SPORTS IMAGE RIGHTS IN KENYA

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G62/67879/2013

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in Partial Fulfilment of the Requirements for the Award of a Master of Laws (LLM)
Degree

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December 2017
DECLARATION

This Project is my original piece of work and it has never been submitted to any other learning institution for the award of any Diploma or Degree Certificate, by either me or any other person, whatsoever.

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G62/67879/2013

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TABLE OF CONTENTS

DECLARATION ........................................................................................................................................... II

ACKNOWLEDGMENTS ............................................................................................................................. III

ABSTRACT ................................................................................................................................................... VII

ABBREVIATIONS AND ACRONYMS ....................................................................................................... viii

LIST OF CONSTITUTIONS ........................................................................................................................... ix

LIST OF KENYAN STATUTES .................................................................................................................. x

LIST OF FOREIGN STATUTES ................................................................................................................ xi

LIST OF CASES .......................................................................................................................................... xii

CHAPTER 1 .................................................................................................................................................. 1

BACKGROUND TO THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA ................................................... 1

1.1 INTRODUCTION AND BACKGROUND OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA ........ 1

1.2 STATEMENT OF THE PROBLEM OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA .............. 5

1.3 RESEARCH OBJECTIVES OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA ...................... 6

1.4 RESEARCH QUESTIONS OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA .......................... 6

1.5 HYPOTHESIS OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA .......................................... 6

1.6 REVIEW OF LITERATURE AND POLICY ON THE STUDY OF SPORTS IMAGE RIGHTS IN KENYA .... 6

1.7 JUSTIFICATION AND SIGNIFICANCE OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA ........ 13

1.7.1 Significance of the Study on Sports Image Rights in Kenya .............................................................. 14

1.8 THE CONCEPTUAL AND THEORETICAL FRAMEWORK OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA 14

1.8.1 Conceptual Framework of the study on Sports Image Rights in Kenya ............................................. 15

1.8.2 Commercialization of Image ........................................................................................................... 16

1.8.3 Intellectual Property Rights and Sports Image Rights .................................................................... 17

1.8.4 Theoretical framework on the study on sports image rights in Kenya ............................................. 19

1.9 RESEARCH METHODOLOGY: DESIGN, METHODS, AND TECHNIQUES OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA ................................................................. 22

1.10 CHALLENGES IN THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA ...................................... 24

1.11 CHAPTER OUTLINE OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA ................................. 24

CHAPTER 2 .................................................................................................................................................. 26

2 STRUCTURE AND REGULATION OF THE SPORTS INDUSTRY IN KENYA ........................................... 26

2.1 DEVELOPMENT OF THE SPORTS INDUSTRY IN KENYA .............................................................. 26

2.2 CONCEPTUALIZATION OF SPORTS IN THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA .......... 28

2.3 PROFESSIONALIZATION AND COMMERCIALIZATION OF SPORTS IN KENYA ............................. 29

2.4 PROFESSIONAL SPORT PERSONS AS CELEBRITIES IN KENYA ................................................... 30

2.5 LEGAL AND INSTITUTIONAL FRAMEWORK OF THE SPORTS INDUSTRY IN KENYA .................... 33

2.5.1 Key Constitutional Provisions that Regulate Sports in Kenya ......................................................... 33

2.5.2 The Sports Act, 2013 ....................................................................................................................... 34

2.5.3 Anti Doping Act, 2016 .................................................................................................................... 35

2.5.4 Institutional Framework of the Sports Industry in Kenya .............................................................. 36

2.6 SIGNIFICANCE OF SPORTS IMAGE RIGHTS IN KENYA’S SPORTS INDUSTRY ............................ 44

2.7 THE LAW OF CONTRACT AND SPORTS IN KENYA ............................................................................ 45

2.7.1 Sports image rights and sponsorship in Kenya ............................................................................... 46

2.7.2 Sports image rights and endorsements ......................................................................................... 50
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1 Introduction to the Summary Findings, Recommendations, and Conclusion of the Study on Sports Image Rights in Kenya</td>
<td>106</td>
</tr>
<tr>
<td>5.2 Research Findings of the Study on Sports Image Rights in Kenya</td>
<td>109</td>
</tr>
<tr>
<td>5.3 Conclusion of the Study on Sports Image Rights in Kenya</td>
<td>111</td>
</tr>
<tr>
<td>5.4 Recommendations on Sports Image Rights in Kenya</td>
<td>113</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>115</td>
</tr>
</tbody>
</table>
ABSTRACT

Sports in Kenya have grown into an industry as a result of the convergence between sports and business. Kenyan sports persons are famous worldwide following their performance in international sports events. Given their high turnover and the growing fan base of Kenyan sports persons, it is surprising that there is no codified law that expressly recognises a sports person’s right to exercise control over the commercial use of his or her name, image, likeness or other distinctive features, such as voice, signature, nickname and personal attribute.

This Thesis argues that the IPR laws of Kenya do not sufficiently address the growing commercial reality regarding the exploitation of sports image rights and there is need for state intervention in regulation of sports image rights to resolve conflicts in the commercialization of sports in Kenya. Premised on the hypothesis that sports persons in Kenya lose economically because there is no right to image in Kenya, Chapter 1 introduces the research, outlining the background to the problem, research objectives, hypotheses, and theoretical framework. Chapter 2 explores the Kenya sports industry to determine the need for legislative intervention of sports image rights while chapter 3 makes a case for Kenyan IPR framework’s incapacity to protect the nature of sports image rights wholly. Chapter 4 considers best practices in the US, Guernsey and South Africa treatment of sports image rights. This leads to chapter 5 which winds up the research by presenting the research findings and making recommendations. This research contributes to the development of an Africanized approach to IPR and it also impacts resolution of sports image rights disputes in Kenya and ultimately, the development of the sports industry.

Key words: Sports Image Rights, Kenya, Intellectual Property, Sports law.
# Abbreviations and Acronyms

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<thead>
<tr>
<th>Abbreviation</th>
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<tr>
<td>AK</td>
<td>Athletics Kenya</td>
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<td>ADAK</td>
<td>Anti Doping Agency Kenya</td>
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<td>CLR</td>
<td>California Law Review</td>
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<td>EABL</td>
<td>East African Breweries Limited</td>
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<td>FIFA</td>
<td>Fédération Internationale de Football Association (International Federation of Association Football)</td>
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<td>FKF</td>
<td>Football Kenya Federation</td>
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<td>IOC</td>
<td>International Olympic Committee</td>
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<td>IP</td>
<td>Intellectual Property</td>
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<td>IPL</td>
<td>Intellectual Property Law</td>
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<td>IPRs</td>
<td>Intellectual Property Rights</td>
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<td>IRIE</td>
<td>International Review of Information Ethics</td>
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<td>ISLJ</td>
<td>International Sports Law Journal</td>
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<td>KBF</td>
<td>Kenya Basketball Federation</td>
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<td>KFS</td>
<td>Kenya Swimming Federation</td>
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<td>KHU</td>
<td>Kenya Hockey Union</td>
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<td>KRU</td>
<td>Kenya Rugby Union</td>
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<td>NOCK</td>
<td>National Olympic Committee of Kenya</td>
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<td>PwC</td>
<td>PricewaterhouseCoopers</td>
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<tr>
<td>SCA</td>
<td>Supreme Court of Appeal (South Africa)</td>
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<td>SCG</td>
<td>Supreme Court of Georgia</td>
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<td>SDNY</td>
<td>South District of New York</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UONLJ</td>
<td>University of Nairobi Law Journal</td>
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<td>US</td>
<td>United States</td>
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<td>USCOA</td>
<td>US Court of Appeals</td>
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<td>USDC</td>
<td>United States District Court</td>
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<td>WADA</td>
<td>World Anti Doping Agency</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
</tr>
</tbody>
</table>
LIST OF CONSTITUTIONS

