, "the most famous photograph in the world and a symbol of the 20th century." Since then, the image has adorned T-shirts, wall posters, banners and even wristwatch faces around the world. Henry Butterfield Ryan, a former United States diplomat and author of *The Fall of Che Guevara*, said the picture is the primary reason for Che Guevara's legendary status.

[13] *Ibid.* Albert Korda never received any royalties from the photo and never sought any payments.

[14] The only time when Korda asserted copyright was when the image was used in an advertisement by Vodka. In "Photographer wins copyright on famous Che Guevara image" available at

Various jurisdictions have developed markedly different solutions to the problem and there has been comparatively little uniformity in approach. The roots of this study lie in the English common law which is the system of law that Kenya prescribes to and is guided by. The common law has been reluctant to provide a remedy for appropriation of personality, and as will be seen in chapter two while looking at the case of the late Princess Diana such plaintiffs have failed to secure redress for the unauthorised use of their persona.[15] Other jurisdictions have, to varying degrees, rejected the rigid English approach, employing a number of different legal concepts to provide redress for the multifarious aspects of appropriation of personality.[16]

1.4 Economic and dignitary interests

It is important to note that once there is unauthorised appropriation of personality, two main interests may be harmed: economic or pecuniary interests in personality, and dignitary or non-pecuniary interests.[17] An economic interest in one's persona will include existing trading or licensing interests and other intangible recognition values. Whereas dignitary interests will deal with interests in one's reputation and interests in personal privacy.[18]

1.4.1. Existing trading or licensing interests

This first category covers the interests of those who might have a *de facto* economic interest in their persona and who might be actively involved in exploiting their fame for

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http://archives.cnn.com/2000/WORLD/europe/09/16/cheguevaraphoto.ap/ Last accessed May 5, 2006. Korda summarised his position thus: "As a supporter of the ideals for which Che Guevara died, I am not averse to its reproduction by those who wish to propagate his memory and the cause of social justice throughout the world," he said. "But I am categorically against the exploitation of Che's image for the promotion of products such as alcohol, or for any purpose that denigrates the reputation of Che." Korda won an out-of-court settlement of about $50,000, which he donated to the Cuban medical system. "If Che were still alive, he would have done the same," Korda said. Also see Pascal Fletcher, "Vodka and Che Guevara Just Don't Mix", *London Financial Times*, September 11, 2000, at 11

[15] See Chapter Two 2.3 the international exploitation of the late Princess Diana. It is important for the reader to also keep in mind that this a developing area of intellectual property law which borrows heavily from both traditional property rights and the arena of tort law.

[16] See Chapter Three, 3.2.1 South Africa's legal awakening and Chapter Four 4.3 on recommendations to the Kenyan law while highlighting the Canadian and German jurisprudence on this issue.

[17] A thorough analysis of the two interests will be found in Beverley-Smith Huw, *The Commercial Appropriation of Personality,* (2002) Cambridge University Press, New York at 11-14.

[18] *Ibid.*

money. Sportsmen, for example, often endorse products which might be within their field of expertise such as sports equipment and clothing and an endorsement of this kind will often be an effective way of boosting sales of such goods. In Kenya, marathon champion Paul Tergat is an official endorser of *FILA* products, especially the training shoes.[19] On the other hand, a sportsman's image might be used in connection with goods or services that are totally un-related to the sportsman's sporting activity. Again, Paul Tergat is also the official spokesperson for *Western Union* Money Transfer services, having landed a one-year contract with Post Bank.[20] The Kenya Tourism board has also used him to market Kenya as a tourist destination abroad and there are Paul Tergat billboards advertising the Nakumatt chain of supermarkets in the country.[21]

Companies may also wish to associate their products or services with the image of a famous person in a way which falls short of endorsement of any particular product. Indeed, in the advertising business, a distinction is often drawn between "tools of the trade" endorsements[22], a term which is largely self-explanatory; "non-tools" endorsements, involving products on which celebrities do not use in their primary field of activity[23], and "attention grabbing devices" which involve using the names or images of celebrities on, or in connection with, goods or services without suggesting any endorsement.[24]

1.4.2 Other intangible recognition values

Fame is a rather peculiar commodity and it seems to be a fact of advertising practice that the use of the persona of a vast range of famous people can be beneficial in more ways than simply selling goods or services. Apart from the more common cases such as

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[19] Juma Kwayera and Robert Muthomi, "Sport is a Money Spinner, Especially Off the Field", *The East African*, September 1, 2003 at 13.
[20] *Ibid.*
[21] *Ibid.*
[22] A good example is the endorsement given by Paul Tergat for *FILA* training shoes.
[23] For example Catherine Ndereva, the Kenyan female marathon record holder in an advertisement for *Aquamist* mineral water. This is not a tool of her trade but she was endorsing the said product.
[24] A good example of this is the billboard of Paul Tergat advertising the Nakumatt supermarkets with the caption "Take the Lead". Clearly, this is an attention-grabbing gimmick as he would in no way be endorsing the said supermarket but they are using his running prowess to market their slogan.

musicians and sportsmen, people of high professional standing,[25] holders of public office and politicians are often desirable people with whom to associate products or services. In Kenya a key example of such a person is Professor Wangari Maathai, the Nobel Peace Prize laureate.[26] Although such people would not normally be actively trading in their image by granting licences or entering into endorsement deals, they may still have what might be referred to as "recognition value".[27]

Their names or images are familiar to the public, but their potential for endorsing or being associated with products remains latent and unrealised, until an ingenious advertiser, with or without seeking prior permission, finds a suitable use for them. Following her international fame and recognition value soaring, Wangari Maathai's image and name has been commercially exploited on the Internet with horrendous results. On one website, a drawing of her image watering a tree shaped in the peace symbol, clearly capitalizing on her Peace prize has been used to sell all sorts of paraphenelia.[28] On the other website a sketch of her face and the slogan "Planting the Seeds of Peace" have been attached to a myriad of merchandise from coffee mugs to boxer shorts![29]

The significance of the distinction between these two categories becomes important as it will be seen later that the Kenyan legal system will not protect such "recognition value".[30] However, other jurisdictions, most notably the United States and Canada, have been willing to protect intangible recognition value even when the person(s) injured do not

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[25] Some of the earliest English authorities concerned with unauthorised commercial exploitation of personality involved the use of the names of leading members of the medical profession, for example, *Clark* v. *Freeman* (1848) 11 Beav 112; *Williams* v. *Hodge* (1887) 4 TLR 175 and *Dockrell* v. *Dougall* (1899) 15 TLR 333.

[26] Wangari Maathai, *Unbowed,* (2003) Knopf Press, United States.

[27] In Professor Wangari Maathai's case, winning the 2005 Nobel Peace Prize gave her not only local but international recognition value. She was thereafter named roving Ambassador for Congo Basin. Available at http://greenbeltmovement.org. Last accessed August 8, 2006.

[28] http://www.cartoonstock.com/directory/w/wangari_maathai_gifts.asp. Last accessed August 8, 2006. The site has already reserved copyright of this image and it can reproduce this image in all sorts of merchandise. (See Appendix B for a copy of the said image).

[29] http://www.cafepress.com/esangha/403796. Last accessed August 8, 2006. The website states that all proceeds will go to e-sangha Buddhism portal. This is clearly an illegal and unauthorised exploitation of Wangari's persona. (See Appendix C for copies of the images and items on sale.)

[30] See Chapter Three 3.3 on local exploitation generally. For further concise reading on Intellectual Property Law see Ben Sihanya's, *Intellectual Property law,* LL.B. IV Teaching Notes and Materials, 2006.

have and do not carry out any related business or trading activity. For example, in a Canadian case, *Baron Philippe de Rothschild, SA* v. *La Casa de Havana Inc.*[31], the Ontario High Court of Justice restrained a cigar merchant from using the name of the Rothschild family as his business name. The part of the judgment dealing with the claim for appropriation of personality contains nothing more than the bare assertion that, "one cannot commercially exploit another's name or likeness without his permission"[32] and the decision was not based on any evidence that the plaintiffs had suffered any damage, or evidence that they had exploited their name commercially.

In the United States, the case of *Roberson v. Rochester Folding Box Co.*[33] is illustrative. Without the knowledge or consent of the plaintiff, a young girl suing through her guardian, the defendants had obtained a likeness of the plaintiff for use in their flour advertisement, accompanied by the caption "flour of the family". The plaintiff was awarded damages, despite not being involved in such business or trade and Parker CJ noted that the legislature could intervene to create legislation prohibiting the unauthorised use of another's name or picture in advertising.[34]

1.4.3 Dignitary interests

No ready definition of the term "dignitary interests" can be found in the legal literature, reflecting the fact that there is no coherent notion of human dignity as a legal value.[35] Feldman thus treats dignitary interest as one where, first, a finite sum of money might not provide complete recompense for the invasion of a dignitary interest and secondly where a plaintiff might remain unsatisfied after an award of damages.[36]

Taking an injury to reputation as an obvious example, it is clear that a sum of money might not provide complete recompense, and even an award of damages that would seem

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[31] (1987) 19 CPR (3d) 114.
[32] *Ibid,* 115.
[33] 171 NY 538 (1902).
[34] *Ibid,* 545. As a result, in the following year the New York legislature intervened and enacted a statute making the unauthorised use of a person's name, portrait or picture for advertising, or for the purposes of trade, both a tort and a misdemeanour. See NY Sessional Laws 1903 Ch. 132 ss. 1–2.
[35] See, generally, D. Feldman, "Human Dignity as a Legal Value" [1999] PL 682.
[36] *Ibid,* 683.

very generous, if not excessive, to an objective observer might not give a plaintiff complete satisfaction.[37] The difficulty in placing any objective value on a dignitary interest such as reputation is reflected in the widely divergent awards of damages for defamation, which have caused some concern even in Kenya. For instance, in *Nicholas Biwott* v. *George Mbuguss and another*,[38] Justice Lady Joyce Aluoch awarded Nicholas Kipyator Biwott, then a powerful cabinet minister, Kshs.20 million in a defamation suit against George Mbuguss and Kalamka Ltd.[39] In the case of *John Evan Gicheru* v. *Andrew Morton and another*[40] brought by Judge of Court of Appeal Evan Gicheru (now Chief Justice) against Andrew Morton and publishers, Michael O'Mara Book Ltd, the same Justice Aluoch awarded a sum of Kshs 2.25 million! [41]

1.4.4. Interests in reputation and personal privacy

Everyone has an interest in their personal reputation, be they famous celebrities or ordinary people. For present purposes, it must suffice to note that an injury to a person's reputation can cause financial harm, and can also cause harm, which cannot be expressed in monetary terms. For example, most of the raunchy publications available in Kenya and Uganda usually carry the photographs of well-known local celebrities inside the magazines next to lewd articles.[42] In this case, the action resulted in an injury to the reputation of the lady and was a cause of action for defamation. The damage suffered was also financial as both existing and potential clients in the modeling world and advertisers withdrew their business and social relationships with her. She also suffered from shock, distress, humiliation and injured dignity.

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[37] *Ibid* 687.

[38] HCCC 2143 of 1999.

[39] Hassan Kulundu, "Media, Judiciary in new face off: Huge monetary awards in defamation cases crippling media houses" *Kenya Times, Insight Magazine*, May 29, 2006 available at http://www.timesnews.co.ke/29may06/insight/ins3.html.Last accessed August 10, 2006.

[40] HCCC No. 214 of 1999.

[41] *Ibid.*

[42] Some of the magazines go by the names *Bliss* or *Seen* or *African Woman*. In one such publication, a well-known female celebrity had her photograph in a bathing suit, which she stated had been taken as she contested in a local beauty pageant, reproduced in the *Bliss* magazine next to a lewd article, clearly wishing the reader to form a connection to the same. She has still not sought any form of legal redress.

An interest in privacy is difficult to define but a simple dictionary definition such as "freedom from intrusion or public attention" or "avoidance of publicity" will suffice.[43] A central problem is that of reconciling a person's claim to privacy with the person's status as a public figure.[44] It is difficult to reconcile a celebrity's claim that his/her privacy has been invaded as a result of unauthorised commercial exploitation of personality. This is because there is a widely held belief that most celebrities consciously seek out fame and media attention. Thus being figures of contemporary society *par excellence* it cannot be justified to seek privacy from the public.[45] On the other hand, some people do not actively seek celebrity but find that it is thrust upon them, without having done anything to deserve it.[46] Either way, this particular interest is difficult to protect as the society believes the life of a celebrity is in the public domain.

1.5 Conclusion

Our urge to know and associate with celebrities is not only motivated by our desire to be entertained. As one writer notes, "celebrities have become, in recent decades, the chief agents of moral change in the world."[47] They have come to embody abstract issues or points of view, and are shorthand forms for ideals or expertise.[48] Explaining how fame

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[43] *The Concise Oxford Dictionary*, 1990, Oxford University Press, Oxford, 8th edition.

[44] Beverley-Smith Huw, *The Commercial Appropriation of Personality,* (2002) Cambridge University Press, New York at 45.

[45] *Ibid.*

[46] A prime example would be the late Emperor Haile Selassie of Ethiopia, a man who is to date worshipped as a god by the Rastafarian movement and who in his lifetime did nothing to encourage or seek such deification. Haile Selassie I had no role in organising or promoting the Rastafari movement in fact he was a devout member of the Ethiopian Orthodox Church, as demanded by his political role in Ethiopia, and it was his role as Emperor of Ethiopia that he devoted his life to. His publicly known views towards the Rastafarians varied from sympathy to polite interest. See http://en.wikipedia.org/wiki/Haile_Selassie

[47] Paul Richter, "Pentagon reaches for Stars to recruit defense: U.S. tries to enlist celebrities in campaign to attract young people", *L.A. Times*, Jan. 29, 2000. He describes the Pentagon's attempt to enlist celebrities to convey information about military opportunities to young people.
In Kenya, celebrities have been used for a number of causes, be it the Millennium Development Goals (MDGs) in Kenya where Professor Wangari Maathai, winner of the 2005 Nobel Peace Prize, boxing champion Conjestina Achieng, and musical artists such as Eric Wanaina and Gidi Gidi Maji Maji, joined with the United Nations in Nairobi, the Kenyan capital, to launch a series of public service announcements (PSAs) promoting the eight MDGs by 2015. Available at http://www.worldfamilyorganization.org/News/UNNews/development_UN_News.htm

[48] Leo Braudy, *The Frenzy of Renown: Fame and its History*, (1997) Vintage Books, London at 119: "The single, photographed act of Princess Diana shaking hands with an AIDS patient at the Middlesex hospital in London did more to change the British public's perception on AIDS, how it was transmitted, and their relationship with those who had contracted the disease than years of public information, editorial, and advertising."

arises, or is produced, is as difficult as describing the factors affecting the demand for celebrity as in many ways, celebrity seems to be as unpredictable and fortuitous as life itself.[49] Moreover, becoming famous is hardly a solitary endeavour; it always requires a public and its acclaim.[50] Hence, theorists often emphasize the importance of the media and the public in the collaborative making of celebrities.[51] Fame is exclusively dependent on what most often are fickle and capricious tastes by the public hence the celebrity can never "manufacture" fame for himself/herself. It is a process that requires the public.[52]

As seen, fame may arise as the near-exclusive result of a person's activities, with minimal public or media input.[53] Other celebrities may become so only as a result of relentless advertisement and media promotion, without there being any great reason as to why that person became a celebrity.[54] Finally, other people rise to fame without slick promotion and media assistance, but through "word-of-mouth", or a certain "underground" network.[55] But, however the fame is acquired, the law should endevour to protect celebrity identity because it is a repository of social meaning. This will be clearly illustrated in my next chapter as I move to explore exactly what value, if any, Kenyan celebrities have today.

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[49] *Ibid.*

[50] *Ibid,* 121.

[51] See Michael Madow, "Private Ownership of Public Image: Popular Culture & Publicity Rights" 81 Cal. L. Rev. (1993) at 184. By looking at a number of reputational histories, Michael Madow has convincingly argued that media play a key role in creating disparities in fame among successful artists, athletes and business people.

[52] *Ibid* at 191.Fame is exclusively dependent on what most often are fickle and capricious tastes by the public hence the celebrity can never "manufacture" fame for himself/herself. It is a process that requires the public.

[53] Nelson Mandela and Wangari Maathai are good examples of this.

[54] In the United States a good example is Paris Hilton, heiress to the Hilton chain of Hotels while in Kenya, a good example would be the infamous Debra Sanaipei, a former Miss Tourism Kenya who is now known as a "Nairobi socialite".

[55] A good example in Kenya is Ukoo Fulani Mau Mau, an underground music group that grew from K-Shaka and today has offshoots in Mombasa, Arusha and Dar es Salaam. They released a 19-track album "Dandora Burning" which had the hit song "All over the world" featuring Brooklyn high priestess of rap and floetry Rha Goddess and 37 Eastlands ghetto rappers. The group (which is really a collection of performers) receives very little media attention or play if at all and has been largely ignored by all local music awards but has gone ahead to record successful albums purely by word of mouth. See Tony Mochama, "Dandora Burning", *Pulse magazine, East African Standard*, April 14, 2006 at 6.

CHAPTER TWO
THE POWER OF PERSONALITY

2.1 Introduction

The previous chapter has dwelt on the various facets of the commercial appropriation of famous persona. In this chapter I will examine if in fact there is need for such protection. To figure out the answer the question one may ask is why the law should be so interested in the celebrity world especially in Kenya. Granted, the majority of society may not be that interested – at least not in the antics of the individuals concerned- but it is undeniable that we are concerned about the broader impact of celebrity culture. The impact in helping to reshape the social, cultural, economic and even political scenery in Kenya. Virtually every newspaper, magazine, and television news broadcast now had a repertory company of protagonists-celebrities-whose romances, marriages, divorces, binges, escapades, peccadilloes, declines, dysfunctions, and pronouncements became a primary focus of the press and help cement the already rising or diminishing star of that celebrity in Kenya.[1]

2.2 The Impact of Celebrity Culture in Kenya

A recent and intriguing article in a Kenyan daily titled "Famous for being Famous?"[2] states that this culture is rising fast in Kenya. The writer posits a reason for this.

> "Kenya has always had its own breed of famous people-think of comedian Ojwang' Hatari and the Vitimbi crew, soccer great Joe Kadenge, athlete Kipchoge Keino and boxer Robert Wangila-but they weren't 'celebs.' Locally the term 'celebrity' became a much sought-after appendage slightly less than three years ago with the advent of local hip-hop music, FM stations and the attendant culture of nosiness into the faces of this new phenomenon. But it all began with *Holla!* A research carried out by Consumer Insight Africa on the lifestyle, values and aspirations of Kenyans aged below 25. ...They yearned for tabloid-style reporting of entertainment issues spiced with sleazy gossip about their 'celebs.' And they got it."[3]

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1 Glossy local magazines such as True Love, Drum, Insyder, Qz among others are the best buy for salacious gossip while the daily newspapers have dedicated weekly magazines, for example "Pulse" in the Friday edition of the *East African Standard*, "Buzz" in the Sunday edition of the *Daily Nat*ion and "Seen At" in the Wednesday edition of the *People* newspaper to reveal the latest celebrity stories and sightings in Kenya.