Constitution of Kenya, 2010
Constitution of the United States of America
Constitution of South Africa 1996
LIST OF KENYAN STATUTES

Competition Act 2010
Consumer Protection Act, 2014
Copyright Act, 2001
Industrial Property Act, 2001
Sports Act, 2013
Trademarks Act, 2012
LIST OF FOREIGN STATUTES

Civil Code (California)
Civil Code (German)
Civil Code (Netherlands)
Civil Procedural Act (German)
Civil Rights Law (New York)
Copyright Act (Netherlands)
Data Protection Act (UK)
Federal Copyright law (US)
Federal Trademark Act 1946 (US)
Human Rights Act (UK)
Image rights (Bailiwick of Guernsey) Ordinance 2012
Image rights (Bailiwick of Guernsey) Regulation 2012
**LIST OF CASES**

Ali v. Play Girl Inc. (1978) SDNY.

Bernstein v. Bester NO (1996) 2 SA 751

Booth v. Curtis Publishing (1967) SC

Dallas Cowboys Cheerleaders Inc. v. Pussycat Cinema, 604F.d 200 (1979) 2d Cir.

Douglas and Others v. Hello! Ltd [2001] 2 WLR 992

Edmund Irvine v. Talksport Ltd [2002] EWHC


Gautier v. Pro-Football Inc. 304 N.Y 354(1952)


Haelean Laboratories Inc. v. Topps Chewing Gum Inc 202 F.2d 866 92nd Cir., 1979)

Henderson v. Radio Corporation Pty Ltd [1969] RPC 218

National Media Ltd ao v Jooste (1996) ZASCA.


Pavesich v. New England Life Insurance (1905) GA.

Robertson v. Rochester Folding Box Co. (1902) NY 538.

Robertson v. Rochester Folding Box Company 171 N.Y 538 (1902)


Tolley v. Fry [1931] A.C 333

CHAPTER 1

BACKGROUND TO THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA

1.1 Introduction and Background of the Study on Sports Image Rights in Kenya

Daily we see a surge of adverts with images of renowned Kenyan sports persons either promoting or endorsing almost every product imaginable, from food and drinks all the way through to electronics, sports gear and tools. Bill boards set up in the cities, in smaller towns and along major roads, TV advertisements and flyers cast our favourite sports celebrities’ photographs, names, voices and other personal attributes in connection to products or goods, drawing our attention to them. These showcase examples of how sports persons in Kenya have been recognised as celebrities and gained popularity that has the ability to be exploited commercially.

Modern society worships celebrities like musicians, actors, as well as professional athletes.\(^1\) It is this ability to influence a population that gives an individual marketability. Celebrities are role models that individuals want to imitate and businesses have discovered the ability of sports personalities to influence consumer behaviour and this has resulted in commercial exploitation of well known sports personalities as a marketing tool and Kenya has not been left behind.\(^2\)

Over time, sports persons have become increasingly aware of the value of their image in a world where merchandise endorsement is common and perceived to be lucrative.\(^3\) Many companies recognise the attractive force of the reputation of a celebrity as an encouragement to buy products or use services, and fully understand that celebrities can create awareness, focus attention and transfer images and glamour to products that otherwise might remain

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anonymous. In addition to an attractive packaging and a respected trade mark, the limelight of a celebrity adds substantial market value to a product. 4

In the last decade or two, as this "celebrity industry" has grown in power, organization, and sophistication, the use of one’s image or personality for the marketing of goods and services has become more and more valuable and both advertisers and marketing departments alike have been quick to tap into this segment of the public’s apparently ceaseless appetite for images of its idols. 5

This marketing phenomenon has not escaped the sports industry. Sport was traditionally a leisure and recreational activity but as modernity set in sport became professional, with participants engaging in sports for monetary remuneration. Increased emoluments of sports persons and image marketing led to gradual transformation of sports into an industry. The sports industry is not connected to other industries through business transactions. This professionalization and commercialization of sports led to Government intervention in a bid to prevent conflict of interest and control the financial aspect of it.

Through sports marketing, sports transformed from a mere recreational activity into an industry. However, all this has been possible through exploitation of sports persons’ image rights.

Image in this context means the name of a person or any other name by which a person is known, the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute, any photograph, illustration, image, picture, moving image or electronic or other representation of a person. 6

Image rights, is the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one’s identity. 7 It includes the right to keep

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one’s image and likeness from commercial exploitation without permission or contractual compensation. 8

It is therefore the ability to decide when, how and by whom our physically recognizable features such as image, voice, and name can be captured, reproduced, or published. 9

However, as commercial exploitation of celebrity image soared, the vulnerability of the image of famous persons led to the pressure for legal intervention to protect image rights; other than unfavourable media coverage, free riders often cash in and misappropriate a celebrity’s features in order to promote their goods and services by using names, voices, and likenesses of such personalities for advertisements and endorsements 10.

Image plays a fundamental part in society. An individual’s image is capable of conveying various messages and symbolisms. It tends to become independent of its subject, and represents and acquires an autonomous value, which may be informative, commercial, social, moralising, or propagandist. 11

Many jurisdictions recognize and protect the right to image. Notably the United States has had a big contribution to the development and protection of image rights. The right held by an individual to its “persona” is known in different jurisdictions by a variety of names, including “rights of publicity” in the USA, “rights of privacy” in the UK, and “rights of personality” in continental Europe. However, they can be collectively referred to as ‘image rights’. 12

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12 Synodinou Tatiana, ibid.
Bearing in mind that this research was focused on sports persons; I will refer to ‘sports image rights’. Marios Papaloukas defines sports image rights as sports persons’ right to their own image as well as the right to exploit such image commercially.\footnote{13}

Image Rights can be lucrative, and for some sports persons and sports organizations such as clubs, the most valuable source of revenue. However, sports image rights are still a foreign concept as a right in Kenya. There is no legal recognition of the right to image in Kenya. Despite the sports industry in Kenya being commercially active there is no specific legislation that provides a distinct property right in image of sports persons to enable them stop others from unjustly gain from the commercial exploitation of their image.