2 Kamau Mutunga, "Famous for being Famous?" *Daily Nation* Weekend, February 9, 2007 at page 2.

3 *Ibid.*

As I stated in Chapter One, true fame or infamy is conferred by the media and the greater public but the criteria used is largely unknown and rarely makes sense. The situation is no different in Kenya. Why the media should have developed in this way is a difficult question and not part of this thesis, but part of the answer is that the cult of celebrity has become one of the chief drivers of the economy. We are long past the time when the major part of economic activity consisted in the manufacture of industrial commodities. Now we have the commodity of personality. Mutunga thus surmises:

> "Welcome to the world of the slippery (definition-wise) Kenyan 'celeb'...we now call them 'celebrities' never mind who celebrates them. But they have spurred a Peeping Tom culture that creates the urge to know whether they are dating, dieting or drably dressed. These 'celebs' are the kind we parade in inch-thick cake of make-up to ask pet questions, like what they dreamt about last night...it's a youth driven culture and older Kenyans don't understand what this whole celebrity business is all about...."[4]

Clearly, this culture has given rise to the use of the celebrity as a commodity, in fact into an asset which can be used to sell products, attract audiences, generate charity donations and promote political or social causes.[5] It then stands to reason that the same celebrity should be able to legally protect his or her most famous asset that is now a commodity of sorts: the persona.

2.2.1. Economic Impact

In present day Kenya, celebrities are now the beneficiaries of lavish lifestyles and an economic force in their own right.

> "Gone are the days that our established celebs were 'jiving' in matatus or riding in ramshackles of automobiles. Some of the celebs are now 'souping up' their rides, buying homes and building empires. *The celebs have become enterprising citizens who are busy building the nation.* Our musicians have been doing very well financially and could even be said to be living large. One musician who made a lot of money is Kenya's King of Ohangla, Tony Nyadundo, who describes 2006 as a very good financial year for him. 'I believe it opened my eyes to understanding and knowing that music is my life,' he says."[6]

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4 *Ibid.*

5 See 1.4 in Chapter One where I succinctly go through the two interests that are generated by famous personas namely: economic and dignitary interests.

6 Caroline Nyanga and Edith Fortunate "Celebrity Fame and Fortune" *Pulse* magazine *East African Standard* December 8, 2006 at 6. All through the said year, Nyadundo performed for fees ranging between Sh200,000 and 150,000 per show in the festive season or between Sh60,000 and Sh50,000 during the dry months doing three shows a week. "With the demands and the many shows across the country I now realise how people love and appreciate my music and that gives me the morale to go on", he says. The singer, whose debut CD "Isanda Gi Hera" caught the psyche of Kenyans, has invested most of the cash from the

The distinction between the popular musicians of today in Kenya and the yesteryear musician who barely eked out a living is clear proof that today they are viewed as celebrities in the media and they have done so by carefully solidifying this status by living and pursing affluent, flashy and enviable lifestyles that their fans want to imitate. The trend, as the article reports, is not limited to Kenya alone but has followed the Kenyan celebrities who perform abroad.

> "Another Kenyan musician who is doing well is afro-fusion star, Abbi Nyinza. He has been performing mostly in Europe, where he gets between ten to fifteen shows a year. He is paid around 4,000 to 5,000 euros per show (Ksh 400, 000 to 500,000). 'I'm happy that our local music scene is responding well too,' he adds. His album sales around Europe were at KSh700, 000 a month. Abbi is now planning to set up a music production company."[7]

Apart from the music, it is emerging that local celebrities have embarked on trading in their persona as well. As executives in the corporate world pride themselves in wearing imported designer suits every morning, armies of youngsters are turning to the local market and wearing Jua Cali Wear, Nonini Wear, CMB Prezzo Clothing, Ruff Wear International and Ogopa Wear, among other labels.[8] These labels are the names of popular local musicians Jua Cali,[9] Nonini,[10] CMB Prezzo,[11] Rufftone[12] and the music

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gigs. He currently runs various businesses and owns plots in prime areas. He owns a number of vehicles, a Mazda MX6 sports car, Subaru Legacy and two cars he is not ready to mention for security reasons. (Italics mine).

7 *Ibid.* Kenya's foremost Entertainment group Homeboyz entertainment also perform abroad and this deejays outfit has taken radio and television entertainment to another level. They have launched TV shows in Uganda and will be going to Tanzania and South Africa. Homeboyz are the only East African deejays to have a dedicated Radio channel on an International Airline (one can tune in to them aboard Kenya Airways Afrobeat Channel One) and when it comes to television ,their programmme H2O is also broadcast in Uganda. The DJs are set to broadcast in Tanzania and South Africa in March 2007.

[8] Dan Tengo, "Local music stars, local labels", *Saturday Review* magazine, *Saturday Nation* January 17, 2004 at 25.

[9] *Ibid.* Jua Cali (real name Paul Nunda) is a local musician well known for hit songs "Kiasi" , Bidii Yangu" and is currently the face of the *W series Motorola* Handset mobile phones in Kenya. He produces under Calif records under a genre of music called "Genge".

[10] *Ibid.* Nonini, also a Genge artist (real name Hebert Nakitare) shot to the limelight with the controversial rauchy song "We Kamu". His subsequent songs "Keroro" and "Si Lazima" have also raised widespread debate on their content value.

[11] *Ibid.* This is the self-proclaimed president of hiphop in Kenya whose real name is Jackson Makini. He is more known for his flashy bling bling lifestyle and courts controversy wherever he goes. His songs include "Naleta Action", "Mafans" and "Bring me the Music" which is a collaboration with fellow musician Wyre, the lovechild. He was also recently named as one of Kenya top 100 most influential people. See "The top 100 Kenyans" *The Standard*, Friday July 6, 2007.

production house, Ogopa.[13] In a trend that is fast catching on, young local artistes are increasingly making outfits for thousands of their fans and rapidly becoming forces to reckon with in the local garment industry.

The article goes on to report that each of these celebrities have actually cemented their fame by exploiting their persona.

> "Though the songs earned him (Jua Cali) recognition, it is only after launching his clothing line – Jua Cali Wear – that their popularity soared. 'People started taking keen notice of my songs because they had seen funky attire with my name on it,' he says. Jua Cali, who had been making only T-shirts, started experimenting with a wide array of merchandise – caps, wrist-bands, spaghetti tops and trousers – *all with his name emblazoned on them.*"[14]

These local musicians have realised the different interests that they can exploit with regard to their persona, in this case it being the economic interest. In the interview each artist concurs that they have been reaping the economic benefits of the power of their personalities.

> "Controversial Genge rapper, Nonini says, 'I'm happy because I get paid enough to make ends meet, but I must confess that I accrued money from *selling some of my merchandise (t-shirts, caps, jumpers with the name 'Nonini') and taking part in advertisements* as opposed to only selling my music.' To Rufftone, the launch of Ruff Wear International is a career landmark. 'I am impressed with the sales of the T-shirts and will be adding more jewels to my crown,' he states. Since he launched his clothing line, the sales of his album have risen dramatically and it is no wonder, therefore, that Rufftone has nothing but praise for the business. '*The success of the T-shirt business clearly illustrates how illustrious musical careers can feed other side-businesses for musicians*,' he argues."[15]

Clearly, these local celebrities have learnt the art of exploiting their persona and getting paid for it. The question then is, does the Kenyan law protect them should their monikers be used by third parties without their authorisation?

For example, a local television advertisement to market the detergent OMO has a child playing and scoring a goal in a muddied pitch to sell the slogan: "No Stains, No

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[12] *Ibid.* Rufftone (real name Roy Smith Mwita) is arguably one of Kenya's most popular gospel musician in the youth category. He burst to the limelight in 2003 with the hitsong "Mwikulu" (meaning "Heaven" in his native Luhya tongue) and has garnered an enviable following of fans in this genre of music.

[13] *Ibid.* Ogopa (Swahili for "Fear") is the Kenyan music production responsible for the careers of superstars such as Nameless, Amani and The Longombas to name a few. It is credited with changing the sound of Kenyan music in the late 1990s creating a genre of music called "Kapuka" and is still going strong to date.

[14] *Supra* note 8. (Italics mine.)

[15] *Ibid.*

Learning" and the phrase: "The next Dennis Oliech?" appears. Many Kenyans know who Dennis Oliech[16] is and the connection is made but can that not be termed as unauthorised exploitation of his name, unless of course he has consented to it being used? My Chapter Three answers this among other queries as it outlines and critiques in great detail the relevant Kenyan intellectual property laws.

That local celebrities are an economic powerhouse is evidenced further by the solicitation of Paul Tergat,[17] Kenya's champion marathon runner by the Kenya Football Federation for fundraising! It turned to Tergat to raise money for the remaining 2006 World Cup qualifiers who launched a fund-raising initiative for the Kenyan national football team, the Harambee Stars with a personal donation of $1,000(Kshs. 70,000/-).[18] Tergat said his fund-raising committee had set a target of $160,000 (Kshs. 11 million) to cater for the two vital matches against Guinea and Morocco in June and was quoted as saying:

> " 'As a Kenyan I found it very disheartening to read about the frequent reports on the financial troubles encountered by the Harambee Stars.'" Tergat said.[19]

Paul Tergat is also the founder cum organiser of the Sportsman of the Year Awards (SOYA)[20] in Kenya an initiative that has not only rewarded athletes for their prowess but has found sponsorship[21] and donations in the corporate world. Massive fundraising and donations[22] has resulted and it can all be attributed to Paul Tergat's power of personality.

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[16] Dennis Oliech is the Kenyan born international soccer player currently at Nantes FC who is best known for his run-ins with the media and off the court escapades making him one of the most easily recognisable faces in Kenyan sports today after world marathon record holder Paul Tergat and female pugilist Conjestina Achieng.

[17] Paul Kibii Tergat is regarded by many as one of the most astounding long distance runners of the last decade. Tergat has the rare distinction of winning a record 5 consecutive IAAF Cross Country titles from 1995 to 1999 and is to date the holder of the Marathon World Record set in 2003. Information available at http://www.paul-tergat.net/biography.htm. Last accessed July 15, 2006.

18 " Cash for Kenya's Football Federation" available at http://forum.football.co.uk/about1242.html. Last accessed July 15, 2006.

19 *Ibid.*

[20] Peter Njenga, "SA Marathon Star to Grace SOYA awards," *Daily Nation,* February 21, 2007 at page 18.

[21] *Ibid.* Since its inception, Safaricom, a leading mobile service provider in Kenya has been the official sponsor of this event.

[22] Odindo Ayieko, "CFC Hand Ksh 1m donation to SOYA," *Daily Nation,* December 12, 2006 at page 7.

As I stated in Chapter One, one of the legal interests in personality is economic which in turn is twofold: an existing trading or licensing interest or other intangible recognition value. We have seen that Kenyan celebrities are now achieving affluent lifestyles and wealth from their trade or talent but more so, in the trading of their monikers or personas as illustrated by Nonini. The intangible recognition value of the persona is clearly illustrated in the influence that an individual like Paul Tergat has. He has a value that makes him sought after and to be affiliated with and companies are scouring to sponsor his initiative or fund his projects. This is clearly an intangible economic interest in persona that Paul Tergat and so many other celebrities in Kenya today possess and such interest should be protected by the law.

2.2.2. Social impact

The influence of local celebrities to raise funds or get serious public response to a crisis was further evidenced when local media personality and celebrity in her own right, Caroline Mutoko of the KISS FM station interviewed girls facing the problem of lack of sanitary towels, a problem that had persistent for years despite the presence of numerous organisations that may have helped. As soon as the interview was aired, radio presenter Caroline Mutoko started a drive asking people to help these girls by buying them sanitary towels. The response was great, prompting a partnership with Proctor and Gamble, the makers of Always brand towels, where they gave a pack for every pack donated by the public.[23]

> "At Kiss 100 in Nairobi, we've teamed up with Procter & Gamble (P&G) which has agreed to match every Always sanitary pack our listeners buy. In the first three weeks after we launched, we received 40,000 packs, and P&G matched this with another 40,000. We've distributed them in schools in the Maasai area. We're working like mad but loving it."[24]

This campaign was so successful that the Divas of the Nile,[25] a trio of popular female musicians from Nyanza Province joined in and their message was that it was not right for

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23 Francis Karugah, "Kibera and Mukuru Daughters are Bleeding - Please Help Us" *Pulse Magazine, The Standard*, August 4, 2006.

24 *Ibid.*

25 The group is made up of three well-known musicians Mercy Myra, Suzanne Owiyo and Princess Julie.

girls to be missing school for a week over a natural occurence.[26] Thus the social impact of celebrities in Kenya today is being felt as they have helped to throw the spotlight on wider problems in society.

As they take on social causes, local celebrities are using their carefully crafted personalities and talents to do so. There is therefore a need to ensure that the very same persona that gives them such influence and impact is protected and utilized only by its creator. As they become daily fodder for the media so too must their reputations remain pristine and reflect the causes they support.[27] Yet the reality is that it would be very easy to use Caroline Mutoko's photograph to sell any number of merchandise including pornographic material and there would be no legal remedy under our laws.

Now more than ever, the local celebrities are being used in public service announcements and social campaigns not only in Kenya but also worldwide. Some prime examples are the Global Call to Action against Poverty (GCAP) which on 16th June 2005, used 800 school children and 20 Kenyan celebrities to launch the African Snaps and SMS campaign in Moi Avenue Primary School in downtown Nairobi.[28] Well known celebrities among them Kora award winner Achieng Abura and Kisima award winner Abbi spoke about the importance of the fight against poverty and the Day of the African Child.

> "Achieng declared at the press conference, 'we do care about poverty. We are concerned about the growing gap between the rich and the poor in Kenya and very happy to be associated with the Global Call to Action against Poverty campaign.' Abbi said, 'We are a small representation of numerous African artists that link their music, poetry and theatre to social issues such as HIV/AIDS, poverty and children'. They were among prominent musicians, sportspeople, actresses and film-makers who turned out to endorse this event."[29]

The Trust condom campaign in Kenya with the slogan, "*Je una yako*?"[30] is another that went out of its way to use local artistes, comedians and media personalities to endorse it.

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26 *Supra* note 23.

27 See 1.4.3. of Chapter One where I investigated the dignitary interest to a persona and one of them was an interest in reputation.

28 " Major advertising campaign launched in Kenya" available at http://www.millenniumcampaign.org/site/apps/nl/content3.asp?c=grKVL2NLE&b=190470&ct=1041727. Last accessed October 10, 2006.

29 *Ibid.*

30 Translated to English it means, "Do you have your own?" The celebrities who appear on this ad all carry a packet of Trust condoms and are asking the viewer if they do the same promoting the message of safe sex to all.

According to Population Services International (PSI), local celebrities Nameless, Prezzo, Kleptomaniacs, Deux Vultures [31] and others did not endorse it by default.[32]

> "They are influential celebrities whom the youth can relate to. Research was carried out and different personalities were interview for the campaign. Several had to be dropped as they did not fit the brand's image."[33]

The other campaign *"Chanukeni Pamoja"* aimed at the promotion of HIV testing at the Voluntary Counselling Centres (VCT) also used Kenyan celebrities but was graced by a more mature class of celebrities such as Susan and Gido Kibukosya and Eric Wainanina,[34] carefully selected to portray a sense of maturity and responsibility.

Beyond advertisements, local celebrities have used their talents for social awareness. Recently local musicians and producers such as GidiGidi, Big Ted, DNG, Die Hard [35] among others came together to record and star in the video of a song called "Public Mirror" whose theme was rape and its aftermath. This was collaboration between these celebrities and nominated MP Njoki Ndungu.[36]

> "GidiGidi said, 'I had a meeting with Njoki Ndungu and she wanted to know how local musicians can advocate for the Rape Act and talk about rape and gender violence. I didn't

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[31] These are all very popular local musicians who have evolved into celebrities in their own right and have enormous fan base following both locally and beyond the Kenyan borders. Nameless is well known for his hit album "On Fire" and hit songs including 'Juju', 'Ninanoki' among others, Prezzo is most probably more well known for his flashy blingbling lifestyle more than his music having hired a helicopter to make a grand entrance to an award show, the Kleptomaniacs have had a string of hit songs including 'Tuendelee ama Tusiendelee' and 'Swing Swing' while Deux Vultures also enjoy massive success with their songs the most famous being 'Kinyaunyu' and 'Adhiambo C'.

32 Carole Hinga, "Got a Brand?" *Pulse magazine, The Standard,* Friday February 9, 2007 at page 10. I will discuss endorsements by local celebrities in detail in chapter three.

33 *Ibid.*

[34] Susan and Gido Kibukosya are well known producers in Kenya having produced groups like K-South and Bamboo and were the event organizers for an annual event showcasing local music talent, 'Beats of the Season.' Eric Wainanina is a well known musician who won a KORA award in 2003 and is most famous for his socio-political songs including 'Nchi ya Kitu Kidogo' an anthem against corruption, 'Ukweli' a song commissioned by the Mill Hill Fathers to talk about the suspicious death of Father John Kaiser who was murdered in Kenya in 2003 and his notable release 'Kenya Only' which, after the 1998 terrorist bombing in Nairobi was adopted as the unofficial song of mourning, receiving extensive radio and TV airplay nation-wide. Information available at http://en.wikipedia.org/wiki/Eric_Wainaina_(musician). Last accessed October 10, 2006.

[35] Gidigidi is one-half of the popular rap duo GidiGidi MajiMaji whose biography is set out later in this chapter. Big Ted is a local music producer who has helped produce a number of musicians, DNG is a well known gospel artiste and Die Hard is an underground rap artist.

36 Naliaka Wafula, "Stars for Hope", The Standard, Pulse magazine, Friday February 9, 2007 at page 13.

> get any payment for doing this but the feedback we got, knowing that the message is getting out there is good enough payment.'"[37]

Another social initiative undertaken by local celebrities has been in the fight against corruption. In March 2007, the National Anti-Corruption Campaign Steering Committee (NACCSC) launched a nation wide campaign called the Integrity Torch Race Run dubbed "Mwenge Dhidi ya Ufisadi" from Mombasa to Busia.[38] Paul Tergat, Catherine Ndereba, Moses Tanui, Ezekiel Kemboi, Tegla Loroupe, Susan Chepkemei[39] among others were selected to run with the torch and hand it over in different designated spots around the country. The response in using these well known personalities has been positive:

> "The anti-corruption agency's public relations officer Ms Faynie Mwakio said the campaign will bear fruit going by what they have so far witnessed. 'The athletes at every stop since they left Mombasa last Monday have addressed the public about the dangers of quick money and the need to struggle to earn a living. When we stopped in Voi we had a large turn out and we allowed an interactive session and people were allowed to ask questions and were given answers,' said Ms Mwakio. The top athletes are being used as models to inspire Kenyans to uphold integrity, discipline and hard work and Assistant Minister for Justice and Constitutional Affairs Mr Danson Mungatana, who had been invited to flag off the run in Mombasa, said its objective was to have the top athletes identify with and endorse the national anti-corruption campaign activities."[40]

Globally, Kenyan celebrities have also been used to raise social awareness on a number of issues. Kenya has no less than 3 goodwill ambassadors appointed by various United Nations agencies and who are celebrities in their own right. The first is Paul Tergat who is the World Food Program (WFP) Hunger Ambassador since January 2004.[41] A spokesperson for the said organization is quoted thus:

> "We are tremendously proud that Paul Tergat, our ambassador on hunger has won yet another major marathon," said James Morris, WFP's Executive Director. "Not only is he a great athlete but a wonderful humanitarian who is deeply dedicated to helping the world's poor and hungry."[42]

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37 *Ibid.*

38 Kennedy Masibo and David Kiplagat, "Track Stars in Race to Stamp out Corruption," *Daily Nation,* March 5, 2007 at 12. Translated in English the phrase means, "Torch Against Corruption."

39 *Ibid.* These are all champion long distance runners and marathoners who hold various world records and awards in this field.

40 *Ibid.*

41 " WFP Hunger Ambassador wins thrilling NYC Marathon" available at http://www.wfp.org/english/?ModuleID=137&Key=1916. Last accessed July 15, 2006.

42 *Ibid.*

In my Chapter One I have also given examples of the various product endorsements and advertisements that Paul Tergat has featured in Kenya cementing his status as a celebrity locally but he is also a celebrity worldwide. His performances in Brazil have made him the second most recognised personality, second only to Nelson Mandela.[43]

The internationally known and well respected musical duo Gidi Gidi and Maji Maji are also Ambassadors with UN Habitat's Messengers of Truth since 2004 for their work informing the youth world wide about the Millennium Development Goals (MDGs).[44] Their biography was well summarized in the Habitat's website.

> "In 1999, their first hit single 'Ting Badi Malo' shot to the top of the East African charts. It became so popular that international radio stations, including BBC and Voice of America started giving it airtime. During the national elections in Kenya in 2002, Gidi and Maji recorded a song called 'Unbwogable'. Demonstrating the power for music to influence politics, the song which targeted issues of social justice and good governance, was an unbelievable hit and was used by the-then opposition party National Rainbow Coalition (NARC) as their theme tune during the elections. It made Gidi Gidi Maji Maji superstars in East Africa, and subsequently attracted the attention of Gallo Music (the South African license for Warner Bros and Atlantic). In 2003 they successfully recorded and sold an album with Gallo Records and have since emerged as Kenya's most successful Hip-Hop group and the country's only Hip-Hop group with an international label."[45]

While appointing them the Habitat spokesperson said:

> "Artists have the power, energy, and peer support to drive social change through music. Globally, there are many young artists that use Hip-Hop as a means of communicating about social issues like HIV/Aids and speaking out against crime, violence, and drug abuse. Cities can engage youth by having Hip-Hop artists perform and initiate dialogue around such issues."[46]

As global ambassadors what legal protection exists for GidiGidi and MajiMaji should a local entrepreneur start selling unauthorised merchandise with their names on it? What if they found their name registered as a domain name that led to a pornographic website?

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[43] *Supra* note 3, Kamau Mutunga, "Famous for being Famous?" also available at http://www.paul-tergat.net/biography.htm Last accessed July 15, 2006. Tergat's fame in Brazil arose as a result of his 5 victories in the Saint Silvetser Marathon, the most famous event in Brazil's street racing. He was declared the principal winner in that race as he still holds the record time since 1995 to date.

44 Gidi Gidi Maji Maji – UN Messengers of Truth available at http://www.habitatjam.com/viewIdea.php?iid=34&section=4. Last accessed July 15, 2006.

45 *Ibid.*

46 *Ibid.*

What is the recourse under the law? The answer is as shocking as it is disturbing. They will be unable to do anything under the present laws.

Tegla Loroupe, the Kenyan world-class female marathoner was named UN Ambassador for Sport in 2006 by the then Secretary General Kofi Annan.[47] She is also an International Sports Ambassador for the International Association of Athletics Fund (IAAF) and for the United Nations Children's Fund (UNICEF).[48] She is also the founder of the Tegla Loroupe Peace Foundation (TLPF) which was established in 2003 and whose slogan is "Running for Peace."[49]

She has also evolved into a global advocate for human rights and a humanitarian. Recently she was part of the delegation of 4 international celebrities namely actor and director George Clooney, actor Don Cheadle and Olympic speed-skater William Cheek that crisscrossed the world to talk to various diplomats about the Darfur Crisis.[50] After this visit, the then Secretary-General Kofi Annan met with the 4 celebrities at United Nations headquarters in New York to discuss the humanitarian crisis in Darfur.[51] Despite her fame and accolades, she is also exposed to the same problem-no legal protection in case of unauthorised use of her persona.

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47 Tegla Loroupe available at http://en.wikipedia.org/wiki/Tegla_Loroupe. Last accessed July 15, 2006.

48 *Ibid.*

49 http://www.teglaloroupepeacefoundation.org. Last accessed July 15, 2006.The Foundation uses 'Peace Races' as a mobilizing tool to bring the warring communities of the Greater Horn of Africa Region together and has successfully organized 5 peace races since 2003: four in Kenya and one in Uganda.

50"International Celebrities Discuss Darfur" available at http://www.aucegypt.edu/newsatauc/main.cfm?ArticleId=471: Last accessed July 15, 2006. "In a closed session in Oriental Hall, Egypt, actor and director George Clooney, actor Don Cheadle, long-distance track runner Tegla Loroupe and Olympic speed-skater William Cheek met with members of AUC and Egyptian community to discuss potential solutions to the Darfur crisis. The four celebrities came to AUC as part of a trip to raise awareness about Darfur that included stops in China and Turkey."

51 "Clooney, Cheadle, Tegla Meet With Annan On Darfur" available at http://www.showbuzz.cbsnews.com/stories/2006/12/15/people_crusades/main2272215.shtml.Last accessed July 15, 2006. The Darfur conflict began in July 2003 and is an ongoing armed conflict in the Darfur region of western Sudan, mainly between the Janjaweed (translated: 'devils on horseback'), a militia group made up of nomadic Arabs and the land-tilling tribes of the region. The Sudanese government, while publicly denying that it supports the Janjaweed, has provided money and assistance and has participated in joint attacks with the group. The conflict has raised alarm in the world community for the systematic ethnic killings also called 'ethnic cleansing' which have been termed in many circles as an ongoing genocide by the Janjaweed assisted by the Sudaneses Government.

2.2.3. Political impact

Apart from the economic and social impact, celebrities have also swayed the political vote. Joshua Green in his article[52] points that celebrities invariably provide attention, something political campaigns constantly need. As the cost of campaigning soars, associating with the famous both helps fundraising and generates what strategists call "earned media"—valuable television airtime that, unlike political advertising, does not have to be paid for. But what really seems to have intensified the process is tangible proof of a celebrity's effect on politics.[53] This is a trend that has fast caught up in Kenya as well as Africa.

Kenyan politics became synonymous with local celebrities in the year 2002 when the hit song "Unbwogable" became an anthem in the then opposition party National Rainbow Coalition (NARC) election campaign.[54] In an interview, Joseph Ogidi, better known as GidiGidi, said that he did not write the song for any specific political purpose, but that it was adopted during the NARC campaign and quoted by its team during many speeches.

> " 'The song was embraced by the young and old,' Ogidi said. 'The youth rode behind this excitement to pour out in the streets that led to youth euphoria and no one wanted to be left behind,' he added, saying he believes the song encouraged young people to participate in the political process. Ogidi said he feels the adoption of the song meant his voice was being heard by the higher political class. '[Kibaki] is probably the first president to embrace and benefit from hip hop,' he said, further extolling the virtues of the medium. 'It showed how hip hop has become a powerful tool of expression that has no boundaries.'"[55]

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52 Joshua Green, "Madonna wants Me", available at http://www.theatlantic.com/doc/200403/green-celebrity. Last accessed August 8, 2006.

53 *Ibid.* Green further argues that politicians have traditionally sought out actors and musicians as a way of attracting the youth vote as young people being a group that secretly baffles and terrifies them, leaves them susceptible to the belief that the imprimatur of Madonna and other pop-culture icons can, like some secret handshake, unleash torrents of support.

54 *Supra* note 38 and 39 details the biography of the rap duo and their rise to fame after the release of this song.

55 Jonathan Fowlie, "Hip-hop music provided singer with an escape from poverty", Vancouver Sun available at http://www.canada.com/vancouversun/news/westcoastnews/story.html?id=f5826584-e96d-4c35-b3fb-8430907bcb84. Last accessed August 8, 2006.

And the spirit lives on as today as local celebrities are spearheading the very imaginative campaign "Vijana Tugutuke, Wazee Washtuke!"[56] for the upcoming elections. The project is a collaborative initiative between the Institute for Education in Democracy (IED) and renowned artists Redykulas.[57] In this initiative, IED and Redykulas have entered into agreement to encourage youth civic involvement. Their goal is to register as many young voters as possible.[58] As they toured the USA in 2006, it was noted that the group shared the vision of their "Vijana Tugutuke" campaign, using their influence and celebrity to be a force in bringing the future of the country, the youth, to the decision making table.[59]

These anecdotes were not for mere entertainment value but were to illustrate a very valid and important point, that there can be no doubt that both the Kenyan celebrity, whether deserving of that fame or not, has become a force in the political economy of today. With such clout, they have earned recognition by the law as an industry of value and hence their personas must be seen as valuable property able to be protected.

Before I delve into whether or not such legal protection exists locally I wish to address the issue of legal protection from an international platform to shed light on the origin of such protection for a better understanding of the issue. To do so, I will highlight two international jurisdictions namely the United Kingdom (UK) and the United States of America (USA) in relation to the protection of a celebrity's persona using an international icon: the late Princess Diana.

I have chosen the UK primarily because its jurisprudence is based on the common law which is what Kenya has adopted to date thus Kenyan statutory laws will be similar to or inspired by the UK. My choice of the second jurisdiction is because the USA is rightfully

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[56] Translated to English the phrase means, "Arise youth, shock the old generation." It is meant to be a phrase to agitate the youth to be more active in the political process whether through voting or even running for public office.

[57] Redykulas are the comedic trio that have kept Kenyans entertained with their parodies of various famous personalities and social issues.

58 "Vijana Tugutuke- Ni Time Yetu!" available at http://www.iedafrica.org/subsection.asp?ID=25. Last accessed August 8, 2006.

59 Auma Meja, "Redykyulas Crew Entertain, Inform and Inspire" available at http://www.mshale.com/article.cfm?articleID=1240. Last accessed August 8, 2006.

perceived to be the birthplace of celebrity hood and has developed serious legal protection of persona as will be seen shortly. As I do so I will be laying a foundation to Chapter Three where I will illustrate the African/Kenyan problem.

2.3 International Exploitation: Princess Diana

It is an undisputed fact that the late Princess Diana was a celebrity involved in various social causes, very widely photographed and an influential force. In April 1987, the Princess of Wales was one of the first high-profile celebrities to be photographed touching a person infected with HIV/AIDS. Her contribution to changing the public opinion of people living with HIV/AIDS (PLWHA) was summarised in December 2001 by Bill Clinton at the "Diana, Princess of Wales Lecture on AIDS:"

> "In 1987, when so many still believed that AIDS could be contracted through casual contact, Princess Diana sat on the sickbed of a man with AIDS and held his hand. She showed the world that people with AIDS deserve no isolation, but compassion and kindness. It helped change the world's opinion, and gave hope to people with AIDS."[60]

In 1997, the pictures of Diana touring an already-cleared Angolan minefield, in a ballistic helmet and flakjacket were seen worldwide. It was during this campaign that British conservatives accused the Princess of meddling in politics and declared her a "loose cannon."[61] In August that year, just days before her death, she visited Bosnia with the Landmine Survivors Network. She is believed to have influenced the signing, though only after her death, of the Ottawa Treaty, which created an international ban on the use of anti-personnel landmines. Introducing the Landmines Bill 1998 to the British House of Commons, the Foreign Affairs Secretary, Robin Cook, paid tribute to Diana's work on landmines:

> "All Honourable Members will be aware from their postbags of the immense contribution made by Diana, Princess of Wales to bringing home to many of our constituents the human costs of landmines. The best way in which to record our appreciation of her work,

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60 Available at http://en.wikipedia.org/wiki/Diana,_Princess_of_Wales. Last accessed August 15, 2006. As we look at the Diana story it is imperative to keep in mind the Kenyan celebrity and I will be making subtle references and omparisions where I can.

61 *Ibid.*

and the work of NGOs that have campaigned against landmines, is to pass the Bill, and to pave the way towards a global ban on landmines."[62]

The background to the problem that faced the Diana, Princess of Wales Memorial Fund (hereinafter "the Fund") and her Estate when they tried to protect the deceased's name, likeness and image upon her death both in the UK and the USA has been explored in an article by Alan Story.[63] The first question posited is how Diana's name and image got so famous and he gives an interesting answer-social relations.

> "How did Diana's image become so valuable? Who created it? Was it an individual act of creation, the product of individual genius, or was it created by many people within a particular societal relationship, structure, and context? The transformation of Diana Spencer, kindergarten teacher, into Diana, Princess of Wales, was the result of both happenstance (meeting and marrying Charles) and of pre-existing structures (the existence of the monarchy). Although she certainly developed, in time, more style and public relations savvy than the rest of the royal family, Diana *principally* acquired her fame and celebrity status because she was a member of that *taxpayer supported, constitutionally prescribed* institution and family."[64]

Much (though not all) of Diana's fame, then, was not principally self-created, but rather, for the most part, pre-determined and inevitable. As I have argued in Chapter One, the cultural production that creates fame "is always (and necessarily) a matter of reworking, recombining, and redeploying already-existing forms, sounds, narratives and images".[65] And Alan Story goes on to state that:

> "Her title of 'princess' made her a predestined candidate for extensive media coverage, no matter what her personality or talents. And, because of royalty's still exalted, though recently more tarnished, role in British society, she was also assured of having her fame recognised and, in turn, created by the British people, again without regard to personality or talent. You don't need either to be famous or talented if you are a member of British royal family."[66]

Of course, Diana was not, in some ways, a typical royal. It was precisely because of her personality, her talents (for example, at fund-raising for charities and at marketing royalty

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62 *Ibid.*

63 Alan Story, " Owning Diana: From People's Princess to Private Property" available at http://webjcli.ncl.ac.uk/1998/issue5/story5.html. Last accessed August 15, 2006.

64 *Ibid.* Italics in original text.

65 Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights" (1993) 81 California Law Review, p. 196 (emphasis in original).

66 *Supra* note 63, "Owning Diana."

itself), her appearance, and the happenstance of her unexpected death that her fame and role increased several fold in comparison with the typical royal. Some writers have suggested, in fact, "her greatest achievement was to craft an `image' for herself".[67] In Kenya quite a number of celebrities have crafted images for themselves, which has made them even more famous.[68]

Diana was, as well, the object of more than the usual media fixation with the royals. It was this media attention and particularly the photographic coverage of her every move - whether dancing with John Travolta at the White House or inspecting mine fields in Angola - which did much to give her name and image value.[69] This is the exactly what is unfolding today in Kenya what with local personalities receiving serious media coverage making them instant celebrities.[70] Alan Story goes on to argue that:

> "Even more than most other celebrities, Diana's image was, in large measure, a created image. Simultaneously and as a response to this coverage, it was participatory public events and spectacles, such as her 1981 wedding or the outpouring of grief when she died, that solidified her fame."[71]

However, he concedes with the point that I elucidated in the beginning of this chapter, that her fame was apparent to the greater part of society whether carefully crafted or not.

> "The point then is neither to deny agency to Diana nor to deny she had particular talents and abilities and became a *highly personalised symbol* for many people around the world."[72]

Upon Diana's death, even before the princess was buried, entrepreneurs were churning out her likeness on items ranging from thimbles and saucepans to Christmas decorations

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67 H. Bhabha, "After Diana" in Michael Merck (ed), *Designer Creations* (1998) Verso Publishers, London at 103.

68 An example is the local musician called CMB Prezzo who has crafted an image of 'blingbling' lifestyle and immense wealth. The King of Bling, as he is now known had hired a chopper for KSh70 000 to give him a 15-minute ride to the Carnivore grounds where the CHAT awards were being held. The stunt worked for the flashy nominee, he became an instant hit and the term 'blingbling' officially entered our lingual lexicon. He was recently on the entertainment new again for buying a mouthpiece jewelry known as "Grillz" for over Kshs. 250,000/-. See Tony Mochama, "Kenya: Memoirs of a Magazine" Pulse magazine, *East African Standard,* March 2, 2007 at page 2.

69 *Supra* note 57.

70 *Supra* note 2.

71 *Ibid.*

72 *Ibid.* Emphasis mine. I emphasised these words as they highlight the idea that a celebrity's persona can indeed become a symbol or property of sorts.

and computer screen-savers.[73] This led to the establishment of the Fund as a trust to channel this swelling commercial impulse toward Diana's favourite charities and it -with Diana's estate's approval-licensed six products.[74] But scores of other products bearing her likeness or signature were been marketed by companies without the Fund's approval, and often without contributing to it. This was the genesis of a battle royal as the Fund took legal steps both in the UK and overseas over the intellectual property rights to Diana's persona. This is the problem I can foresee for many local celebrities as their personas are becoming commodities which can sell anything.

Diana's Estate and the Fund made several applications in the UK for copyright and trade mark rights in Diana's name and her image, submitting 52 photographs of Diana from numerous angles and in various guises. They also applied for a trade mark in her signature as part of a stylised Diana logo. The solicitors also stated that they were claiming copyright in the name "Diana, Princess of Wales".[75]

In May 1998, the Fund and the Estate commenced a trade mark and a right of publicity infringement action in the USA District Court in Los Angeles against the Pennsylvania-based Franklin Mint. The suit claimed that Franklin, a well-known manufacturer of memorial plates, porcelain dolls, and related bric-a-brac, was making unauthorised use of Diana's image on several of its products.[76]

What then was Diana's fate in the UK and USA in relation to traditional intellectual property doctrine namely copyright and trade mark laws? Hopeless, as will be illustrated below.