In the year 2012, a dispute occurred casting some attention to the emerging issue of sports image rights in the sports industry in Kenya. A conflict between Dennis Oliech and East Africa Breweries Ltd (EABL) arose when East Africa Breweries used Oliech’s image in a beer advert. Oliech claimed his permission had not been sought and neither had he received any payment for any endorsements. EABL claimed it had a right to his image being the team sponsor. KFK had no direction on the matter and sought FIFA’s help. FIFA declined to interfere and referred the matter back to KFK. Lack of recourse led Dennis Oliech quit from the national football team.\footnote{14}

Following this dispute, the matter was tabled in Parliament on the 12\textsuperscript{th} of May 2012. The house questioned the then minister for Youth Affairs and Sports; Dr. Otuoma on the commercial exploitation of Kenyan Sports men without financial gain.\footnote{15} The Ministry reported increase in commercial exploitation of sportspersons image and advised that such matters be handled under contract. In Oliech case, KFK was directed to mediate an agreement to settle the issue. This led to the realization that there was no dispute resolution mechanism for sports image rights disputes in Kenya.


As Paul Gelder observes commercial entities continue to view sports stars as compatible with their goods, services, or products and pay handsomely for these individuals to be associated with them.\(^{16}\)

One does not need to look far to view the proliferation of goods which bear the image or name of a sports star.\(^ {17}\) This is attributable to the prominent position of sport in today’s society and the largely dedicated loyalty that sports fans display towards particular sports and teams. Consequently, investment in the industry is a particularly attractive proposition for commercial entities seeking to acquire a financial and marketing advantage over their competitors.

It is therefore important that Kenya’s position on image rights is established and developed to aid Kenyan sports personalities in achieving market value both locally and internationally. Although Kenya is renowned for her sports prowess internationally, there has been no attempt to legally enable sportspersons earn from the exploitation of their image or prevent the unauthorised exploitation of their image.

This research was concerned with whether sports persons should have the legal right to control the commercial use of their identity and to what extent considering that under the African philosophy of ownership, there is communal sharing of property.

1.2 Statement of the Problem of the Study on Sports Image Rights in Kenya

Kenya is renowned for its prowess in sports and more particularly in athletics.\(^ {18}\) The country boasts of many sports persons of international reputation. Sports persons in Kenya are increasingly exploiting their image commercially but despite the commercialization of sports in Kenya there is no legal recognition and protection of sports image rights.


\(^{18}\) Sports includes all forms of physical or mental activity which, through casual or organized participation, or through training activities, aims at expressing or improving physical and mental well-being, forming social relationships or obtaining results in competition at all levels, Sports Act, 2013 S.2.
1.3 Research Objectives of the study on Sports Image Rights in Kenya
The general objective of this study was to evaluate the need for legislative intervention for sports image rights in Kenya. The three specific objectives of the study were to:

First, examine the legal framework in Kenya and identify the need for sports image rights in Kenya’s sports industry.

Secondly, find out the best practices in US, Guernsey and South African IPR legal framework towards effective protection of sports image rights that Kenya may emulate.

Thirdly, present appropriate ways of creating an effective IPR framework for sports image in Kenya.

1.4 Research Questions of the study on Sports Image Rights in Kenya
This research sought to answer the following three questions;

1. Is there need for legislative intervention in regulation of sports image rights in Kenya?
2. What is the role of IP in sports image rights?
3. What measures should be taken to create effective sports image rights protection framework in Kenya?

1.5 Hypothesis of the study on Sports Image Rights in Kenya
This study is premised on the hypotheses that sports persons in Kenya lose economically because there is no right to image in Kenya.

Although there is an affluence of literature on intellectual property law, there is an apparent scarcity regarding the treatment of the issue that this paper seeks to address in Kenya and Africa at large. However, many important aspects of this paper, relating to both form and substance heavily rely on the existing literature.

Ian Blackshaw points out that we are now living in an era where image rules and perception is everything and that this is no longer limited to celebrities. Celebrities who project the right kind of image that maintains their celebrity status and popularity are increasing their marketability and their bank balances. Images of celebrities are used as a brand for consumer

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products and services. Blackshaw notes that this philosophy has been transferred and applied by clever marketers to sports, sports events and sports persons as products competing for consumer attention and spending.\(^{20}\) This author sums up very well, how image is important to sports persons. In his arguments, this author establishes that realization of the commercial value of image rights is essentially the first step, both for the sports persons and producers of goods and services. In Kenya, there is lack of such awareness. Perhaps the legislation of the right will create more awareness. There is need for all Kenyans to know that it is wrong to exploit someone’s image rights for commercial gain without their permission.

In Guernsey\(^{21}\), the Bailiwick of Guernsey Image Rights legislation protects image rights by enabling a *personnage*\(^{22}\) to register their personality.\(^{23}\) This illustrates that image right\(^{24}\) becomes a property right capable of protection under legislation through registration. Registration enables the image right to be protected, licensed, and assigned. This research sought to illustrate the importance of such legislation in Kenya that would protect the image rights of sports persons from commercial misappropriation.

Further, Bert-Jan van den Akker and Dolf Segar, in Netherlands, establish that professional sport is not just a game.\(^{25}\) It is a product that sells with professional athletes being as popular as pop stars and actors. Sports personalities are so popular among fans that commercial organizations seek them to sell their products. They contend that although there is no specific Dutch law creating image rights, sports persons have the Copyright Act\(^{26}\) and the Benelux

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\(^{22}\) Bailiwick of Guernsey Ordinance, 2012 Section 1 describes a personnage as a natural person; a legal person; a joint personality or a group publically perceived to be linked in a common purpose and who together form a collective group or team or a fictional character of a human or non human.


\(^{24}\) Section 3 describes the elements of an image right to include the right for the proprietor to commercially exploit the voice; signature; likeness; appearance; silhouette; feature; face expressions; gestures; mannerisms; any other distinctive characteristics or personal attribute of a personage and any photograph, illustration, image, picture, moving image or electronic representation of the personage.


\(^{26}\) The Dutch Copyright Act, 1912 Art.13-15, 21, 26, 35. In the Netherlands copyright is governed by the Dutch Copyright Act also called "Auteurswet". According to the Dutch Copyright Act copyright is the exclusive right of the author of a literary, scientific, or artistic work or his successors in title to communicate that work to the public and to reproduce it.
Trademark Act\textsuperscript{27} to protect their personality rights from misuse by third parties. This is not the situation in Kenya. Sports are not generally viewed as a profession. It’s not a serious occupation. This is likely to change with the introduction of the current sports law and application of other laws, like IP laws to sports in extension.

It is clear that Dutch sportspersons are aware of their exclusive rights to their own image. The popular ones have gone ahead and commercialized themselves. The Dutch Copyright Act protects the portrait of a sports person. A portrait is defined as a depiction of a person’s face with or without the depiction of other parts of the body, however it is done. The Utrecht District Court made a ruling in 198\textsuperscript{28} that a photo of a football team did not infringe portrait rights.\textsuperscript{28} This discussion indicates the fact that image rights fall under intellectual property. However in Kenya, the Copyright Act, 2001 the image of a person is not recognized as part of any of the categories of eligible works and further, it seeks to protect the proprietary right of the person who captures the photo, not the subject of the photo. The Dutch copyright however illustrates that the Kenyan Copyright Act offers the opportunity for amendment, to allow sports person the right to stop unauthorised commercial exploitation of their photos, likeness, caricature, posture or other related likeness through the use of a photograph.