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73 John Christensen, "The Commercialization of a Princess", a CNN Special available at http://edition.cnn.com/SPECIALS/1998/08/diana/diana.commerce/index.htm last accessed August 8, 2006.
74 *Ibid.* In fact, the Fund approved only six products: a set of commemorative stamps from the British post office; the Princess Beanie Baby, a purple bear with a rose on its chest; a crystal candle holder; a tribute CD featuring Elton John and other musicians; scented candles; and two limited-edition enamel boxes. The products ranged in price from about $1.60 for the stamps and slightly more than $8 for the Beanie Baby to about $160 for the more expensive of the two enamel boxes. Elton John donated $32.6 million (£20 million) from sales of his remake of "Candle in the Wind," and the "Diana, Princess of Wales -- Tribute" CD raised about $22 million (£13.6 million).
75 *Ibid.*
76 *Ibid.*

2.4 The relevant Intellectual Property Regime

2.4.1. Copyright law

In the United Kingdom, to qualify for copyright protection, the author of a creative work such as a book, photograph, or pop tune, must demonstrate, as an initial step, first, that he or she is the author who created it; second, a work has been produced and third, that this work is original.[77] Thus the name "Diana" or "Diana, Princess of Wales" would likely fail to qualify as an original literary work of authorship because as long ago as 1869 the English courts ruled that copyright law offers no protection to a name. In *Du Boulay* v. *Du Boulay*[78] the Privy Council stated thus:

> "We do not recognise the absolute right of a person to a particular name...whatever cause of annoyance it may be."

The position remains the same today. Fictional names such as Sherlock Holmes or in the Kenyan case, Nonini or Prezzo are considered neither property[79] nor protected by copyright and neither are the names of real people. Further, while Arthur Conan Doyle may have authored the name Sherlock Holmes, Diana was, like any other real person, not the author of her own name. This was enunciated in the *Elvis Presley* decision by Justice Laddie:

> " 'There is nothing akin to copyright in a name. This has been part of our common law for a long time,' stated Laddie J. 'Even if Elvis Presley was still alive, he would not be entitled to stop a fan from naming his son, dog or goldfish, his car or his house 'Elvis' or 'Elvis Presley' simply by reason of the fact that it was the name given to him at birth by his parents.'" [80]

Thus the name Diana cannot and did not become Diana ©.

What about copyright of her numerous photographs and images? Surely, we would imagine that the image of the then most photographed woman in the world is as valuable and as ubiquitous as her name, perhaps more so. Here again the copyright law in photographs decidedly worked against the Fund's claim to own Diana. Except for photographs taken under a contract assigning rights to her, copyright in the literally

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77 Copyright, Designs, and Patent Act (hereafter "CDPA") 1988 sections 1, 3 and 9. This is the same position under the Kenyan Copyright Act of 2001 sections 2(1) and 22(3).
78 1869 LR2 PC430.
79 *Conan Doyle* v *London Mystery Magazine Ltd.* [1949] 66 RPC 312.
80 *Elvis Presley Enterprises Inc* v *Sid Shaw Elvisly Yours* [1997] RPC 543 at 547.

millions of photographs of Diana is held by the photographers who took them or, in some cases, by the photographers' employers.[81] Thus these photographers own her images and possess full rights to use or assign or licence her photographs in newspapers, on T-shirts, tacky souvenirs or any other merchandise that they wish to use.

Clearly this is the same scenario that will play out in Kenya as our local celebrities who are now regularly hounded by the paparazzi need to be aware that under the law, such photographs do not belong to them and can be used, assigned or licensed without their permission. As Alan Story states, Diana's photographers were well aware of their rights and position in the law:

> " 'One jet-setting American photojournalist, who has taken Diana's picture numerous times, told me confidently in an interview, 'I'd love to face the Fund in court; I own her image.'"[82]

Even international law recognises the shortfall of copyright law in this instance. The World Intellectual Property Organization (WIPO) in its 1994 Report on Character Merchandising[83] critiques the level of protection that copyright law will afford in a case of commercial appropriation of personality which view I subscribe to. It states thus:

> "The relevance of copyright protection in the case of personality merchandising[84] is limited, because copyright does not vest in the real person concerned but in the person who created the work in which the essential personality features of a real person appear for example, *the author of the photographs (or more accurately of the negatives) and not the subject will own the copyright.* Only if a photograph is commissioned for private and domestic purposes does the commissioning party has usually a right to prevent the making of copies of the photograph or its being shown in public but in this case a problem arises in the case where the party commissioning the work is not the person who is the subject of the photograph."[85]

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81 CDPA 1988, sections 1(1)(a), 4(1), 9(1) and 11(1)(2). The same position prevails in Kenya, sections 2(1)(c) and 31(1) (a) of the Copyright Act of 2001.

82 "Owning Diana", *supra* note 63.

83 Available online at www.wipo.org. Last accessed August 15, 2006.

84 The 1994 WIPO Report on Character Merchandising at page 9, " (ii) Personality Merchandising: This more recent form of merchandising involves the use of the essential attributes (name, image, voice and other personality features) of real persons (in other words, the true identity of an individual) in the marketing and/or advertising of goods and services. In general, the real person whose attributes are "commercialized" is well known to the public at large; this is the reason why this form of merchandising has sometimes been referred to as "reputation merchandising." In fact, from a commercial point of view, merchandisers believe that the main reason for a person to buy low-priced mass goods (mugs, scarves, badges, T-shirts, etc.) is not because of the product itself but because the name or image of a celebrity appealing to that person is reproduced on the product."

85 *Ibid* at page 18. (Italics mine.)

Thus the only time a celebrity will have rights over his or her photographic image is where he or she commissions the work.[86]

2.4.2. Trade Mark law

The 1883 Paris Convention on the Protection of Industrial Property[87] states that the conditions for the filing and registration of trade marks shall be determined in each country of the Union by its domestic legislation. As defined by the UK Trade Marks Act of 1994 (hereinafter "TMA 1994") a trade mark means;

> "Any sign capable of being represented graphically which is capable of distinguishing goods or services from those of other undertakings... [a] trade mark may consist of words (including personal names), designs, or letters ."[88]

The Fund's trade mark claim to register "Diana, Princess of Wales" as a name and as a photographic image involved more issues than its copyright claim since as stated above under the TMA 1994, a personal name is registrable. Perhaps the greatest hurdle to trade mark registration that "Diana, Princess of Wales" faced was that it was considered devoid of distinctiveness,[89] meaning that a proposed trade mark would fail to demonstrate that no other meanings could be attributed to it when marking goods and services. Alan Story explains further:

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[86] Section 31(1) of the 2001Copyright Act of Kenya states as much: "Copyright conferred by sections 23 and 24 shall vest initially in the author: Provided that where a work - (*a*) is commissioned by a person who is not the author's employer under a contract of service; or (*b*) not having been so commissioned, is made in the course of the author's employment under a contract of service the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting the transfer." For detailed analysis on Kenyan copyright law see Ben Sihanya's *Copyright law*, Intellectual Property Law, LL.B. IV Teaching Notes and Materials, 2006.

[87] Article 6(1).

88 Section 1(1). In Kenya the Trade Marks Act Chapter 506 Laws of Kenya define a trade mark under Section 2 (1) as "a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connexion in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of the identity of that person."

89 Section 3(1) of the TMA Act states as follows:-"The following shall not be registered...b) trade marks which are devoid of any distinctive character". Kenya's Trade Mark Act contains a similar provision: Section 12 (1) (e) states that a name, signature or word or words, other than such as fall within the descriptions in paragraphs (a), (b), (c) and (d), shall not be registrable under this paragraph except upon evidence of its distinctiveness. For detailed analysis on Kenyan trademark law see Ben Sihanya's *Trademark law*, Intellectual Property Law, LL.B. IV Teaching Notes and Materials, 2006.

" 'In other words, if you see the name BOOTS, you say to yourself, 'yes, the chemist;' but by comparison, if you see the name 'Diana', you *do not* say to yourself, 'yes, the Diana brand of scented candles.'"[90]

The closest case law analogy to the Diana trade mark saga occurred in the *Elvis Presley* case[91] in which a souvenir dealer, one Sid Shaw successfully opposed registration of a UK trade mark in "Elvis" and "Elvis Presley." Both proposed marks failed the distinctiveness test, as ruled by Judge Laddie because:

"...the more famous Elvis Presley is, the *less inherently distinctive* are the words 'Elvis' and 'Presley'."[92] (Underlining mine.)

If Elvis was famous, then Diana, in life and in death, is and was even more famous, hence even less distinctive, and certainly so in the UK. The *Elvis* judgment also contained eerily prescient words for the Diana registration when it addressed the origin function of trade marks, that is, trade marks indicate to consumers the source from which goods originate. Laddie J. concluded that:

"Not a single use of the names Elvis or Elvis Presley is in a trade mark sense. They are all uses which accurately refer back to the performer. When a cup is offered for sale bearing the legend 'Elvis Presley 1935–1977' the use of the musician's name does not perform the function of enabling a customer to distinguish that cup as a cup emanating from Enterprises from other memorabilia from other suppliers. *It is not an indication of trade origin at all.*"[93]

Authorised Diana memorabilia would have not emanated from a single source, but rather from tens or hundreds of disparate profit-driven sources and thus the trade mark would definitely not have been an indicator of the source of origin. Perhaps the Fund could have side-stepped this distinctiveness problem, if before applying for a trade mark, it had begun marketing "Diana" as a trade mark on some products. The TMA 1994 states that:

"If, before the application date, the sign 'has, in fact acquired a distinctive character as a result of a use made of it,' a later objection that a sign lacked distinctiveness would not, by itself, prevent registration."[94]

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90 *Supra* note 63, "Owning Diana." Italics in original.
91 *Supra* note 81, *Elvis Presley Enterprises Inc* v *Sid Shaw Elvisly Yours* [1997] RPC 543.
92 *Ibid* at 552.
93 *Ibid* at 554. Thus once a sign is already performing trade mark-like functions (e.g. showing that a product originates from a particular source), a rival trader cannot later challenge the sign's distinctiveness as this has already been demonstrated in the marketplace. (Underlining mine.)
94 Section 3(1). No such provision is found in the Kenyan Trademark Act.

Guided by these principles, in his decision[95] to the Fund's trade mark applications, the Registrar, one Allan James first began by observing the celebrity status of Diana and in the same breath distinguishing that she had had no trade connection with any goods or services.

> " There cannot be any doubt that the late Diana, Princess of Wales was one of the most famous people in the world. I believe that I am entitled to take notice of this and that the name and face of Diana, Princess of Wales has, since her marriage to Prince Charles in 1981, continuously featured on the covers of countless magazines, books and in TV programmes. *She was probably one of the most photographed people in the world but none of this use indicated any trade connection between the source of these goods/services and the Princess....* Laddie J. made specific observations about this in the *Elvis* case when he said:
>
> > 'When a fan buys a poster or a cup bearing an image of his star, he is buying a likeness, not a product from a particular source. Similarly the purchaser of any one of the myriad of cheap souvenirs of the royal wedding bearing pictures of Prince Charles and Diana, Princess of Wales, wants mementoes with their likeness. He is likely to be indifferent as to the source.'"[96]

He then went on to tackle two issues simultaneously:

> "In order to get to the real question to be answered in this case one must first clear away two red herrings. The first is that whilst she was alive Diana, Princess of Wales owned her name and therefore had an exclusive and unqualified right to the use of it for commercial purposes. That is not true as no such 'personality right' exists under UK law. The second red herring is that a name which is unique to a particular person must by definition have distinctive character as a trade mark. This is not necessarily so. Personal names do not usually allude to non-origin attributes of the goods or services and where a famous name is concerned (other than names which are famous as indicators of trade source) there is the possibility that the name will serve to signify not the trade source of the goods/services but merely the subject matter."[97]

The Registrar even turned to the European Court of Justice to illustrate what exactly a trade mark is about.

> " In *Canon* v. *MGM* 1999 ETMR 1 at para 28 on page 8, the European Court of Justice confirmed that according to the settled case-law of the Court, the essential function of a trade mark is to guarantee the identity of the origin of the marked products to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin. For the trade mark to be able to fulfill its essential role in the system of undistorted competition which

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95The full decision is available at http://www.patent.gov.uk/tm/legal/decisions/2000. Last accessed August 15, 2006.

96 *Ibid.*

97 *Ibid.* Laddie J. explained in the *Elvis* case, 'the distinctiveness addressed by the Act is not a quality of the mark which exists in a vacuum. It is a particular type of distinctiveness, namely the ability to distinguish the proprietor's goods from the same or similar goods marketed by someone else. The more a proposed mark alludes to the character, quality or non-origin attributes of the goods on which it is used or proposed to be used, the lower its inherent distinctiveness.'

the Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have originated under the control of a single undertaking which is responsible for their quality..."[98]

During the hearing, the Fund accepted the fact that there was no use of the name as a trade mark for goods whilst the Princess was alive. And the Registrar wasted no time in concluding that the said trade mark applications of both the names and photographs of Princess Diana were to be rejected on the grounds of lack of source of origin and lack of distinctiveness.

In the USA almost immediately after her death, her executors registered in California, USA as the successor-in-interest to Princess Diana's' right to publicity under California Civil Code 990,[99] the statute that grants the descendants of a celebrity the rights to continue licensing (and receiving royalties for) the use of the celebrity's name and likeness after the celebrity's death. The executors also filed federal trade mark registrations in various classes for the marks "Diana Princess of Wales" and "Diana Princess of Wales Memorial Fund". Apparently, in the days after her death, the commercial value of Princess Diana's name and image was also recognized by Franklin Mint.[100] On Sept. 4, 1997, Franklin Mint sought permission from Princess Diana's executors to use her name and likeness on a number of commemorative products.[101]

Undeterred by these rejections, Franklin Mint started selling a number of commemorative Princess Diana items, including a "Diana, Princess of Wales Porcelain Portrait Doll," a

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98 *Ibid.*

99 California Civil Code section 990 provides in relevant part: "(a) Any person who uses a deceased personality'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 purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified shall be liable for any damages sustained by the person or persons injured as a result thereof. (b) The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents. "

100 Jeffrey L. Eichen, "Too Famous to Trade Mark: Diana case proves point", The National Law Journal, Intellectual Property Newsletter, Monday October 16, 2000.

101 *Ibid.* On the same day, the Franklin Mint also filed federal trade mark applications for a variety of marks relating to Princess Diana, including "Diana, Queen of Our Hearts," "Diana, Queen of Hearts," "Diana, Angel of Mercy" and "Diana, the People's Princess." A month later, Princess Diana's executors rejected the Franklin Mint's request to license her name and image. Later, the U.S. Patent and Trademark Office also rejected the Franklin Mint's trademark applications, in part because the marks suggested a connection between the Franklin Mint and Princess Diana.

"Diana, Queen of Hearts Jeweled Tribute Ring," a "Diana, England's Rose Diamond Pendant," "Diana, Forever Sparkling Classic Drop Earrings" and other pieces with similar names.[102]

In response to the sale of these items, the executors of Princess Diana's estate and the trustees of the Princess Diana Memorial Fund filed suit in May 1998 in the US District Court for the Central District of California against Franklin Mint and the Fund's complaint was a claim for false designation of origin and false endorsement under section 43(a) of the Lanham Act and a claim of infringement of California's statutory right of publicity.[103] I will look at each claim separately.

2.4.3 False designation of origin and false endorsement under section 43(a) of the Lanham Act

A federal statute, known as the Lanham Act,[104] is the main source of USA trade mark legislation.[105] Section 32(1) covers registered trade marks. Section 43(a) covers both registered and unregistered trade marks. Section 43(a) of the Lanham Act, dealing with infringement, states *inter alia*:

> " Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –
> a) 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, or
> b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

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102 *Ibid.* The items were offered with a "certificate of authenticity" and, in the case of one item—the *"Princess Diana Tribute Plate"—a promise by the Franklin Mint to donate 100%* of the purchase price to Princess Diana's favorite charities.

103 *Ibid.*

104 *15 USC 1051 – 1127.*

105 See especially section *32(a)* of the *Lanham Act, 15 USC for registered marks and section 43(a) of the* Lanham Act for unregistered marks.

shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act." [106]

This section was originally interpreted to forbid "passing off".[107] It has now expanded to cover false or misleading statements, or false or misleading impressions of designation of origin, sponsorship or approval, and as stated, covers both registered and unregistered trade marks.[108] Infringement will essentially occur if someone other than the trade mark owner uses a mark similar to the trade mark to identify competing goods.[109]

The gist of the plaintiffs' Lanham Act claim was that Princess Diana's persona is recognizable as a sort of trade mark indicating to consumers that her estate and Memorial Fund are the source of—or at least have given their approval to—any purportedly "authentic" Princess Diana memorabilia. According to the plaintiffs, therefore, Franklin Mint's use of Princess Diana's name and likeness was likely to confuse or deceive consumers as to the source of these goods.[110] The court, however, rejected this analysis entirely. Instead, the court held that there is no violation of the Lanham Act when a celebrity's name and likeness are not being used as a trade mark or endorsement but, rather, simply for the sake of aesthetic appeal.

> "The court likened the Franklin Mint's use of Princess Diana's name and likeness on memorabilia to Andy Warhol's use of Campbell's tomato soup cans and Coca-Cola bottles in his paintings. Both the Campbell's soup can and Coca-Cola bottle are undoubtedly protected as famous trademarks; according to the court, however, Mr. Warhol's use of these brand names and images does not imply any connection, endorsement or common origin between his paintings and the products depicted therein. *Similarly, the use of Princess Diana's name and likeness on the Franklin Mint's products does not indicate in any way the source or sponsorship of these goods.*"[111]

Having concluded that the Franklin Mint's use of Princess Diana's persona is outside the scope of federal trade mark protection, the court then considered whether there was

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106 15 USCA 1125(a), section 43(a).
107 S. Codero, "Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trade Mark and Publicity Rights to Cultural Icons", Fordham Intellectual Property, (Winter 1998) Media and Entertainment Law Journal, 599.
108 *Ibid.*
109 *Ibid.*
110 *Supra* note 101, Jeffrey L. Eichen, "Too Famous to Trade Mark: Diana case proves point."
111 *Ibid.* This jurisprudence is similar to what the UK Registrar Allan James used while dismissing the Fund's trade mark applications, see *supra* note 88 to 90.

evidence of a likelihood of confusion in this case, even if one assumes that Princess Diana's persona were somehow protected by trade mark law. The court in this case looked at the strength of the association between the mark and the plaintiffs and found that no likelihood of confusion existed in this matter.[112] Even with some "minimal" evidence of actual confusion and an admittedly strong mark, the court concluded that the critical factor in this case—the lack of any meaningful association between the mark and the estate of Princess Diana—compelled the court to grant summary judgment to the defendants.

> "Under these circumstances, and regardless of the extraordinarily high degree of recognition of Princess Diana's persona among consumers, the court concluded that the use of Princess Diana's persona had reached a degree of ubiquity that any connection between her persona and her estate as a source of goods was weak at best. *According to the court, the use of a celebrity's persona can become so pervasive and widespread that it is no longer capable of indicating a particular source or endorsement of the goods. When a celebrity's persona becomes this ubiquitous, any mental association between the celebrity's persona and a particular source or endorsement of goods is dulled to the point of meaninglessness."*[113]

Her own persona while being aggressively exploited because of its instant power and recognition in the end turned out to be her undoing under the law in the end.

2.4.4 Right of Publicity

The right of publicity is the recognition of a property right in one's identity, whether it is in a person's likeness, voice, or other distinguishing characteristic.[114] J. Thomas McCarthy, who wrote the definitive treatise on this topic, referred to the right of publicity as:

> "The inherent right of every human being to control the commercial use of his or her identity."[115]

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[112] *Ibid.*

113 *Ibid.* Again, the same sentiments were echoed in the UK by Judge Laddie, see *supra* notes 85 and 86 and the UK Registrar, Allan James held while dismissing the trade mark applications by the Fund. See *supra* notes 88 to 90.

114 F. Jay Dougherty, "The Right of Publicity—Towards a Comparative and International Perspective", (1998) 18 Loyola Entertainment Law. Review, 421, 423. See also Restatement (Third) of Unfair Competition section 46 (1995).

115 J. Thomas McCarthy, "Melville B. Nimmer and the Right of Publicity: A Tribute", June/August, 1987 34 UCLA Law Review 1703. See also J. Thomas McCarthy Institute for Intellectual Property and Technology Law at the University Of San Francisco School Of Law, available at http://www.usfca.edu/law/mccarthy/. Last accessed August 28, 2006.

This is not just a property right —it is also a personal right. The right of publicity protects a person's right to privacy as well as their economic interest in marketing their likeness or other discernable characteristics.[116] Judge Jerome Frank, in a landmark decision,[117] was the first to coin the term "right of publicity:"

> "This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."[118]

In Diana's case, the court dismissed as a matter of law the plaintiffs' claim for infringement of the right of publicity under California law—ostensibly, the plaintiffs' strongest claim. According to the court, California's choice of law rules dictated that the law of UK, and not California, should apply to the question of whether Princess Diana's estate owned any right of publicity after her death. Unlike California, the UK—Princess Diana's domicile at the time of her death— does not recognize a post-mortem right of publicity, and the plaintiffs therefore could not bring a claim based on this nonexistent right.[119] With that, the Fund was locked out and the Franklin Mint was free to continue selling its Diana memorabilia.

Thus the Fund has lost all but a number of its claims to protect Diana's image, name and likeness. In fact the only success it has found is in the extra legal remedy of dispute resolution of various domain names relating to Princess Diana found on the Internet. The Uniform Domain Name Resolution Policy (UDRP)[120] has been adopted by the Internet

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116 Restatement (Second) of Torts 652C (1977) states: "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

117 Haelan Laboratories, Inc. v. Topps Chewing Gum, 202 F.2d 866, 868 (2d Cir. 1953). He further determined that the right of publicity afforded a person the same benefits as with any other property right, namely that the right is "exclusive, assignable, and descendible".

118 *Ibid* at 870

119 *The Diana Princess of Wales Memorial Fund* v *Franklin Mint Co.*, 216 F.3d 1082 (table disposition) 1999 WL 1278044 (9th Cir. 1999).

120 See http://www. icann. org. Last accessed August 28, 2006.

Corporation for Assigned Names and Numbers (ICANN)[121] to provide a cheap and speedy resolution for bad faith and abusive registration of domain names. Disputes are referred to an independent administrative panel to administer the dispute in accordance with the ICANN policy and rules.[122]

To bring a complaint, a party claims that the registered domain name is: (i) identical or confusingly similar to a trade mark or service mark in which the complainant has rights; (ii) the registrant has no rights or legitimate interests in respect of the domain name; and (iii) the domain name has been registered and is being used in bad faith. The complainant must prove that each of these three elements is present.[123] The procedure has allowed a number of well-known individuals to secure a transfer of domain names consisting of their personal names. In *CMG Worldwide, Inc.* v. *Naughtya Page*[124] and *CMG Worldwide, Inc.* v. *Steve Gregor*[125] the arbitration panels ordered that the domain names princessdi.com, princessdiana.com and dianaspencer.com, respectively, held by other individuals be transferred to the Fund. In each of these disputes the panels found that the 3 elements had been satisfied.

> "The ICANN dispute resolution policy is broad in scope in that the reference to a trademark or service mark in which the complainant has rights means that ownership of a registered mark is not required–unregistered or common law trademark or service mark rights will suffice to support a domain name complaint under the policy. Further, the Complainant (the Fund) currently has pending trademark applications for the marks and pending trademark applications provide rights in a mark. Diana, Princess of Wales before her death had rights to her common law trademarks and the terms specifically at issue, Princess Diana, Princess Di and Diana Spencer thus the domain names at issue are confusingly similar to marks in which the Complainant has an interest." [126]

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121 In depth reading of the URDP policies and procedures is to be found in a myriad of papers: See generally J. M. Gitchel, "Domain Name Dispute Policy Provides Hope to Parties Confronting Cybersquatters" (2000) JPTOS 611; R. Chandrani, "ICANN Now Others Can" [2000] Ent LR 39; S. Jones, "A Child's First Steps: The First Six Months of Operation-The ICANN Dispute Resolution Procedure for Bad Faith Registration of Domain Names" [2001] EIPR 66 and D. Curley, "Cybersquatters Evicted: Protecting Names Under the UDRP" [2001] Ent LR 91 to cite a few.

122 *Supra* note 113. the Panels are composed of between 1 and 3 arbitrators, appointed from a list of over 120 drawn from 30 countries.

123 Uniform Dispute Resolution Policy, paragraph 4 (a) available at http://www.icann.org/udrp/udrp-policy-24oct99.htm Last accessed August 28, 2006.

124 http://www.arb-forum.com/domains/decisions/95641.htm Last accessed August 28, 2006.

125 http://www.arb-forum.com/domains/decisions/95645.htm Last accessed August 28, 2006.

126 *Supra* note 125.

They also found that the three websites had been registered and were been used in bad faith and thus ordered the names transferred to the Fund.

> "Princessdi.com directs users to an unrelated commercial site. Attracting Internet users to a website, for commercial gain, by creating a likelihood of confusion with the Complainant's marks is evidence of bad faith registration and use. Princessdiana.com was not used until after notice of the domain name dispute when it was linked to a commercial website almost 3 years after it was registered. The Panel finds that the Respondent has registered and is using the domain names in bad faith. As for dianaspencer.com, the respondent has offered to sell the domain name with no legitimate use of the same and is currently using the domain name as a link to commercial banner advertisements, unrelated to any *bona fide* or good faith use constituting use in bad faith."[127]

The Fund was finally able to get a legal reprieve in an unlikely source though it lost the most important battle of them all-halting the commercial exploitation of Princess Diana's persona. This case has however served a very important role: it brought to the limelight the sheer inadequacy of intellectual property laws in the legal protection of persona.

2.5. Conclusion

It is ironic that the Fund found some sort of redress away from the courts of justice and the rigid intellectual property laws. This may serve as a dire warning that redress for the celebrity whose persona is exploited may not be found in the courts or the existing intellectual property laws but perhaps elsewhere. The purpose of this chapter was to show the political economy of our local celebrities while at the same time the lack of legal protection that the same celebrity of an international status will face, when he or she faces mass exploitation of his or her persona. How then will Nelson Mandela and other local celebrities battle this very same fight in Africa or Kenya? The next Chapter explores this angle in depth.

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127 *Supra* note 126.

CHAPTER THREE

THE PROBLEM OF PERSONALITY

3.1 Introduction

The preceding Chapter gave an exhaustive analysis of the power that personality holds in Kenyan society today. With this power, there has arisen the real and immediate problem of the unauthorised appropriation and exploitation of the same personality. Most of the times it is for financial gain while other times it is simply to reap off the benefits of the goodwill created by a certain personality. The reader may wonder what harm this could possibly cause as in the preceding Chapters we have seen certain laws state that there can be no ownership to a persona. In this Chapter I will show by illustrations and anecdotal evidence the harm caused by such exploitation and the lacuna that the laws must address to remedy this situation.

3.2 Nelson Mandela

Born Nelson Rolihlahla Mandela on July 18, 1918 in the Transkei on the southeast coast of South Africa, the famous prisoner who later became the first president in a democratic South Africa is defined as an icon.[1] The Oxford English Dictionary defines an icon as "a person or thing regarded as a representative symbol, especially of a culture or a movement, a person or institution considered worthy of admiration or respect."[2] Douglas Holt in the opening line of his book[3] identifies Nelson Mandela as a cultural icon and goes on to state thus:

> "More generally, cultural icons are exemplary symbols that people accept as a shorthand to represent important ideas. The crux of iconicity is that the person or the thing is widely regarded as the most compelling symbol of a set of ideas or values that a society deems important."[4]

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[1] Jyoti Mistry, "Mandela: Humanitarian Hero'', available at http://www.eurozine.com/articles/2002-12-18-mistry-en.htm. Last accessed October 3, 2006.
[2] *The Concise Oxford Dictionary*, 1990, Oxford University Press, Oxford, 8th edition.
[3] Douglas Holt (2004), *How Brands Became Icons: The Principles of Cultural Branding"*, Harvard Business School Press, Boston at 1.
[4] *Ibid.*

Thus, as befits a cultural icon, South Africa boasts a Nelson Mandela Foundation (NMF) for charitable work, a Nelson Mandela Children's Fund and a Nelson Mandela Square dominated by a huge statue of Mandela. There is also a Nelson Mandela Metropolitan University, a Nelson Mandela Bridge, the Nelson Mandela Cup, a soccer trophy; the Nelson Mandela Invitational, a golf tournament and a Nelson Mandela Metropolitan Art Museum on Nelson Mandela Bay to mention a few.[5] How did this happen? For so long an invisible presence in South African political life, during his 27 years of imprisonment, Mandela's image was banned in South Africa. "When a picture of Mandela did appear it was made sinister and soulless by the censor's ink strip across his eyes," states Cape Town academic Sam Raditlhalo in an essay on Mandela's iconic status.[6]

While this crisis of visibility did nothing to deflate his power in the popular imagination, it did result in some dodgy graphic depictions. Designers were reliant on hopelessly outdated and grainy images of him taken before imprisonment.[7] His euphoric release in 1990 as a result created, arguably, one of the most photographed and visible persons in recent times and it is not uncommon nowadays to see Mandela's face adorning such unconnected objects as fridge magnets and bar mats, print fabric and gold coins.[8] Shops hawk Mandela salt-and-pepper shakers, paper dolls, refrigerator magnets and cotton cloth, all festooned with the icon's unlicensed image and name. In fact on the day of Mandela's inauguration, vendors were hawking coffee cups with Mandela's smiling visage emblazoned across their enamel surfaces. The outcome for Mandela, personally, has therefore been a "brand management" problem of great magnitude.[9]

One of the first legal problems that Mandela encountered regarding appropriation of his persona was in a series of artwork sketches he had done while in prison.[10] These included *My Robben Island*, a series of sketches of subjects from Robben Island and *Impressions*

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[5] *Ibid*

[6] Sam Raditlhalo, "Of Icons and Myths: Mandela, Father of a Nation?" *Fatherhood, Peace and Justice*, Vol. 8 No. 3, December 1999 at 23.

[7] *Ibid.*

[8] *The Creative Review,* "Protecting brand Mandela" available at *http://www.mad.co.uk/Main/Home/Articlex/513625c95de6410c8de8d72430fa33e3/Protecting-brand-Mandela.html. Last accessed October 3, 2006.*

[9] *Ibid.*

[10] *Ibid.*

of Mandela, which consisted of ink prints of Mandela's hand, the outline of the African continent visible in their palm.[11] In April 2005, a South African investigative magazine *Noseweek* [12] ran a lead article of forgery of Mandela's signature on a series of lithographs of *My Robben Island.* Hundreds of lithographs were made all purportedly with an original signature by Mandela, and the proceeds were to go to various charities.[13] Mandela's lawyers alleged that many of the signatures were forgeries and the former South African President was locked in a legal battle over what happened to the profits from Mandela's brief flirtation with drawing.[14]

Now, it seems, Mandela has had enough. "It makes Mr Mandela angry," says Don MacRobert, an intellectual property lawyer who represents the Nelson Mandela Foundation (NMF), a non-profit organisation.[15] "Mr Mandela is cross and he gets crosser if you use his name or image commercially without approval. Mr. Mandela's instructions are very clear and emphatic, if you want a museum or municipality named after him, he will agree if you get his approval. If you have a commercial concern-such as t-shirts, or hats or diamonds- the short answer is, 'No,'" said MacRobert, adding that Mandela was determined to prevent all attempts to "Disney-ize his name."[16]

He says Mandela has given him direct instructions to challenge anyone intent on profiteering off his image.[17] He did this mainly in terms of an obscure piece of legislation known as the Marks Merchandise Act of 1941 that makes provision concerning the marking of merchandise and of coverings in or with which merchandise is sold and the

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[11] *Ibid*

[12]Sean O'Toole, "Marketing the cult of Mandela" BBC Focus On Africa magazine in Johannesburg available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4120990.stm. Last accessed October 10, 2006.

[13] *Ibid.* Oprah Winfrey, David Beckham, Bill Clinton, Samuel Jackson, the Sultan of Oman and Prince Charles of the UK are all said to have been buyers, believing that their money was going to charity.

[14] *Ibid.*

[15] Clare Nullis, "Disney-izing' Mandela: Legend opposes branding his name." available at http://www.niza.nl/uk/press/mandela/mgmandela.html. Last accessed October 10, 2006.

[16] *Ibid.*

[17] David Blair, " 'Madiba Inc' is Mandela's weapon to ward off exploitation," The British Telegraph, January 15, 2005 also available at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/01/15/wnels15.xml. Last accessed October 10, 2006.

use of certain words and emblems in connection with business.[18] This Act provides protection for national symbols such as coats of arms, flags and trademarks from being exploited and also prohibits the unauthorised use of the president's image or name for commercial purposes.

> "Any person who uses in connection with his or her trade, business, profession or occupation *any device, emblem, title or words in such a manner as to be likely to lead other persons to believe that*-(a) his or her trade, business, profession or occupation is carried on under the patronage of; or (b) he or she is employed by or supplies goods to: *the President*, any State department or a provincial government, without authority in writing signed by or on behalf of the President, the Minister administering that department or the Premier of the province concerned, as the case may be, shall be guilty of an offence."[19]

Therefore, while Mandela was president, the various businesses in South Africa carrying his name for example Nelson Mandela Panel Beaters, Madiba Auto Electrics, Madiba Cash Loans and Madiba Cash&Carry among others could have been prosecuted under this Act. But when Mandela ceased to be president this law was no longer applicable. It is also important to note that this is domestic legislation; only applicable within South Africa therefore the international exploitation of Mandela is still not addressed. MacRobert said he was involved in about 45 known cases of Mandela becoming "commodified" and turned to a consumerist icon.

First was a man in Sydney who registered the Internet domain name of nelsonmandela.com. After threats of legal action, he transferred the name to Mandela.[20] Then a textile company that produced clothing bearing Mandela's grinning but unauthorized visage, in addition to the now defunct Nelson Mandela Fine Art collection.[21] Third is a woman in Holland who wanted to register the name Nelson Mandela for an educational company. When challenged, she insisted "Nelson Mandela" was a holy Sanskrit name![22]

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[18] Preamble, Marks Merchandise Act 17 of 1941.
[19] Section 14 (1H) (2), Marks Merchandise Act 17 of 1941.Italics mine.
[20] David Shapshak, "The marketing of Madiba" available at http://www.aegis.com/news/afp/2004/AF0407G2.html. Last accessed October 11, 2006.
[21] *Ibid.*
[22] *Ibid.*

Fourth a clothing company that applied to register Mandela's prison number, 46664.[23] MacRobert put his objections into verse and the company relented—and then folded. Mandela has since lent his prison number to be used and worn by the South African national rugby team, the Springboks and as an AIDS hotline number.[24] The number has subsequently been used with his approval, around the world in music concerts following the initial 46664 concert in Cape Town, South Africa.[25] Sixth was artist Yiul Damaso who has begun making a name for himself by representing Madiba as a Rastafarian in his portraits.[26]

Then a South African company, Investgold that minted gold coins bearing Mandela's name and image. MacRobert won a temporary court order barring Investgold from selling the coins, which it had been marketing under an agreement to pay a 5 percent royalty to the NMF.[27] In the High Court case, Mandela's lawyers argued that the use of the words "Nelson Mandela" and his image on the coins was an infringement of his rights. The court held that the personality rights of famous people cannot be transferred away from that person.[28] Investgold had also secured Mandela's prison number-46664-as part of his business phone number but Mandela has since reclaimed it for use with an AIDS hot line.[29]

Then there was the managing director of the company that markets personalized license plates for South Africa's government who surrendered to the NMF the "MANDELA" plate he had reserved and hoped to sell eventually for a big profit.[30] There were swindlers based in Nigeria who set up nelsonmandelafoundation.com and solicited gifts for

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[23] *Ibid.*

[24] " Mandela Lawyers Fight for His Prison Number" *Reuters*, November 9, 2004.

[25] Carole Landry, "Building Mandela's humanitarian legacy", Associated Free Press (AFP), July 14, 2004.

[26] *Supra* note 20.

[27] Gillian Jones, "Mandela coin company gets six-month reprieve", South Africa Mail & Guardian online, July 13, 2005 also available at http://www.mg.co.za/articlePage.aspx?articleid=245308&area=/breaking_news/breaking_news__national/. Last accessed October 11, 2006.

[28] *Ibid.* The company later on reached an agreement with NMF to trade in the said coins for the next six months after which it was prohibited from such trade in South Africa. It was also to remit a percentage of its earnings to the NMF.

[29] See note 24.

[30] *Supra* note 20. David Shapshak, "The marketing of Madiba" available at http://www.aegis.com/news/afp/2004/AF0407G2.html.

Mandela via a Cyprus bank account.[31] The police agency, Interpol and the bank in question got involved and the scam ended, though it's not clear how much the thieves pocketed. MacRoberts also had to deal with the unsolicited use of Mandela's beaming countenance when it was used to endorse the Hilton Hotels chain.[32] The commercial, was lambasted for appropriating Mandela's image without his consent and the advertisement was promptly withdrawn.

Most outrageous was the use of Nelson Mandela's image in a pro-gun advertisement by a South American lobby group to make it look as if he supported the campaign.[33] The lobby group ran a television commercial that featured a newspaper photo of Nelson Mandela visiting São Paulo, Brazil, his fist raised in an apparent show of solidarity. The NMF decried the use of his image in the advertisement as "incorrect, improper and illegal" stating, "Mr. Mandela's fight against apartheid bears no relation to the sale of guns." [34]

From the foregoing, it is clear that Mandela's persona has morphed into a brand. It then begs the question, if Mandela really were a brand, what would he really be worth? A recent survey found that after Coca-Cola, Nelson Mandela was the world's second most widely recognized "brand".[35] The idea of celebrity as a brand is well known as I illustrated in chapter one and as we saw with the late Princess Diana in chapter two. It is also inescapable for someone of Mandela's status.

"The man of rank and distinction," wrote Adam Smith in 1759, "is observed by all the world. Everybody is eager to look at him."[36] And, by extension, it seems, own him too.