Lars Halgreen reports that awareness of the importance of intellectual property rights in Danish sport is high.\textsuperscript{29} Sports persons and sports organizations are exploiting popularity, names and sports events to earn a lot of money. Sports marketing, which is the commercialization of sports events is now a big industry taking advantage of a sport’s popularity. Danish law protects the name, picture or likeness of sports personalities or other known celebrities under ambush marketing,\textsuperscript{30} even though there is no express provision in law recognizing the right to image based on the realization that it is unfair to let others cash in on a person’s popularity without their consent, this is not good marketing practice.\textsuperscript{31} This author credits this to the awareness of IPR in Denmark. Such awareness is yet to take root in

\textsuperscript{27}Benelux Trade Mark Act,S.11. In 1962 the three Benelux countries – Belgium, the Netherlands and Luxembourg signed a treaty to uniform their national trademark legislations: the Benelux Treaty on Trademarks. This led to the Uniform Benelux Law on Marks taking effect in 1971 called the Benelux Trade Mark Act. The national legislations of the Benelux countries were repealed when this Act took effect. It is therefore no longer possible to defend a trademark in only one Benelux country; protection in one of the three countries simultaneously offers protection in the other two countries.

\textsuperscript{28}Krol cum suis v. Panini NJ 1980 481


\textsuperscript{30}Buster Larsen Case of 1965.

\textsuperscript{31}Danish Marketing Practises Act S 1
Kenya where more value is given to tangible property as opposed to IPRs. The legal protection of sports image rights is likely to increase awareness and this will lead to an increment in litigation over misappropriation of image rights in Kenya.

Michael Gerlinger\textsuperscript{32} interrogates the economic development of professional sports in Germany and notes that German athletes now fight increasingly for their own marketing against marketing by third parties. He notes that image right protection is based on the protection of personality. Indeed a case for legal awareness is made. Where there is law granting cause of action, there is an increase in both exploitation of the right and litigation defending the safe right. Currently in Kenya, there is no decided case regarding the issue of sports image rights because no one has had the confidence to approach a court to settle disputes arising out of the unauthorised commercial exploitation of their image.

Image right is, according to Gerlinger, not the author's right in his work but the right of self determination in view of his pictorial representation.\textsuperscript{33} The German civil code protects the right to a name\textsuperscript{34} and the Copyright act creates the right in a person’s picture\textsuperscript{35}. He notes that the first significant sports ruling was in the Ligaspiele case where the Federal court of Justice dealt with collective exercise of personality rights by associations. It is very clear that in Germany, sports persons can register their names and personality rights. They also have legal mechanisms in place to enforce them. This identifies a gap in the Kenya legal system; sports persons whose image rights are misappropriated have no avenue to access courts to seek justice. Only the legal recognition and enforcement of image rights can enable them. Kenya can consider amending the existing IP laws by adding a standalone right to image in all its variations.

John Wolohan is of the opinion that if image rights of professional athletes, teams, and organizations in the United States were properly managed, they can earn billion of dollars.\textsuperscript{36} In the United States the term “sports image rights” is closely associated with the right of privacy and the right of publicity. A person’s image right relates to his or her name or


\textsuperscript{34} S. 12 German Civil Code (BGB).

\textsuperscript{35} S. 22 Kunst-Urhebergesetz (KUG) German Copyright Act.

likeness such as a photo or any other visual representation. It now also includes voice and persona. Likewise, this author opines that the sports industry in Kenya can increase in its earning if sports persons are allowed to protect their image rights, hence be able to manage its commercialization.

The celebrity culture is no different in South Africa. Rachel Sikwane and Zaid Gardner report that as a result, the commercialization of image Constitutional and common law provisions have been extended to protect personality rights. The basis for protection of image rights is found mainly in the common law relating to the protection of the right to privacy. Consequently, image rights of sportspersons have immense commercial value. These image rights are sought after by companies who wish to exploit them in order to enhance brand image, create brand awareness, and promote the sale of their products. Individual sportspersons are therefore treated as commodities and are commercialised. The author is convinced that likewise, in Kenya, the lack of legal enforcement is holding back the economic earning potential of sports image rights. The lack of legal recognition is not only demotivating; it allows unjust enrichment for those that exploit another’s image without authorization and paying for the license to use it.

Andre M Louw confirms that South African law recognizes that every individual possesses the right to privacy under the common law right of privacy and the South African law of delict. South Africa is spearheading development of sports image rights in Africa and therefore is very significant to this research because Kenya as a progressive state need to move in the same direction.

Across the world, there is a convergence between the sport and business turning sport into an industry. Likewise in Kenya, producers of products and services in Kenya and marketers endeavour to cash in on the popularity enjoyed by sports persons and have realised the value of associating their merchandise with them. There has been immense growth in the commercialization of sports in Kenya.

40 Andre M Louw, Sports Law in South Africa (Kluwer law international 2010).
The sports industry has increasingly developed into a major revenue stream. Many companies in Kenya are fully aware of the fact that they need their customers to stay in business and many of them know the high significance which marketing plays in making them compete successfully amongst their competitors. This has led to using famous sports persons as marketing tools, through endorsements and merchandising of products and services using their image rights.

Shane Murugen and Jerry Varachia predicted that Kenya’s sports industry will generate revenues of up to US$150.4 million by 2017 up from the current estimation of US$138 million improving the economy but this can only be achieved if there is legislative protection of the economic rights of all parties involved in the commercialization of sports. The recognition and protection of sports image rights will secure confidence and order in the commercialization of sports. The predicted earning will not actualize if the economic right attached to sports image rights is not protected.

Professor Ben Sihanya argues that the laws of Kenya and of most African states do not sufficiently address the growing commercial reality regarding the exploitation of image rights but that despite the limited legal development on image rights in Africa, the practice and culture of celebrity endorsements is rapidly emerging. He further asserts that without a legal right to image, it is difficult to curb unscrupulous advertisers and vendors from exploiting the image rights of an athlete without the permission of the athlete or personality. Professor Ben Sihanya further contends that even though Kenya and other African states have made progress and have laws governing IP, IPRs are not fully developed as property and therefore a lot needs to be done to ensure IP is as fully developed as real, personal, and other property in Kenya and Africa. This establishes the gap in IP law relating to protection of image rights. This research sought to justify the need for a right to image in Kenya.

43 ibid
It is this researcher’s contention that Kenya needs to create a standalone right to image that provides a distinct property right in sports image rights in Kenya as this research sought to establish. Producers of products and services in Kenya and marketers endeavour to cash in on the popularity enjoyed by sports persons and have realised the value of associating their merchandise with them. However, this creates difficulties when the attributes of an individual are used without their consent. This right can be created through amendment of current IP laws to include a new IPR as in the case of the approach taken in some of the states reviewed.