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[31] *Ibid.*

[32] Michael Wines, "Mandela name: He doesn't want it worn out", The New York Times Wednesday, January 19, 2005 available at http://www.iht.com/articles/2005/01/18/news/mandela.php. Last accessed October 17, 2006.

[33] International Action Network on Small Arms, IANSA website http://www.iansa.org/updates/update211005.htm. Last accessed October 17, 2006.

[34] *Ibid.*

[35] Janis van der Westhuizen, Ph.D University of Stellenbosch, " Beyond Mandelamania: Imaging, Branding and Marketing South Africa," Report commissioned by the Policy Coordination and Advisory Unit, Presidency of the Republic of South Africa and the Swedish International Development Agency, May 2003.

[36] Adam Smith, The Theory of the Moral Sentiments 1759 accessed online http://www.adamsmith.org/smith/tms/tms-index.htm. Last accessed October 2, 2006.

While it has not been possible to place a realistic commercial value according to the normal methodologies, various leading South African and international brand specialists have held the same opinion on Mandela's persona being a formidable and instantly recognised brand. Interbrand,[37] arguably the world's best branding consultancy firm has a centre in South Africa. Its managing director, Jeremy Sampson had this to say about the brand Mandela at a presentation to the World Intellectual Property Institute (WIPO):

> "Today my world and that of the Interbrand Group, in 26 centres around the world, is totally brand centric. *We see everything as a brand*, so be it South Africa itself *or Nelson Mandela,* Johannesburg or Cape Town, the Kruger Park, a bottle of Thelema wine or a Kruger Rand *these are all brands*. A brand is not simply a name or a logo or a product, it is a melange of absolutely everything that relates to it -the promise of an experience."[38]

The power of his personality and today's society has turned his persona to a serious commodity recognisable even by an international brand consultant company. Patrick Collings[39] believes that in aligning his brand with the South African brand, Mandela is credited with helping the South African national brand improve its global profile.[40]

> "People who become widely-recognized brands can broadly be grouped into one of two categories. The first, such as entertainers, typically set out with the intention and hope of becoming a recognized brand. The second group comprises people who achieved brand status whilst doing something else. Mandela, affectionately known by his nickname Madiba, *is a firm member of the second category whose brands tend to be more resilient than ones formed by reliance on fickle consumer tastes and fleeting prowess*."[41]

The same opinion of Mandela being responsible for the image of South Africa is held by Simon Anholt[42] and Wally Ollins[43], both international branding specialists. They had this

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[37] Started in 1974 by a former Dunlop executive, John Murphy, Interbrand has created and managed several valuable brands such as BMW, AT&T, American Express, Bacardi Martini, British Airways and British Telecom. This London-based agency, which has 28 offices worldwide, is now part of the transnational Omnicom group. It is responsible for valuation of the world's leading brands and releases annual polls showing their positions. Information from www.interbrand.com. Last accessed October 30, 2006.

[38] Presentation to the WIPO Second International Conference on Electronic Commerce and Intellectual Property, Geneva, September 19, 2001. (Italics mine.)

[39] Patrick is a founding partner of Sagacite Brand Agency, a South African network of independent companies and consultants who bring together their brand, marketing, creative, management, social science & technology skills and experience for diverse brand-related projects in the corporate and government arenas.

[40] Patrick Collings, "Between Mandela", *Brand Architect* magazine, March 2006 at 35.

[41] *Ibid.*

[42] Simon Anholt advises governments, ministries, civil services and NGOs on the branding aspects of public diplomacy, economic development, public affairs, cultural relations and trade, tourism and export

to say during an interview with both of them by a South African consultant on the issue of "nation branding":

> "Q: South Africa has many well-recognised institutions, symbols. The flag is among the top three most recognised in the world, individuals (Nelson Mandela), companies (Sappi, De Beers, Anglo American), etc. What role, if any, do they play, and how can they be leveraged to shape the brand positioning of South Africa?
> A: They can all be important. *At the moment, Mandela is about 90% of the image of the country.* The companies, tourism, other people, sport, and culture need to be promoted to 'round out' what is still a pretty thin brand."[44]

Thus Mandela's lawyer, MacRobert is quick to acknowledge Mandela's brand power. "Assuming he was a commercial entity, you could rank him alongside Coca Cola and Microsoft".[45] But he clarifies as to what the brand Mandela is to be associated with. "We don't mind a Kennedy-ised Mandela," he stated. "You see Kennedy museums and Kennedy streets all over America and that's fine. What we are fighting against is the commercial, profit-making side. We don't want a Disney-fied Mandela. To me, certain names are no-go commercial zones; Mandela, Sisulu and Tambo in our country, for instance. Kennedy in yours."[46]

Despite this statement of intent, the NMF is still inundated with requests by entrepreneurs seeking Mandela's endorsement for everything from pens to Madiba diamonds, to crèches bearing his name. In South Africa the trade mark still remains the most viable form of protection to Mandela's persona. MacRobert has applied for trade mark registration of the names Nelson Mandela, Madiba (an affectionate reference), Rolihlahla (his Xhosa name) and Mandela's well-known prison number 46664.[47] But there has recently been a new awakening to a new tort that may be used in protection against unauthorised commercial exploitation of personality; the *actio injuriarum.*

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promotion. He is a prolific author on the subject and a well-known public speaker, editor and broadcaster on these and many related topics.

[43] Wally Olins is the co-founder of brand consulting house Wolff Olins, and the president of Saffron, a Europe based brand consultancy. He lectures at a number of Business Schools in Europe and is a published author on the subject of brands. His clients include *Prudential, Repsol, Renault* and *Volkswagen.*

[44] Thebe Ikalafeng, "Brand the Beloved Country, " *Design Indaba* magazine, April 2005 at 30.

[45] *Supra* note 32. Michael Wines, "Mandela name: He doesn't want it worn out", The New York Times Wednesday, January 19, 2005 available at http://www.iht.com/articles/2005/01/18/news/mandela.php.

[46] *Ibid*

[47] *Ibid.*

3.2.1. South Africa's legal awakening

The South African law of delict (a civil law doctrine similar to the law of torts in common law) rests on the twin foundations of *damnum injuria datum* and the *actio injuriarum.*[48] While the former has become the general remedy for wrongs to interests of substance, the latter affords a general remedy for wrongs to interests of personality.[49] The *actio injuriarum* protects a triad of interests comprising of *fama* (reputation), *corpus* (body) and *dignitas* (dignity).[50] While the first concerns the law of defamation, and the second deals with infringement of a person's physical integrity and personal liberty, the third provides an essentially residual category of personality rights which do not fall under the first two categories.[51]

In the *actio injuriarum,* two essential elements of liability must be established: first, an act constituting an impairment of the plaintiff's personality for example Mandela; and secondly, wrongful intent.[52] The defendant's motive is irrelevant, and it is not necessary to prove any ill-will or spite, it being sufficient to show that the injuries suffered by the plaintiffs were inflicted with deliberate intention, rather than accidentally or negligently.[53] Thus, the unauthorised publication of a Mandela's photograph and name for advertising purposes could be capable of constituting an aggression upon his person's *dignitas* (dignity), amounting to an injury.

This was the holding in the South African case of *O'Keeffe* v. *Argus Printing and Publishing.*[54] A picture of the plaintiff was used in an advertisement for rifles, pistols and ammunition. Although the plaintiff had consented to having her photograph taken whilst in the act of aiming a pistol, such consent only limited to its use in a newspaper article. The essence of the complaint related to use of the plaintiff's name and photograph for

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[48] J Neethling, J M Potgieter & PJ Visser, (2002) *Law of Delict*, Butterworths Press, Durban .
[49] *Ibid,* 10.
[50] *Ibid,* 83.
[51] *Ibid,* 84.
[52] *Ibid,* 53.
[53] *Ibid,* 56.
[54] *O'Keeffe* v. *Argus Printing and Publishing Co. Ltd* 1954 (3) SA 244 (C).

advertising purposes.[55] There was no question of an aggression on the plaintiff's person (*corpus*) or reputation (*fama*), and the action was based purely on the violation of the plaintiff's dignity. Watermeyer, J. observed as follows:

> "*It seems to me that to use a person's photograph and name, without his consent, for advertising purposes may reasonably constitute offensive conduct on the part of the user.* In the well known English case of *Tolley* v *J.S. Fry and Sons Ltd.* a defamation case, and so not wholly *in pari materia* with the present case, Greer, L.J., in the Court of Appeal expressed the view that in publishing a caricature of the plaintiff without his consent as an advertisement for the defendants' chocolate, the defendants had acted 'in a manner inconsistent with the decencies of life and in so doing they were guilty of an act for which there ought to be a legal remedy'. Similarly in the United States of America the legal principle is well established that the unauthorised publication of a person's photograph for advertising purposes is actionable."[56]

He then went on to hold that the South African law would apply the same principles as the UK and US in this matter alongside its own law of delict. He held that the unauthorised advertisement was clearly capable of causing an injury to the plaintiff's *dignitas* (dignity).

> "It seems to me that under our law similar considerations must apply. *The unauthorised publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's dignitas.* It is not necessary for me in the present case to hold, and I do not hold, that this is always so. Much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like. *All that I need decide at this stage of the action is whether the publication of the advertisement in question is capable of constituting an injuria. In my opinion it is.*"[57]

This case law is directly applicable to the myriad of cases that Nelson Mandela was and is facing in South Africa on the unauthorised use of his name for commercial purposes. It is therefore puzzling why his lawyer would rely on the Marks Merchandise Act of 1941, which as we have seen ceased to apply when Mandela was no longer president. What about appropriation of his name? In a recent decision by the Supreme Court of South Africa (February 2007)[58] the Court extensively used the said tort to decide a case of appropriation of the name of another for commercial advantage.

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[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] *Grütter* v. *Lombard* [2007] SCA 2 (RSA).

In *Grütter* v. *Lombard* the court observed that this was an area of the law largely ignored by the courts in the past but slowly coming to life:

> "The extent to which the features of a person's identity – for example his or her name or likeness – constitute interests that are capable of legal protection has received little attention from our courts. In the United States the appropriation of a person's name or likeness for the benefit or advantage of another has come to be recognised as an independent tort during the course of the last century. The English common law seems to have been more reticent in that regard. *In this country it appears to be generally accepted academic opinion that features of personal identity are indeed capable (and deserving) of legal protection. Professor McQuoid-Mason describes the appropriation of a person's image or likeness (the same must apply to other features of identity) as 'a violation of a person's right to decide for herself who should have access to her image and likeness – something that goes to the root of individual autonomy or privacy.'"*[59]

The court went on to quote and refer to *in extenso* earlier cases that had dealt with the issue and it was clear that the courts had been in agreement on the rights that a person may hold in regard to his personality:

> "In *Universiteit van Pretoria* v *Tommie Meyer Films,* Mostert J. recognised that the interest that a person has in his or her identity is capable of delictual protection though his observations in that regard were obiter. Earlier, in *O'Keeffe v Argus Printing and Publishing Co Ltd,* it was held that the action injuriarum was capable of protecting a person against unauthorized publication of his or her name and likeness in an advertisement.[60]

Their ruling in the case before them was faithful to the previous trend. They held that unauthorised use of a person's name for commercial gain was illegal.

> "*We can see no such considerations that justify the unauthorized use by the respondents of Grütter's name for their own commercial advantage.* What is conveyed to the outside world by the use of Grütter's name is that he is in some way professionally associated with the respondents, or at least that he is willing to have himself portrayed as being associated with them, which, as pointed out by Professor Neethling, is a misrepresentation of the true state of affairs for which there can be no justification. The respondents are prohibited from using the name 'Grütter' in the description of their practice or their respective practices; are prohibited from representing in any way that the applicant is associated with their practice or practices; and are ordered to remove the name 'Grütter' from the description of their practice or practices on any nameboard, letterhead or other material."[61]

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[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*

This ruling from the highest court in the land can only spell victory for MacRobert should he decide to institute legal action against any existing offenders appropriating Mandela's many names. One can only hope that with the changing winds blowing in the South African court system regarding appropriation of personality that the Nelson Mandela Foundation will succeed where the custodians of the images of the late Elvis Presley and the late Princess Diana have failed. To protect Africa's most famous icon from exploitation — intentionally or otherwise.

3.3 Local exploitation

As I stated in Chapter One, the reason behind the fame is irrelevant in this thesis. All that a celebrity represents to his fans is an image that they wish to identify with and that image be it a combination of the name, image, voice or likeness or only one of these is the product of a well orchestrated persona that needs legal protection. Kenya, as seen in Chapter Two, has seen a deluge of celebrity mania in the last five years or so. They range from popular musicians, radio presenters, world class athletes and run off the mill hodgepotch of people who are popular for no apparent reason.[62]

As a result, corporations and traders have finally realised that Kenya has its own breed of celebrities who can be associated with their products to boost sales and not as mere advertising gimmicks.[63] In my opening statement of the proposal I had highlighted the plight of a well known Kenyan female pugilist Conjestina "Hands of Stone" Achieng berating the unauthorised use of her image to sell various paraphernalia.[64] The question that may be posed at this stage is whether Kenya can actually boast of such a breed of celebrities who can actually exploit their personas for commercial gain or otherwise. The answer is a resounding yes. Just as we discovered the amazing impact that celebrities have on the social, economic and political scene in Kenya, today Kenya can boast of celebrities who have exploited their persona for serious commercial gains. A few examples are listed below.

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[62] For an in depth analysis of the rise and impact of the celebrity culture in Kenya see Chapter Two, 2.2.

[63] In the past, a few local celebrities were used for limited advertising spots such as Kipchoge Keino, the legendary long distance runner in the Kilometric ballpoint pen advertisement and J.J. Masiga, a well known football player in the 1970s used in a Crown Paints advertisement.

[64] See Research Proposal at (x) and '*SideShow*" magazine, Saturday *Nation*, January 14, 2006 at 20.

The Longomba brothers popularly known as "Longombas" are a duo comprising of Christian and Lovy Longomba who have an impressive array of musical hits in East Africa with the most popular tune being "Vuta Pumz" among others.[65] In the year 2006 their popularity in the region was rewarded with their appointment as the face of IDENTITY a South African fashion house represented in Kenya by Deacons.[66] The Longombas will wear the brand in all their local and international performances.[67] According to Carol Mukii, Marketing Manager, Deacons, there is more to endorsing than meets the eye.[68]

She says it's not easy to get the right, let alone the perfect image to represent a brand. "One has to have a good reputation, perceived or otherwise that is in line with the brand. Their personality and popularity had to be beyond reproach."[69] She says it was after painstaking search that they settled on the duo. "We had other groups that did not fit, the Longombas had it all. The style and energy exuded by the duo is the true IDENTITY brand."[70] These views are similar to what a spokesman for PSI said in chapter two[71] when they were looking for endorsers of the Trust campaign in Kenya. Thus going to show that endorsement is not an entitlement of the artists but is actually as a result of their carefully crafted and maintained personas.

Another benefactor of the rise of endorsements is the Nokia Face of Africa Kenya representative of 2006 Doris Anjalo. She was picked by the South African fashion house Truworths and endorsed the brand during the Christmas 2006 season.[72] Their representative is quoted as saying: "We saw what we wanted and signed her on for the

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[65] Lovy and his twin brother, Christian, were at the forefront of the music industry's fight against HIV/AIDS. In 2005 they released the club anthem "Vuta Pumz" meaning "Take a Breath" in Swahili, a song warning of the dangers of HIV, but also encouraging HIV-positive people to stay upbeat and carry on with their lives. The song went on to win a KORA award, the African music industry's equivalent of a Grammy Award.

[66] Wangui Maina & Anne Muriungi, "SA apparel brands invade Kenyan market", Business in Africa magazine, November 13, 2006 at 13.

[67] SideShow Magazine, *Longomba Brothers get a new wardrobe* Saturday Nation September 2, 2006.

[68] Carole Hinga, "Got a Brand?" *Pulse* magazine, *The Standard*, February 9, 2007 at 10.

[69] *Ibid.*

[70] *Ibid.*

[71] See 2.2.2. in Chapter Two.

[72] *Supra* note 68.

season. She has the elegance and persona that fully represents Truworths. She is different."[73]

There is also local disc jockey DJ Stylez[74] who was spotted and signed by A Tiziano, an American label when they were looking for an African representative for the new brand.[75] When asked why they picked him it was reported that there was a hip culture that DJ Stylez radiated and Code Red as a brand was similar to A Tiziano. The label, which is endorsed by the likes of Boyz II Men, Akon and Bow Wow among other Hollywood stars has a line of clothing that includes t-shirts, suits, tracks and jeans. The DJ is contracted to wear the said line of clothing when performing.[76]

There can be no doubt of the emergence of local Kenyan as superstars and celebrities in their own right with the power to draw up such lucrative contracts and endorsements. This brings us to the question posed through out this Chapter. What is Wangari Maathai's or Conjestina's or any other famous Kenyan recourse under the existing laws? The investigation takes us to the intellectual property laws currently in force in Kenya today.

3.4 The Intellectual Property law regime in Kenya

In Kenya, intellectual property law is governed by four main legal instruments: The Industrial Property Act Cap 3 of 2001, the Copyright Act Cap 12 of 2001, the Trade Marks Act Cap 506 and the Seeds and Plant Variety Act.[77] In this thesis however, the relevant legal instruments will be the Copyright Act 2001 and the Trade Marks Act only. This is because I am investigating the unauthorised appropriation of a name, image, voice or likeness. The Industrial Property Act governs patents, industrial designs, utility models

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[73] *Ibid.*

[74] DJ Stylez is a local Kenyan disc jockey and co- founder of Code Red, a stable of disc jockeys who have gained fame and notoriety in Kenya for their spinning skills.

[75] *Supra* note 68.

[76] *Ibid.*

[77] "Promoting better Legislation and Enforcement of Intellectual Property Rights in Kenya", Keynote Address by Honourable Amos Wako, Attorney General of Kenya at the Third Global Congress on Combating Counterfeiting and Piracy at the International Conference Centre in Geneva, Switzerland on January 30, 2007. For further concise reading on Intellectual Property Law see Ben Sihanya's, *Intellectual Property law,* LL.B. IV Teaching Notes and Materials, 2006.

and technovations,[78] and thus my study does not fall under its ambit. Nor will I rely on the Seeds and Plant Variety Act for obvious reasons.

3.4.1 Copyright law

In Kenya, copyright protection extends to the following categories of works:

> "Subject to this section, the following works shall be eligible for copyright- (*a*) literary works; (*b*) musical works; (*c*) artistic works; (*d*) audio-visual works; (*e*) sound recordings; and (*f*) broadcasts."[79]

Thus, copyright may subsist in the author of a photograph or drawing of a person where the photograph or drawing is an original artistic work.[80] An "author" under the Copyright Act in relation to (a) a literary, musical or artistic work, means the *person who first makes or creates the work;* (b) a photograph, means the *person who is responsible for the composition of the photograph*; (c) a sound recording, means a *person by whom the arrangements for the making of the sound recording were made.*[81] Therefore the law grants authorship to any artist who would make or create drawings of Wangari Maathai in an original work. Can that author then have the right to sell such rights to be commercially exploited as seen in chapter one and shown in Appendix B and C? The answer is a resounding yes.