The foregoing literature and policies review can shed some light on the current practise of exploiting the popularity of sports persons by producers of goods and services in Kenya. The problem in Kenya is not the lack of commercialization of image rights; it is the lack of realizing that the popularity and fame attached to an individual is exclusively their property. Further, that this property has monetary value and anyone who wishes to exploit it needs authorization from the owner. This research seeks to answer questions that have arisen as a consequence of the exploitation of sports image rights, including whether the law should protect sports persons against the unlawful use of their image rights and, if so, to what extent should such protection be granted.

There seems to be a common consensus regarding the need for legal protection of the patrimonial aspect of a person’s image in many states as evidenced by the literature from various jurisdictions. In some jurisdictions, the law on image rights is codified where as in others, it operates through common law, which is in case law precedents.

USA is in the lead with the acknowledgment of a new exclusive property right, protecting both the commercial value and dignity of a person’s image based on the right of publicity that prevents the unauthorised commercialization of an individual’s image. South Africa, an African state has also taken the initiative to recognize image rights under its privacy laws and sets a good example for Kenya. Even though there is no harmonised international framework

for sports image rights yet, it is a global phenomenon because sports are interactive and issues go across board inter-state. By regulating the scope of exploitation of sports image rights, legislation boosts development of sports marketing.

This not only increases income for sports persons but also generates revenue for the government via taxes on such income. The assurance of law also ensures third parties observe the law by obtaining consent before exploiting the image of sports persons commercially. There is therefore the need for legislative intervention. The lack of legal recognition and enforcement of the right in Kenya is the background of this research.

This research focused on the protection of sports image rights in USA, Guernsey, and South Africa. It looks at these two jurisdictions as an inspiration for Kenya regarding cultivation of law protecting sports image rights.

1.7 Justification and Significance of the study on Sports Image Rights in Kenya

This study is premised on the hypotheses that sports persons in Kenya lose economically because there is no right to image in Kenya. As a result, there is need for state intervention in regulation of sports image rights to resolve conflicts in the commercialization of sports in Kenya. It therefore seeks to show the important role law plays in the commercial exploitation of sports image rights.

It will also address the development of the African philosophy of property ownership towards establishing and developing IP as property. As Professor Ben Sihanya argues, social, cultural, economic and political development is now influenced by IP.44 Accordingly, Kenya and other African countries need to develop an indigenous IP system protecting such economic rights as sports image rights.

While the results of the study may form a basis for the development of a standalone right of image rights in Kenya, the most immediate aspect of it is to inform sports persons and other

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players in the sports industry of the need to lobby for legislative intervention in the commercialization of sports image rights.

1.7.1 Significance of the Study on Sports Image Rights in Kenya

This research will provide sports persons and other interested parties with concise legal and practical overview for the clarity, creation, protection, and enforcement of sports image rights in Kenya. Chapter 2 of the study looks at the Kenyan sports industry in depth discussing the main players in the industry.

In the view of sports persons, image rights if properly structured and legally protected, can be exploited for a substantial financial return. Protection of sports image rights will benefit them not only against unauthorized uses of their image by third parties but also ensure a fair financial considering their central role in sport.

Legal protection of sports image rights will also raise the integrity and security of the sports industry, which will encourage sponsors to consider the sports industry as a safe and viable environment for event organizers, sponsors and other parties relying on the exploitation of sports image rights. This would lead to increase generated via the sports industry, a boost in the general economy.

This research therefore, seeks to create new knowledge to deal with the deficiency in current Kenya law to protect sportspersons image rights. It also seeks to remove the legal ambiguity or lack of clarity as to the place of IP law in sports for smooth and sustainable development of intellectual property law in Kenyan sports.

1.8 The Conceptual and Theoretical Framework of the study on Sports Image Rights in Kenya

The focus of this project is the need to establish legal; protection of sports image rights in Kenya. The Kenyan legal system relies on written law to control its economy and society. For any individual to have a course of action in a court of law there must be an existing law that bestows the cause of action. Consequently, law dictates access to political, economic and social benefits. The lack of law granting a right to image and absence of a dispute resolution mechanism in case of dispute of commercialization of sports image rights undermines the
earning capacity of sports persons. There is need for a standalone IPR to image in Kenya to allow sports persons control exploitation of their image rights exclusively.

1.8.1 Conceptual Framework of the study on Sports Image Rights in Kenya

This research draws from the relationship between the exploitation of sports image rights in the sports industry and IP law. Several issues that need judicial treatment arose with the professionalization of sports in Kenya.

Key issues in sports include contract issues, gender discrimination, violence in sports, children in sports, dispute resolution mechanism and more recently, doping. All these issues led to Government intervention by creating regulation to settle any disputes on these issues. The intervention by Government led to a specialized area of law; sports law.

However, the Sports Act is silent on the emerging issue on sports image rights. Instead a bunch of IPRs and the Law of Contract apply to protect interests of sports persons and other parties in the commercialization of sports in Kenya.

Sport as an occupation and profession is evolving fast worldwide and it is incorporating sports image rights through commercialization of sports. This study sought to establish that there is need for state intervention in regulation of sports image rights by recognising and protecting a standalone right to image for sports persons in Kenya.

“Image rights” refer to the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's identity. In the case of Proactive Sports Management Limited v. Rooney & Ors Lady Justice Arden defined image rights as a term “used to describe rights that individuals have in their personality, which enables them to control the exploitation of their name or picture.

Bearing in mind that this research was focused on sports persons; I will refer to “sports image rights”. Marios Papaloukas defines sports image rights as sports persons’ right to their own image as well as the right to exploit such image commercially.\(^{48}\)

In broad terms therefore sports image rights includes all symbols which identify a unique human being, including: the name, likeness, voice, signature, character and other distinctive features by which a specific person is identified by other people.

The main concern then relates to the relationship between sports image rights, the sports industry and the law.

1.8.2 Commercialization of Image

We live in a celebrity obsessed era where being a celebrity is big business. Celebrities, including actors, singers, sports persons, and others make millions in earning from commercialization of their image. They are paid to appear on television, adverts and to endorse products or services.\(^{49}\)

Such economic activities arise out the legal right to image. Thomas McCarthy and Paul Anderson further define the right to image as the inherent right of every human being to control the commercial use of his or her identity.\(^{50}\)

These rights ensure that famous persons get paid for their labours in accumulating fame and bestowing benefit of that fame to a third party’s products or services. Sportspersons accumulate fame out of their exploits in their sport.

Image rights law recognizes image of a famous person is now a commodity. It is a form of property and it should therefore be protected against misappropriation. Some famous sports persons are already exploiting their image in Kenya.


However, as with any asset of value, sports image rights are subject to some form of risk and the threat usually comes from the misappropriation of a sports person’s image or image rights by dishonest entrepreneurs.\textsuperscript{51} As a result, a question has arisen, questioning whether the law should protect sports persons against the unlawful use of their image rights and, if so, to what extent should such protection be granted.

Despite the evident exploitation of image by sports persons in Kenya the inadequate protection of sports image rights due to the inability of Kenyan laws to recognize a standalone right to image has led to significant loss of revenue associated with the lawful use and exploitation of sports image rights.

The Kenyan Government runs a capitalistic economy where citizens are free to indulge in market enterprise for individual gain; however this freedom cannot be if there is no law to guarantee financial transaction. The connection between sports and other industries through business transaction necessitates the intervention of the Government. The Government has a very important role; it is responsible for regulations and policies that aid economic growth both to the state and the individual citizen. Further, any individual income is subject to taxation and therefore, the commercial exploitation of image rights will generate income for the Government too, another reason for the Government to be interested in regulating sports image rights in Kenya.

\subsection*{1.8.3 Intellectual Property Rights and Sports Image Rights}

Intellectual Property Rights (IPRs) and sports image rights are connected. Intellectual property rights refer to the various rights that protect innovation and creative endeavours\textsuperscript{52} and include protection of artistic works such as photographs, paintings, drawings and literary works under copyright and logos and brand names under trade mark law. IP recognizes these creations as property and protects interests of the creators or authors. This research sought to determine if there is need for legislative intervention in regulation of sports image rights in Kenya by creation of a standalone IPR of image.


IP and sports image rights meet when the photograph, drawing, or likeness of a sportsperson is used for commercial benefit. There is need to ensure that the image of sportspersons is not exploited commercially without their authorization.

Recognition of sports image rights attaches value to the image of famous sports persons. Ian Blackshaw argues that without IPRs in sports, it would be impossible to market sports events, sports persons, and teams; no one is going to pay for grant of any rights to be associated with sportspersons without those rights being recognized by law and being legally enforceable. 53

IP doctrines and principles are consequently fundamental in this regard. The extent of protection and promotion of sports image rights would depend on the legislative strategy taken to protect a sports person’s image rights; these include acquiring intellectual property rights at the country or state, national, federal, and regional or international levels; monitoring the market for possible infringements of these rights; enforcement of the rights acquired, and using various forms of contracts to protect ownership rights when dealing with various individuals, companies and other agencies. 54

In African countries, IPRs are generally based on westernized philosophy of property, which is a legacy from the colonial era. Upon independence many African states incorporated the western philosophy of property ownership in their property regimes 55 with limited understanding of IPRs and the implications of instituting effective IP protection system based on a westernized philosophy of property.

However, “sports image rights” is yet to develop as property in Kenya and most African countries in general. Professor Ben Sihanya asserts that in Kenya and Africa, intellectual property is not fully developed as property and even though Kenya and other African states have made progress and have laws governing IP, a lot needs to be done to ensure IP is as fully developed as real, personal, and other property in Kenya and Africa. 56

56 Ben Sihanya (2015) “Character Merchandising, Endorsement and Sponsorship in Kenya and Africa” ibid
The legal recognition of the right to image as a kind of IPR would create legal certainty and uniformity to the commercialization and exploitation of sports image rights. The certainty that comes with the legal recognition will enable sports persons to challenge the unauthorised use of their image and further, those who wish to exploit their image will be able to. The recognition of a standalone right to image would also lead to actualising intangible assets as property in Kenya.

1.8.4 Theoretical framework on the study on sports image rights in Kenya

A number of theories have been propounded to lay the grounds for justification of IPRs. This research is informed by the African philosophy of common ownership and sharing, especially in the area of property. In African countries, IPRs are generally based on westernized philosophy of property, which is a legacy from the colonial era. Upon independence many African states incorporated the western philosophy of property ownership in their property regimes.\(^{57}\)

Western philosophy of property ownership regardless of the property theory emphasizes individual ownership of property.\(^{58}\) It is the individual, who would have worked out an idea who is then accorded exclusive rights to property.\(^{59}\) Based on this, forms of IPRs are granted to individuals either singly or jointly.

Before the western influence, indigenous Africans had developed an Africanized philosophy of property ownership based on African culture, traditions, and environment. Based on the African intergeneration and communal nature, property was owned communally. Ownership of property was collective as opposed to the individualized ownership under western philosophy.

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\(^{58}\) John N. Gathegi, ibid.

\(^{59}\) Locke justified private property ownership based on the premise that every individual should own what he/she produces from the commons. With respect to IPRs, the production of ideas comes from a person’s labour, the ideas themselves coming from a commons without getting exhausted and that ideas can become property without being wasteful. Hence, those who sacrifice to ‘labour’ should be rewarded with property rights to work harder.
The genesis of the westernized philosophy of property is based mainly on the Lockean property theory. The Lockean theory springs from the belief that a person who labours upon resources that are either owned or held in common has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right. This western philosophical approach to property rights in orientation and thinking is capitalistic in nature and advocates for strong private property rights.

In the US, the principal justification of individual property ownership is grounded on the Lockean labour which asserts that an individual is entitled to the fruits of their labour. Following this argument, this theory applies to sports image rights in that sports persons have carefully and judiciously developed their public image and expended much time and effort in training and field to attain celebrity status such that legal protection of this image from unauthorised commercial exploitation is warranted. Still on morals, the theory applies to stop any person seeking unjust enrichment by exploiting, commercially, the image of sports persons who have earned fame through their exploits on the field.

Basically, the Lockean theory primarily recognises that people need an incentive to expend effort and resources to produce a socially beneficial product and the institution of private property ownership provides this incentive.

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61 In Chapter V of the Second Treatise of Government, Locke begins the discussion by describing a state of nature in which goods are held in common through a grant from God. God granted this bounty to humanity for its enjoyment but these goods cannot be enjoyed in their natural state. An individual must convert these goods into private property by exerting labour upon them. This labour adds value to the goods, if in no other way than by allowing them to be enjoyed by a human being. See John Locke “Second Government Treatise” at http://oregonstate.edu/instruct/phi302/texts/locke/locke2/locke2nd-a.html (accessed on 11/10/2013) 27.

62 This is essentially a moral argument which accepts that a person who expends effort and labour upon a resource that is held in common or is unowned has a natural proprietary right to the outcome of the effort. See Rosina Zapparoni (2004) ‘Propertising Identity: Understanding the United States Right of Publicity and its Implications- Some Lessons for Australia at http://www.mulr.com.au (Accessed 27/7/2016).

According to Professor Ben Sihanya, intellectual property is not fully developed as property in Kenya and Africa in general and even though Kenya and other African states have made progress and have laws governing IP, a lot needs to be done to ensure IP is as fully developed as real, personal, and other property in Kenya and Africa. There is need for development of IPR under the African philosophy of property.

Further, another outstanding Kenyan scholar, Professor Patricia Mbote asserts that the most critical test for an IP regime is the extent to which it promotes creation of new knowledge for national development. African countries have been pressurized to apply the western philosophy of property on the argument that it would foster development. However, there is no guarantee that the westernized philosophy will impact the development on Kenya. This research therefore took an Africanized approach to IP.

It needs to be noted that sports cannot be owned by an individual. Even though sport is not capable of being owned, sports events can be owned. A lot of money is invested in sports events which are treated as commercial activities. The sports industry also generates a lot of revenue as return investments.