As regards an artistic work or photograph, the first ownership of the copyright vests in the author of the work, the artist or the photographer, or, where the photograph is taken or drawing is made in the course of employment, the employer or by the person who commissioned the work if it is not the author's employer.[82] This means that the subject of

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[78] " An Act of Parliament to provide for the promotion of inventive and innovative activities, to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs, to provide for the establishment, powers and functions of the Kenya Industrial Property Institute and for purposes incidental thereto and connected therewith." Preamble, Industrial Property Act Cap 3 of 2001.

[79] Section 22 (1) of the Copyright Act of 2001.

[80] Copyright Act 2001, s. 22(3) A literary, musical or artistic work shall not be eligible for copyright unless- (*a*) sufficient effort has been expended on making the work to give it an original character; and (*b*) the work has been written down, recorded or otherwise reduced to material form. For detailed analysis on Kenyan copyright law see Ben Sihanya's *Copyright law*, Intellectual Property Law, LL.B. IV Teaching Notes and Materials, 2006.

[81] Section 2(1) of the Act. (Italics mine.)

[82] *Ibid,* Section 31(1).

a drawing or photograph will not enjoy copyright, for example, Doris Anjalo has no copyright over her image on the various Truworths billboards or advertisements. It also means that the said copyright can be transferred to other parties by the said author with no challenge from the subject.[83]

The author even after the transfer of such rights under the Copyright Act 2001 will retain "moral rights" to:

> "(*a*) claim the authorship of the work; and (*b*) object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation. (3) seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work, where such work would be or is prejudicial to his honour or reputation."[84]

This will answer the question why celebrities will be used on the cover of questionable publications and be unable to get any relief as they hold no copyright to the photographs. Only the author even after having transferred on the copyright has a legal recourse to question the use of his "work."

The best recourse under the Copyright Act 2001 would be for a celebrity to commission a person to take such photographs or drawings or pictures and have the copyright vest in him by virtue of section 31 (1) (a). The commissioner of the photograph is the first owner, and is consequently able to control any unauthorised exploitation of the copyright work. Of course this is hardly realistic, as Kenya has seen an emergence of local paparazzi who take uncommissioned and unauthorised photos of local celebrities for various daily newspapers and magazines.[85] It is important to note that many new artists and performers will seek the maximum publicity for the minimum expense and are often unwilling or unable to insist on control of the manner in which their pictures or photographs are taken. Ownership of copyright in such cases is to some extent subject to

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[83] Refer to 2.3 of Chapter 2 where Alan Story discovered that the photographers of the late Princess Diana knew that they owned copyright in the photos they had taken of her.

[84] *Ibid* Section 32(1) and (3).

[85] Right now the Kenyan market is flooded with local monthly glossies like *True Love, Drum, Insyder* all magazines that carry titillating articles and photos of Kenyan celebrities not to mention the daily newspapers which carry similar weekly magazines such as the *Pulse* magazine in the Friday *Standard* newspaper and *Buzz* magazine, which is part of the Sunday *Nation* newspaper.

private contractual arrangement[86] and although it is practically impossible to prevent having one's photograph taken without one's consent, some protection may be grounded on copyright.

Another shortfall under the Copyright Act of 2001 is that infringement of an artistic work or photograph does not extend to making a three-dimensional copy of a two-dimensional work and vice versa. This is unlike s.17(3) of the UK Copyright, Designs, and Patent Act (CDPA) of 1988. Therefore in Kenya a person can easily reduce a picture or photograph of the Longombas into a three dimensional image like a puppet or doll and get away with it without even seeking permission from the author of the photograph. The Longombas in such a case will be faced with multiple appropriations of their personas and no legal recourse. While the author of the photograph or picture may argue that the common law rules still apply under the Judicature Act and hence the UK CPDA may apply in this case, under the Copyright Act 2001 there was an abrogation of common law rights relating to copyright.

> "No copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.[87]

When we look at the appropriation of a persona's voice, the law states that ownership of copyright in a sound recording will vest in the "person by whom the arrangements for the making of the sound recording were made" who is the producer.[88] In Kenya there are a number of personalities that made a name for themselves through use of their voices only. One of the most distinct voices known to most Kenyans belongs to one Leonard "Mambo" Mbotela.[89] The gentleman's claim to fame is the longest running radio show "Je Huu Ni Ungwana?" that commenced in 1967 and airs every Sunday at 12.30 pm

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[86] International celebrities have discovered it would be easier to sell the rights to photograph and cover an auspicious event to one publication to the exclusion of all others. For example the Michael Douglas-Catherine Zeta Jones wedding was sold to *OK* magazine, the photographs of baby Tom Cruise-Kathy Holmes were sold to *Vanity Fair* magazine and here in Kenya, the *Pulse* magazine of the *Standard* newspaper had exclusive coverage of the wedding of local musicians and celebrities Nameless and Wahu although it is not known whether there was a contract to do this.

[87] Section 51.

[88] Copyright Act 2001, Section 2(1) (c).

[89] Another personality well known for her voice was Elizabeth Omolo better known as "Auntie Elizabeth" in the mid 1980s on the Kenyan radio show "Hallo Children".

Kenyan time.[90] So distinct and well known is "Mambo" Mbotela's voice that during the 1982 failed coup attempt in Kenya, he was forced by the rebels to read statements on their behalf as his voice was known throughout the country to convince the nation that the coup was real.[91] Should a situation arise where Mbotela's voice and his famous slogan is used without authorization, the existing copyright law will clearly shut him out should he wish to seek a remedy in law as the owner of that sound recording is the producer not Mbotela.

Recently, two local radio show presenters were entangled in a bitter fight when one presenter used the voice and sound clips of the other to promote his show. Eve D' Souza,[92] a popular presenter at Capital FM was horrified on realising another presenter, Mwafrika, was using her voice and sound clips to promote his own show at Y-FM station.[93] She complained bitterly that she realized this when her fans called to ask why she was promoting Mwafrika's show. "It is unethical to use my voice to promote his show and we work for different stations and are on air at the same time," said Eve.[94] She explained that she helped Mwafrika as a struggling musician during the Capital rap battle but the Y-FM presenter was using her voice recordings to promote his show, despite the fact that they were not recorded for that purpose.

In this case it is clear that copyright of the sound recordings lie with Capital FM who can take legal action against Mwafrika and Y-FM but what recourse does Eve have to remedy the wrong done by the unauthorised use of her voice for the personal gain of another? Under the Copyright Act, 2001 there is no remedy for her. The Copyright Act also deals

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[90] "Je Huu Ni Ungwana" is a Swahili word meaning "Is this civilised/gentlemanly behaviour?" the programme is a social commentary that uses parodies and jests on the wrongs and bad behaviours prevailing in Kenyan societies. After apt illustrations, Mbotela will always summarise his commentary with the same slogan. http://sw.wikipedia.org/wiki/Leonard_Mbotela. Last accessed February 12, 2007.

[91] Haji Kariuki, "The trauma and terror of the day soldiers rebelled", *Sunday Nation*, August 1, 1999 at 13.

[92] Charles Otieno, "Teens chose their role models", *Society* magazine, *The Sunday Standard*, May 1, 2005 at 3. Eve has been at Capital FM since 2001where she presents the popular "Hits not Homework" which airs 7.00pm to 10.00pm on weekdays. She has been a 3 times recipient of the local CHAT awards for Favourite Female Presenter.

[93] Correspondent, "Mwafrika in 'beef' with Eve D'Souza over show promo", *Pulse* magazine, *The Standard* newspaper, June 10, 2005.

[94] *Ibid.*

with the issue of performers' rights, a subset that is very important to the thesis at hand and hence must be analysed as well.

Performers' rights

Under the Copyright Act, 2001 performance means the representation of a work by such action as dancing, playing, reciting, singing, declaiming or projecting to listeners by any means whatsoever and a performer means an actor, singer, declaimer, musician or other person who performs a literary or musical work and includes the conductor of the performance of any such work.[95]

A degree of protection against unauthorised appropriation of such performance may be secured by means of performers' rights under the Copyright Act, 2001:

> "No person shall do any of the following acts *without the authorization of the performer*- (*a*) broadcast his performance except where the broadcast is made from a fixation of the performance authorized by the performer; (*b*) communicate to the public his performance except where the communication- (i) is made from a fixation of the performance; or (ii) is made from broadcast of the performance, authorized by the performer; (*c*) make a fixation of a previously unfixed performance; and (*d*) reproduce a fixation of the performance in either of the following cases- (i) where the performance was initially fixed without the authorization of the performer; or (ii) where the reproduction is made for purposes different from those for which the performer gave his authorization;(*e*) rent for commercial purposes to the public, the original and copies of their fixed performances."[96]

In Kenya, shows, concerts and national public addresses are synonymous with live performances from famous personalities. Under the Act, the dramatic performance of an actor, dancer, musician or mime artist may be protected regardless of whether the individual concerned enjoys rights in any underlying work. This provision is crucial as a staple of most national public holiday addresses, various product and company launches and fundays is the Vitimbi group of comedians whose original skits have entertained Kenyans for over three decades.[97] Such live performances can be easily videotaped by

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[95] Section 30(6).

[96] Section 30 (1). Italics mine.

[97] The Vitimbi group comprises in part of Benson Wanjau alias Mzee Ojwang' Hatari, Mary Khabere alias Mama Kayai, Hirram Mungai alias Ondiek Nyuka Quarter, Gibson alias Prosecutor and Lucy Kanugu alias Mheshimiwa among others. For over two decades, they have starred in two comedy shows on the Kenya Broadcasting Corporation channel, "Vitimbi" (meaning mischievous acts) and "Vioja Mahakamani"(meaning antics in the courtroom).

spectators without authorization and sold or shown for a fee to third parties to the detriment of the performers. The Copyright Act has ensured that such acts are illegal.

The Act also covers live musical performances an area that most Kenyan artists utilize to make a lions share of their earnings.[98] Without such protection, the live shows would be another target by unscrupulous persons to illegally record and benefit from such performances. Live concerts such as the recently concluded Sawa Sawa Festival[99] exposed Kenyans to international musicians; South African jazz artist Hugh Masekela and Jamaican reggae sensation Burning Spear.[100] While the international artistes performed alongside Kenyans like Ayub Ogada[101] and Eric Wainaina among others, it is important to realise that such performances are protected to give the performer comfort that his talent is not exploited without authorization. The performers' individual technique, personality and talent creates something unique and each performance is different from the last.

The protection of a performer's rights subsist for fifty years after the end of the year when the performance took place[102] and the performer, during his lifetime has the "moral right", independent of his economic rights to be:

> " (*a*) identified as the performer of his performances and to object to any distortion, mutilation, or other modification of his performances that would be prejudicial to his reputation; and (*b*) seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work where such work would be or is prejudicial to his honour or reputation." [103]

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[98] See Chapter Two at 2.2.

[99] Kamau Mutunga, "Masekela due for Major City Festival", *Saturday Nation*, May 19, 2007 at 24. Organized by Sarakasi Trust, the concert was held at the Arboretum Park and Moi International Sports Centre, Kasarani in Nairobi, Kenya.

[100] *Ibid.*

[101] Ayub Ogada is an internationally acclaimed Kenyan musician whose genre is world/African music. He co founded the African Heritage Band in 1979 and his forte is the "Nyatiti", the traditional Luo lyre. In 1993 he recorded the album *En Mana Kuoyo* on Peter Gabriel's Real World music label. His music has also been heard on the soundtrack of the 2005 film, "The Constant Gardner". In July 2005 he performed at the "Live 8" concert in Hyde Park, London as an opening act. Information available at http://en.wikipedia.org/wiki/Ayub_Ogada. Last accessed June 5, 2007.

[102] Section 30 (4).

[103] Section 30 (5).

This provision gives the performer the right to challenge use of his performances even when rights to the performance have been transferred. These rights have given celebrities more protection in their performances and by extension, protection of their personas albeit in a limited scope. The Copyright Act, 2001 as seen does not give a lot of protection to a celebrity whose persona has been exploited without authorization. It needs to address its limitations, seek necessary amendments and recommendations for the same will be addressed in my final chapter.

3.4.2. Trade Marks law

The other intellectual property regime law that is relevant to this thesis as I mentioned earlier is the trade marks law and the legal instrument in Kenya is the Trade Marks Act, Cap 506 (hereinafter "TMA (K)"). The TMA (K) defines a trade mark as:

> "A mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connexion in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of the identity of that person."[104]

A mark is defined in the same section as, "a device, brand, heading, label, ticket, *name*, signature, word, letter, or numeral, or any combination thereof." (Italics added). Therefore names are registrable under the TMA (K) as trade marks but as will be seen, the registration process is only the first of a number of hurdles that a celebrity must overcome to trade mark his name. Registration under the TMA (K) falls under two parts: Part A and Part B and each has a certain criteria to be fulfilled. Under Part A, in order for a trade mark to be registrable, it must contain or consist of *at least one* of the following essential particulars:

> "(a) the name of a company, individual or firm. represented in a special or particular manner; (b) the signature of the applicant for registration or some predecessor in his business; *(c) an invented word or invented words; (d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (e) any other distinctive mark. But a name, signature or word or words, other than such as fall within the descriptions in*

[104] TMA (K) Section 2 (1).

paragraphs (a), (b), (c) and (d), shall not be registrable under this paragraph except upon evidence of its distinctiveness."[105]

Let us analyse these provisions. It must be an invented word (s): this would apply to the local celebrities who have invented stage names. In Kenya a lot of celebrities have taken up interesting monikers but not all can be termed as invented words. There are only a few who can be said to possess invented names: Nonini is one such example. The next provision is a word (s) having no direct reference to the character or quality of the goods, and not being according to its ordinary signification *a geographical name or a surname.* Quite a number of local celebrities would fall under this category from Redsan, Nameless, Jua Cali, Deux Vultures[106] to name a few.

But also a large number will be locked out for example, the names Wahu[107], Wangari Maathai and Oliech will be regarded as surnames incapable of registration. Thus Wangari Maatahi will lose the battle to have her name trade marked to prevent the exploitation seen in Appendix B and C.[108] While a name like Mwafrika (meaning African)[109], will be seen to have geographical connotations hence unregistrable. If the name fails to fall under the preceding provisions it is registrable only upon evidence of its distinctiveness.[110] "Distinctiveness" has been defined thus:

> "For the purposes of this section, 'distinctive' means adapted, in relation to the goods in respect of which a trade mark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connexion subsists, either generally or where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration."[111]

We saw in chapter two that celebrities like the late Princess Diana and Elvis Presley have been found to be too famous to trade mark. Their fame makes their names less distinctive

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[105] TMA (K) Section 12 (1). For detailed analysis on Kenyan trademark law see Ben Sihanya's *Trade Mark law*, Intellectual Property Law, LL.B. IV Teaching Notes and Materials, 2006.
[106] These are all well known Kenyan musicians with a string of hit songs and albums to their names.
[107] Wahu is a well known female musician in Kenya having sung popular hits like "Liar" and "Sitishiki" (a Swahili word meaning "not threatened"). She is also married to fellow musician David Mathenge popularly known as Nameless.
[108] This is the same battle the estate of the late Princess Diana faced in registration. See 2.3 of chapter two.
[109] A self-proclaimed "underground freestyle rapper" and radio show presenter at Y-FM, a local radio station in Kenya.
[110] TMA (K) section 12 (1) (e).
[111] TMA (K) Section 12 (2)

when it comes to being associated with a particular good or service. For example, if Dennis Oliech or Wangari Maathai should attempt to trade mark their names for use on certain goods or services, they are very likely to fail. Why? Because where a famous name is concerned there is the possibility that the name will serve to signify not the trade source of the goods/services but merely the subject matter.[112]

The use of their names does not perform the function of enabling a customer to distinguish that good/service as emanating from them from other memorabilia from other suppliers.[113] It is not an indication of trade origin at all. All they will be buying will be the name or likeness, not a product from a particular source as the customer is likely to be indifferent as to the source.[114] While the UK Trade Marks Act 1994 as seen in Chapter Two provides that a celebrity may establish that the name has acquired distinctiveness through earlier use;

> "If, before the application date, the sign 'has, in fact acquired a distinctive character as a result of a use made of it,' a later objection that a sign lacked distinctiveness would not, by itself, prevent registration."[115]

The Kenyan Act has no similar provision therefore our local celebrities who find their names may only be registrable after evidence of distinctiveness have a serious hurdle to overcome. As regards Part B registrations, the same hurdle is faced as the intended mark;

> "must be capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connexion subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.[116]"

For example, it will be easier to register the name Green Belt as a trade mark offering conservation services rather than the name Wangari Maathai as the former is capable of

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[112] See pages 19 and 20 of Chapter Two.
[113] Per Laddie, J. in *Elvis Presley Enterprises Inc* v *Sid Shaw Elvisly Yours* [1997] RPC 543. Quoted *in extenso* in Chapter Two.
[114] *Ibid.*
[115] Section 3 (1).
[116] TMA (K) Section 13 (1)

distinguishing its services having done so since 1977.[117] The latter, while being the founder of the Green Belt has never traded or offered such services in her name hence the difficulty in registration. A well-known personality in Kenya must therefore overcome the distinctiveness and distinguishing tests before they can be granted registration of their names as a trade mark.

This two-fold requirement has caused a lot of appropriation of personality cases by famous persons to be dismissed in the UK as seen in chapter two[118] and the trend will be no different in Kenya. If, owing to the rigorous process of registration, a local celebrity is denied registration of his name under the TMA (K), no person is entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark and the only remedy that lies for an unregistered trade mark is an action in passing off.[119]

3.5 Conclusion

Today's technology and the information age have succeeded in blurring the boundaries between the personal and the public by reproducing and representing famous images in order to sell products and services. On the one hand this practice constitutes the hallmark of a free society.[120] On the other hand, it inevitably raises questions concerning the rights of celebrities whose images have been appropriated without their consent.

This chapter has shown the lacunas in the intellectual property laws not only in Kenya but other parts of Africa. Nelson Mandela resorted to an ancient piece of legislation on Marks Merchandise to protect the unauthorised use of his persona. The few cases which were addressed by the South African courts did not use traditional intellectual property laws alone but borrowed and invoked a delict/tort to find remedy for this wrong.

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[117]Correspondent, "Green Belt turns 30" at http://greenbeltmovement.org. Last accessed January 8, 2007.
[118] As seen an application to register the mark 'Diana, Princess of Wales' for a wide range of goods and services was rejected. It was found that in the absence of any right of personality, Diana, Princess of Wales did not own any rights in her name, as such. While personal names might readily be taken to denote a particular trade source, this was not necessarily the case where a famous name was concerned, where use of the name might merely identify the subject matter of the goods
[119] TMA (K) section 5
[120] See Chapter One.

As I staed in chapter 1, appropriation of personality, being a new doctrine in intellectual property law, has been seen to borrow from both property rights and remedies doctrine. It is clear that here in Kenya there is no clear legal right or remedy for appropriation of personality. We must be challenged to fashion a suitable right and/or remedy, which balances the competing interests of the individual in controlling unauthorised commercial exploitation with the wider interests such as avoiding undesirable monopolies and the suppression of freedom of expression.

The current intellectual property laws in Kenya do not lend much protection to our cause and it is time that we challenge the status quo. The nature and scope of a remedy for appropriation of personality in Kenya is examined in the next Chapter.

CHAPTER FOUR

REFORMS AND RECOMMENDATIONS

4.1 Introduction

As we discussed in the preceding Chapters, celebrity image has become an important currency in our time, be it economically, socially, culturally or even politically. As a result, there has been a growing public and legal awareness regarding the appropriation of these images, and the profits that such appropriation can bring.[1] I have presented persuasive evidence of how international icons such as the estate of the late Princess Diana and Nelson Mandela have been beleaguered with this problem. But even more central to this thesis is the fact that this is a problem faced by our local celebrities in Kenya.[2] I will therefore, in this Chapter be making certain arguments for the reform of the relevant existing laws and recommendations to adopt new laws to address the issue.

4.2 Legal reforms

As we have seen, a degree of protection may be had from a variety of sources – many potentially overlapping but all ultimately insufficient, even taken in sum. Enterprising counsel may make claims relating to trade marks[3], copyright[4] and quasi-legal remedies may also be available under the Uniform Domain Name Dispute Resolution Policy.[5] However, this has been seen to be an inadequate bag of tricks when attempting to secure the value of a personality.[6] The copyright law in this country has shown that in the absence of copyright no one has a right of property in his appearance and cannot restrain the reproduction or exploitation of photographs in which he appears.[7] While it is an ongoing argument over why there would be copyright in a photograph taken since the

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[1] G. Armstrong, "The Reification of Celebrity: Persona as Property" (1991) 51 La. L. Rev. 443 at 457.
[2] See Chapter Three 3.3 on local exploitation.
[3] See generally chapters 2 and 3.
[4] *Ibid.*
[5] See Chapter Two 2.4.4 on the legal protection of famous names as domain names.
[6] See Chapter Three 3.4 on the Intellectual Property Law Regime in Kenya.
[7] See Chapter Three 3.4.1 on copyright law.

basic tenets of any copyright is that the work must be an "original and created work",[8] the answer has been to analyse the meaning of these words and their interpretation under copyright.

> *"What 'original' means is that the work must have been developed independently by its author, and there must have been some creativity involved in the creation. Original does not mean that nothing like this work was ever created before, or that there may be no similarity at all between two works.* It may happen, although this is unlikely, that two people independently create the same work. One possible situation in which this could occur is photography. If two photographers take a photo from the same point of view, using the same exposure time and the same lens, the photos will be almost indistinguishable. In such a case, they both hold the copyright on their respective photos."[9]

Therefore, a celebrity's image once reduced either as a drawing, pictorial or even photograph can indeed be declared original and the author holds copyright of such image. As regards the term "created work" in copyright it has been interpreted as "fixed in tangible form for the first time."[10] Thus there can be copyright protection of an image, famous or not.

To seek to reform the law on copyright on a picture or photograph to make the subject have the same rights as the author would be absurd and defeat the purpose of the Act. Thus if someone takes pictures of Tony Nyadundo in a public place, they will hold the copyright in the photographs. The question at hand is whether the author should be allowed to use the photos without his approval in advertisements to promote for example a pair of shoes, that is, commercially appropriate his image for financial gain. Absolutely not. Yet the Act is silent on this issue.

Further, while the Copyright Act 2001, gives performers moral rights[11] over their performances it does not do the same for the same performers when they are the subjects of say photographs. There is a need to an amendment to give such subjects "moral rights" over their images at least! This will deter the owner of the copyright from using the

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[8] G. Armstrong, "The Reification of Celebrity: Persona as Property" (1991) 51 La. L. Rev. 443 at 457.
[9] *Ibid* at 460.
[10] *Ibid.*
[11] See Section 30 (5) of the Act and 3.4.1 of chapter three.

images indiscriminately and injuring the subject's reputation as the celebrity, will have a moral and legal right to:

> "Object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation and seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work, where such work would be or is prejudicial to his honour or reputation."[12]

One of the reforms that must be seen in the Copyright Act, 2001 is to grant moral rights to the subjects of pictures/photographs or even drawings. Surely, Wangari Maathai's honour and reputation has suffered quite a blow with her persona being plastered on boxer shorts, baby bibs and even floor tiles![13]

There is also the need to include a provision that infringement of an artistic work or photograph extends to making a three-dimensional copy of a two-dimensional work and vice versa.[14] This provision is necessary as without it, the image of a local celebrity can be turned to a three dimensional object such as a doll or a puppet with no legal recourse. Such a provision which is found in s.17 (3) of the UK Copyright, Designs, and Patent Act (CDPA) of 1988 will ensure that multiple appropriations of famous personas in Kenya is illegal.

As regards the trade mark law in Kenya, the glaring shortfall of this law is the hurdle that a famous personality has to overcome to get his name registered as a trade mark.[15] This is primarily because a trade mark is actually a mark to denote the origin of goods or services. We have seen that unless the name is an invented word or not a surname, there must be evidence of distinctiveness or capability to distinguish the product for registration to occur. Ironically, the more famous one is, the less distinctive his name is.[16]

It has been found that when it comes to celebrity merchandising, the consumer does not buy a product carrying a famous name or image because of its source but rather its

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[12] The moral rights covered by Section 32 (1) of the Copyright Act, 2001.
[13] See Appendix C.
[14] See Chapter Three 3.4.1.
[15] See Chapter Three, 3.4.2 on trade mark law.
[16] *Ibid.* Also see Chapter Two, 2.3 the international exploitation of Princess Diana's persona.

subject matter contrary to the principles of trade mark law.[17] Thus many local celebrities will be fighting a real battle should they use the trade mark avenue to protect their already famous names against commercial appropriation. It is therefore crucial to reform the provisions on trade mark registration by repealing the requirement of distinctiveness. If this is not possible then we must adopt the UK position where the Trade Marks Act 1994 provides that a celebrity may establish that the name has acquired distinctiveness through earlier use.

> "If, before the application date, the sign has, in fact acquired a distinctive character as a result of a use made of it, a later objection that a sign lacked distinctiveness would not, by itself, prevent registration."[18]

The Kenyan Act has no similar provision and it would be advisable to amend it to include such a provision.

The reforms I have suggested to the existing intellectual property laws in Kenya may be seen as miniscule but it is important to remember that these Acts were never drawn up with rights to personality in mind. This is a lacuna in the laws which Parliament had not anticipated as personality rights are also a very recent development in the law. All we are doing is finding relevant sections in different legislations that may accommodate this issue. Small but significant changes made to these laws will be crucial in grating some form of legal remedy for our famous personalities.

4.3 Recommendations

In our research, a very important issue that emerged was that another jurisdiction faced with the same limitations of the intellectual property laws that Kenya faces, namely South Africa, has developed and strengthened an existing law to become a remedy to this problem.[19] The South African law of delict (a civil law doctrine similar to the law of torts

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[17] See Chapter Two 2.4.2 and Chapter Three 3.4.2 on the hurdles faced when attempting to registrar celebrity names and images as trade mark.

[18] Section 3 (1). If, before the application date, the sign "has, in fact acquired a distinctive character as a result of a use made of it, a later objection that a sign lacked distinctiveness would not, by itself, prevent registration."

[19] See Chapter Three 3.2.1. South Africa's legal awakening.

at common law) under which the *actio injuriarum*[20] is to be found has been used in two cases of appropriation of image and name, with commendable results.[21]

In both cases, it was clear to the judges that appropriation of personality is an area of the law largely ignored in certain parts of the world which is also the case in Kenya. But the South African courts were alive to the academic writings and jurisprudence of other nations in this matter despite the existing intellectual property laws not being able to address this issue.

They were guided by international precedents but used their local law on delict to develop it into a regime to protect and promote the rights to personality. I am persuaded that this will be a major recommendation as regards the problem at hand. We need to develop a tort of appropriation of personality. This will be done by gleaning off the jurisprudence of other jurisdictions to guide us as we expand our local laws on tort to include this tort. When a local celebrity eventually takes a case of appropriation of personality to court, we must be well armed to persuade the courts that such a tort can be developed.

The tort of appropriation of personality was first introduced in Canada in the case of *Krouse* v. *Chrysler Canada*.[22] The tort was upheld with the relatively bald statement:

> "[T]he common law does contemplate a concept in the law of torts which may be broadly classified as an appropriation of one's personality."[23]

The Canadian courts have thereafter recognised that a person "has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right if it is invaded."[24] This is exactly the tort we need to

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[20] J. Neethling, J. M. Potgieter & P. J. Visser (2002) *Law of Delict*, Butterworths Press, Durban .

[21] *O'Keeffe* v. *Argus Printing and Publishing Co. Ltd* 1954 (3) SA 244 (C) and *Grütter* v. *Lombard* [2007] SCA 2 (RSA). For the facts, excerpts and holdings in these cases see Chapter Three 3.2.1.

[22] *Krouse* v. *Chrysler Canada*, [1972] 2 O.R. 133, 25 D.L.R. (3d) 49, 5 C.P.R. (2d) 30. The facts of this case are as follows: In 1970, Chrysler Canada decided to advertise some of their cars on a promotional device called a 'Spotter.' The centre of the 'Spotter' had a picture of Bobby Krouse, an athlete wearing his number 14 shirt. Although other players were visible in the picture, Krouse was clearly the centre of focus and his number alone was visible. Krouse took exception to the use of his photograph in this manner and sued Chrysler Canada.

[23] *Ibid* at 230.

[24] *Athans* v. *Canadian Adventures Company Limited* [1977] O.R. 2d 425, 435.

develop in Kenya to address for example the issue that faced Conjestina Achieng.[25] I believe that if she was to sue the merchandisers who used her image without authorization to see all sorts of paraphernalia including calendars and clocks, the jurisprudence of the Canadian court in *Krouse* would be very relevant where the court said:

> "The commercial use of his representational image by the defendants without his consent constituted an invasion and *pro tanto* an impairment of his exclusive right to market his personality and this, in my opinion, constitutes an aspect of the tort of appropriation of personality".[26]

Having a similar system of law with Canada, the common law, it is possible to be able to develop our own tort of appropriation of personality. We currently do not have any privacy statutes unlike Canada, which has also relied on its privacy statutes to resolve the issue of appropriation of personality. In *Les editions Vice-Versa* v. *Aubry,*[27] the Court held that the guarantee under section 5 of the Quebec Charter of Rights and Freedoms that the provision "every person has a right to respect for his private life" included the right to control the use of one's image as a fundamental part of a respected sphere of personal autonomy.

In my research I looked for an equivalent of such a provision in our Bill of Rights. Unfortunately, Chapter V of our Constitution that deals with the fundamental Rights and Freedoms of the Individual has no similar provision:

> "Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely - *(a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation."*[28]

This leads me to the other recommendation needed in Kenyan law to address this problem. It is time we expressly provided for a right to personality in the Constitution.

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[25] See research proposal at (x).
[26] *Supra* note 22 at 595.
[27] [1998] 1 S.C.R. 591, 577 D.L.R. (4th) 15.
[28] Section 70, Chapter V of the Constitution of Kenya.

Why should the Constitution provide for "security of the person and privacy of one's home and property" yet omit a person's right to his own personality? In Germany, the right of personality has been recognised in the Constitution since 1954.[29] The German Constitution (Grundgesetz) Art 1 GG guarantees "the dignity of man shall be inviolable and to respect it shall be the duty of all."[30] While Article 2 (1) provides that "everyone has the right to the free development of his personality, in so far as he does not violate the rights of others or offend against the constitutional order or the moral code."[31]

Drawing on the law's recognition of the right of an individual to have his dignity respected and to the free development of his personality, the highest civil appeal court, the Bundesger, has held that a general personality right must be regarded as a constitutionally guaranteed fundamental right.[32] This was in the *Marlene Dietrich* case.[33] The case concerned a claim brought by the heir of the deceased actress against persons who had registered the trade mark "Marlene", had subsequently used it in merchandise and licensed it to a car manufacturer. The court held that:

> "The general personality right protected by the Basic Law (Constitution) protects not only non-material personality interests, particularly entitlement to worth and respect, but also material or economic interests. *Attributes of personality, such as name, likeness or voice, could have a substantial de facto value, often resulting from fame and reputation in the public eye in such fields as sport and the arts*. Indeed, in such cases financial detriment would often be the main crux of the complaint, rather than damage to honour or reputation. *The right of personality should, accordingly, protect the right to decide whether and under what conditions an individual might choose to exploit attributes of his personality.*"[34]

It is clear that the courts are capable and willing to mould a remedy of appropriation of persona if there is even a semblance of a law that recognises such a right. The addition of a similar clause in the Kenyan Constitution will give our local celebrities not only the

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[29] Götz Böttner, "Protection of the Honour of Deceased Persons –A Comparison between the German and the Australian legal situations", (2000) Bond Law Review at 45.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.* The late Marlene Dietrich was a German national who became a famous Hollywood actress in the 1920s.
[34] *Ibid.*

legal rights to the development of their persona but an appropriate remedy in the event of appropriation.

In my recommendations I am hesitant and reluctant to call for the development of *sui generis* legislation or the creation of an entirely new tort. I have simply called for development of the already exiting law on torts to include a general tort of personality and also to extend our Constitutional rights to include rights to personality as has been done in Germany. This is because if the courts can be persuaded that they are merely drawing on existing legal principles, their fears of what they might regard as unacceptable judicial legislation may be assuaged.[35] Judicial application of pre-existing principles is much easier to defend against attack for usurping the role of the Legislature than the development of an entirely new right or cause of action.[36]

4.4 Conclusion

In Kenya over the last five years or so, the "celebrity industry" has seen considerable growth in power, organization, and sophistication and the use of name, image, voice, or likeness (persona) for the marketing of goods, services, social and political causes has become more and more common. My case studies have dealt with larger than life personalities; the late Princess Diana, Nelson Mandela and Wangari Maathai, persons whose images and names have been heavily exploited for commercial use. This thesis, however, hopes to challenge the legal community and academicians to find a legal solution of protecting the "lesser celebrity" who may not wield international recognition but nevertheless has developed a persona worthy of protection. They need avenues to exploit whatever they can out of their fame and the law should be seen to protect their persona.

It is my hope that I have convinced the reader that the Kenyan celebrities need to have legal protection to their personas/personalities and that the legal community will be challenged to rise to the occasion and address this issue exhaustively.

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[35] Beverley-Smith Huw (2002), *The Commercial Appropriation of Personality*, Cambridge University Press, New York, at 248.
[36] *Ibid,* at 250.

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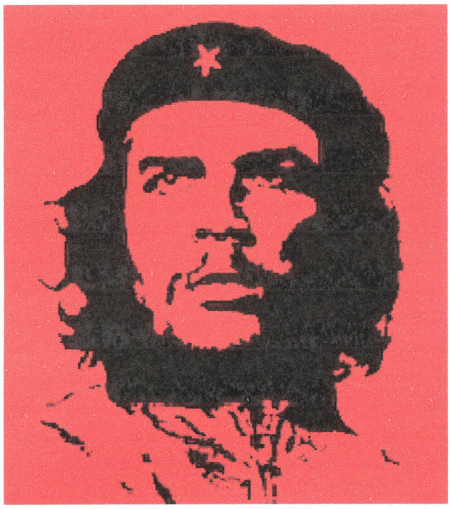
APPENDIX "A"

CHE GUEVARA



APPENDIX "B"

"Welcome to the "wangari maathai" gifts page from CartoonStock. Any of these cartoons (subject to the above) can be bought as prints/originals or printed on the merchandise at the bottom of this page. Follow the links at the bottom of this page to search for gifts on other topics or to purchase reproduction rights for any of these images."

Wangari Maathai gift image 1 - catalog reference knin18

Wangari Maathai - Nobel Peace Prize.

Related topics: prizes, wangari maathai, nobel peace prize, nobel, peace, prize, prises, noble, nigeria, nigerian, environmental activist, environmentalist, nobel laureate, laureate, peace prize, green belt movement, green belt, ecologist,

"All these cartoons can be printed on framed or unframed prints, T-shirts, mouse-mats, mugs and more".

"APPENDIX C"

"Zen Shop T-shirts, Gifts & Clothing : Wangari Maathai Peace T-shirts & Peace T-shirt, Peace Gifts & Gift : (ACCESSED 24-03-07) ALL PROCEEDS WILL GO TO E-SANGHA BUDDHISM PORTAL." http://www.cafepress.com/esangha/403796

Wangari Maathai Value T-Shirt
$12.99

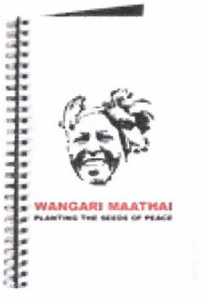
Wangari Maathai Round Ornament
$7.99

Wangari Maathai Oval Ornament
$7.99

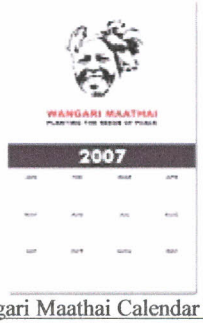
Wangari Maathai Messenger Bag
$23.99

Wangari Maathai Tote Bag
$16.99

Wangari Maathai Framed Panel Print
$44.99



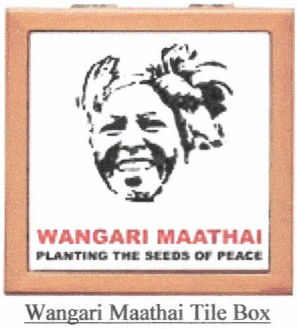
Wangari Maathai Journal
$8.99



Wangari Maathai Calendar Print
$5.99

MORE COLORS AVAILABLE
Wangari Maathai Trucker Hat
$13.99

Wangari Maathai Mousepad
$13.99



Wangari Maathai Tile Box
$19.99

Wangari Maathai Tile Coaster
$5.99

Wangari Maathai Stein
$17.99

Wangari Maathai Mug
$13.99

Wangari Maathai Bib
$7.99

MORE COLORS AVAILABLE
Wangari Maathai Infant Creeper
$13.99

MORE COLORS AVAILABLE
Wangari Maathai Infant T-Shirt
$12.99

MORE COLORS AVAILABLE
Wangari Maathai Kids T-Shirt
$18.99

Wangari Maathai Camisole
$20.99

Wangari Maathai Boxer Shorts
$16.99

MORE COLORS AVAILABLE
Wangari Maathai Sweatshirt
$25.99

MORE COLORS AVAILABLE
Wangari Maathai Hooded Sweatshirt
$29.99

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