In order to protect the investment of parties in the commercialization of sports and to maintain the industry, a set of laws dealing with IPRs has been applied in many jurisdictions, including Kenya, to protect the interests of the parties involved in sports.

Therefore in the application of the African philosophy on property, a significant departure is made from the communal ownership of property when dealing with IPR. The objective of this research’s theoretical framework is to contribute to Kenya’s social, economic, and political development by emphasizing the judicious balancing of a private right of an individual to protection with the right of the community to access and enjoy sports.

The foregoing has been established that the western notion of IP rights is adverse to the African philosophy of common ownership and sharing where as western IP relies on John Locke’s natural law labour theory as a foundation. However, even while appealing to the Africanized notions in IP protection, there is the possibility of an individual to which they have attached their “labour”. Accordingly, Kenya needs to regulate IP in such a way that balances the rights of all involved.67

There truly is need to regulate sports image rights, that established, the matter that follows is how to regulate it, such that the sports industry in Kenya will develop without causing harm to public interest.

1.9 Research Methodology: Design, Methods, and Techniques of the Study on Sports Image Rights in Kenya

Having established the theoretical outlook of this study, which is significant to the method evidence collected will be analysed, it is necessary to consider how evidence will be collected to support the arguments adopted in this thesis. This study was conducted in order to assess if there is need for legislative intervention in regulation of sports image rights in Kenya and argues that there is need for a standalone IPR to image. To be able to gather the necessary data, the researcher utilized documentary research to find an explanation regarding the importance of law in exploitation of sports image rights.

This study utilized the documentary method of research. As widely accepted, the documentary method of research is a fact finding study that involves adequate and accurate interpretation of findings.

The use of documentary methods refers to the analysis of documents that contain information about the phenomenon we wish to study68. Relatively, the method is appropriate to this study since it aims to describe the present protection of sports image rights in Kenya, USA, and South Africa as documented.

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Further, the current study is specific to sports image rights in Kenya. It deals with primarily, the Kenyan IPR framework in a more holistic way and seeks to identify the inadequacies of the framework in protection of sports image rights.

The research was primarily secondary, meaning it was desk study where primary sources such as cases and statutes as well as secondary sources comprising of published texts and, articles and journals from the internet were relied upon.

The primary sources were derived from the legislative instruments relating to sports image rights in USA, South Africa and Kenya such as Constitutions and other statutes. The secondary authorities on the other hand, were derived from the findings stated in published documents and literatures related to the research problem. These were based from the recent literatures related to sports image rights and the factors that led to developments of such rights in USA and South Africa including measures taken to protect the rights.

Such authorities were sourced from books, journal articles, websites, and newspaper publications that relate to development of sports image rights in the three countries. The research relied on authentic and reliable documents as it drew from codified law and published works of acclaimed authors in the subject.

In terms of approach, the study employed a qualitative approach as it focused on personal accounts, observations, description, and individual insights of judges, authors, IP academicians, and experts on the research topic.

The application of document analysis to a grounded theory study is illustrated as analysis was done to analyse data collected in order to elicit evidence to test the study’s hypothesis that sports persons in Kenya lose economically because there is no right to image in Kenya. Central focus was on inductively generating hypothesis from the data collected in relation to laws governing sports image rights in USA, South Africa, and Kenya biased towards an African approach to property.
1.10 Challenges in the Study on Sports Image Rights in Kenya
The study was limited by lack of materials on sports image rights in Kenya and Africa. This is because IP is not fully developed as property and despite the immense growth in the exploitation of sports image rights in Kenya and South Africa, the African IP regime has yet to recognize a standalone image rights. Further, language was also a barrier in cases where foreign language was used in publication of relevant resources.69

1.11 Chapter Outline of the Study on Sports Image Rights in Kenya

Chapter 1: Introduction to the Study on Sports Image Rights in Kenya
This chapter introduce the research study. It discusses the background of the study and lays out the parameters used to conduct the research. The chapter explores image rights in practice, in order to derive a framework and vocabulary on which to build the subsequent legal analysis. It discusses the background to the problem, the objectives of the study, the statement of the problem and its hypotheses, the justification of the study, theoretical framework, conceptual framework, literature review, limitations of the study and methodology used in the study.

Chapter 2: The Structure and Regulation of the Sports Industry in Kenya
This introduces the Kenyan sports industry, exploring the laws governing sports and the evidence supporting the need for sports image rights in Kenya. It conceptualizes the primary subject of the research; the sports persons in Kenya and their right to image.

Chapter 3: Literature Review and Findings on Sports Image Rights as Intellectual property in Kenya
The fourth part of the thesis draws upon the findings of the chapter 2 and three in order to assess the alternative IPR laws that sports persons can use to protect their image. The objective is to establish that the current IPR framework does not fully protect sports image rights. Piece meal legislation offers some protection but it is limited.

Chapter 4: Comparative Analysis of the Best Practises in Regulating Sports Image Rights in US, Guernsey and South Africa

This chapter extensively evaluates the nature, justification, and protection of sports image right. It entails the review of cases, statutes, and common law torts used to protect sports image rights in the US, Guernsey and South Africa in comparison to the situation in Kenya. It explores how these states approach sports image rights. A range of legal, economic and political arguments have developed as to what image rights actually are, their legal efficacy and their potential impact on developments in commercialization of sports persons.

Chapter 5: Summary Findings, Conclusion, and Recommendations from the Study on Sports Image Rights in Kenya

This chapter contains highlights and summary of the findings of the preceding chapters. It also makes a conclusion of the study and makes several recommendations. This chapter makes a case for sports image rights in Kenya, using the legal provisions of the comparative countries a backdrop.
CHAPTER 2

STRUCTURE AND REGULATION OF THE SPORTS INDUSTRY IN KENYA

2.1 Development of the Sports Industry in Kenya

Chapter 1 establishes that there are risks of unauthorised commercial exploitation in a market where popular image is marketable and certain questions arising need answers. This chapter considers the need for the right to image in Kenya, testing the hypothesis of this research that sports persons in Kenya lose economically because there is no right to image in Kenya. This loss is caused by the unjust enrichment gained by those that commercially exploit sports persons’ popularity without their authorisation.

This chapter seeks to determine the first research question on whether there is need for legislative intervention in regulation of sports image rights in Kenya. Its objective is to discuss the sports industry in Kenya and identify the need for sports image rights legislation in Kenya. It discusses the regulative and structural framework of the industry with the aim of appreciating the roles and functions of various stakeholders in the industry and how sports image rights applies in the conceptual and theoretical layout of the thesis. The stakeholders include regulatory, supervisory, and administrative bodies as well as sports persons.

In earlier days, sports were played for recreational purpose and in the spirit of the game. However with time sports was professionalized and commercialized. This professionalization and commercialization led to Government intervention in a bid to prevent conflict of interest.

In Kenya, before colonization various indigenous sports were played for recreational purposes. These traditional games and sports included wrestling, stick fights, hunting, bull fights, and dances because during this time sports was generally used to promote cultural identity and enhance social and physical skills.\(^70\)

Colonization of Kenya by the British however led to restriction of indigenous sports and sports derived from European cultures took centre stage when the colonial settlers introduced new sporting activities and professionalised events by introducing sports clubs and

competitions. After independence, Kenya adopted and integrated the European sports into Kenyan sports culture and several sports are played to promote culture, enhance social cohesion, promote physical health and also professionally where sports person train and compete as professionals in local and international sports events. Sports in Kenya include athletics, rugby, basketball, football, golf, cricket, motor sports, swimming, handball, tennis, and martial arts among others.

After independence the control and administration of sports in Kenya were regulated by private associations set up independent of the Government because the Government took a non-interventionist model of sports regulation. However, professionalization and commercialization of sports led to Government intervention in a bid to prevent conflict of interest. This intervention led to the development of sports law. The Government of Kenya recognized the social and cultural significance of sports in the political stability of Kenya and saw the need regulate the entire conduct of sport and business in order to control interests of the parties involved, including fundamental issues of public interest. This intervention led to the development of sports law in Kenya, culminating to the Sports Act.

Modernity led to sports evolving into a profession, leading to commercialization of sports. The convergence of sports and commerce led to subsequent increase in financial stakes in sports which led to a number of issues related to sports. As a consequence Government intervention to regulate the sports industry and adjudicate disputes was imminent. The Kenyan Government’s role is to create and regulate the infrastructure which supports sports in Kenya and provides dispute resolution mechanism for issues arising in sports. This infrastructure includes the legal and structural framework of the sports industry. The Government intervenes through legislature and the judiciary. Through the legislature the Government creates laws to regulate the sports industry while the judiciary adjudicates issues that demand judicial treatment in sports.

75 Mukul Mudgal (2011) Law & Sports in India, LexisNexis,Haryana,India.
2.2 Conceptualization of Sports in the Study on Sports Image Rights in Kenya

There have been several definitions of the term “sport” and over the years, it has acquired various definitions. The term ‘sport’ is derived from the old French word ‘sporten’ which means ‘to divert’ and also the Latin term ‘desport’ which means ‘to carry away’\(^\text{76}\). The term ‘sport’ was therefore coined as an abbreviation of the original disport and the noun originally meant “to carry away”, especially “to carry away from work” and, by extension, “amusement” or “recreation”, which is what people do by amusing themselves when playing a sport\(^\text{77}\).

Over time, various developed definitions have been made through legislation and scholars of which some are considered. According to Norbert Elias the term ‘sport’ can be used in two main ways: in a general sense to refer to non-work related forms of physical activity, with or without an element of competition\(^\text{78}\). In terms of this rather abstract usage, sport is a socio-cultural universal. However, the term can also be used more concretely to refer to a group of competitive physical activities which are specifically modern in key respects. A sport has physical activity, side by side competition, self-motivation and a scoring system. The difference of purpose is what characterizes sport, combined with the notion of individual skill or prowess.

According to Kenya’s Sports Act, “Sport” includes all forms of physical or mental activity which, through casual or organized participation, or through training activities, aims at expressing or improving physical and mental well being, forming social relationships or obtaining results in competition at all level\(^\text{79}\). Sports can therefore be for leisure or professional competition.

For this study, the Sports Act’s definition was adopted. The study on sports image rights in Kenya is concerned with how the field of law should respond to the growing commercialisation of image rights by famous sports persons in Kenya without interfering with the social and cultural significance of sports to the general public. The research therefore is concerned with professional sports. My argument is that there is need for a standalone right


\(^{79}\) Sports Act, 2013.
to image that gives sports persons the exclusive right to control commercialization of their
image rights but at the same time protects public interest relating to the role of sports socially
and culturally. This can only be done by following an Africanized IP law theory which would
protect the African culture and value of sports, while allowing development of the sports
industry.

2.3 Professionalization and Commercialization of Sports in Kenya

Historically, sport was taken as a human activity that exists somewhere along the continuum
from work to play.\(^80\) Sport was a social recreational activity which has been modernised to be
more. Following the definition of ‘sport’, sport can be recreational, social or competitive.
It ranges from informal participation to more serious organized club sport with complete
commitment in pursuit of the highest levels of excellence at Olympic and World level.

However, modernity led to sports evolving into a profession, leading to commercialization of
sports. The convergence of sports and commerce led to subsequent increase in financial
stakes in sports which led to a number of issues related to sports.\(^81\) As a consequence
Government intervention to regulate the sports industry and adjudicate disputes was
imminent.

Sport is an integral part of societal superstructure and the government’s intervention can be
based on two main objectives. Firstly the need to protect a new industry and secondly, to
promote and sustain sports for all its social and cultural relevance to society, locally and
internationally\(^82\). The Kenyan Government intervened through the Sports Act, 2013. Several
issues that need judicial treatment arose with the professionalization of sports in Kenya. Issue
include contract issues, gender discrimination, violence in sports, children in sports, dispute
resolution mechanism and more recently, doping.\(^83\) All these issues are now regulated under
the Sports Act.

However, the Act is silent on the issue of sports image rights. There is no legislative
provision regarding image rights in Kenya. Image rights permit an individual to exploit

\(^81\) Mukul Mudgal (2011) *Law & Sports in India, ibid*
(2nd ed).
21/2/2016).
personality rights commercially. Sports persons in Kenya are already exploiting their image commercially, even in the absence of law awarding the right to image. The lack of law granting a right and absence dispute resolution mechanism in case of dispute of commercialization of image is bound to cause a hitch in the development of the sports industry.

Producers of products and services in Kenya and marketers endeavour to cash in on the popularity enjoyed by sports persons and have realised the value of associating their merchandise with them. However, this creates difficulties when the attributes of an individual are used without their consent. In this context, image rights have become valuable commercial assets for Kenyan acclaimed sports persons. However, as with any property of value, image rights are subject to some form of risk and the threat usually comes from the misappropriation of a sports person’s image rights by both unscrupulous Producers of products and services. As a result, this research seeks to answer questions that have arisen as a consequence of the exploitation of sports image rights, including whether the law should protect sports persons against the unlawful use of their image rights and, if so, to what extent should such protection be granted.

2.4 Professional Sports Persons as Celebrities in Kenya

A professional sports person is a person who is, on the basis of a contract for engagement and remuneration, preparing or training for the purposes of participating in the relevant sports competition.84

While discussing image rights, it is important to understand what the term celebrity means. Daniel Boorstin defined a celebrity as a person who is known for his well-knownness; he is neither good or bad, great or petty, he is a human pseudo event.85 This definition identifies a person as a celebrity through the trait of being well known. According to him, celebrity status can be acquired by just being known by many and not an achievement of greatness. However, this definition does not accurately capture all kinds of celebrities in this era.

A celebrity is indeed a person that is famous, has great achievement in life or career, and is an entertainer. Neal Gabler asserts that being famous does not make a person a celebrity; the fame together with an entertaining narrative makes a famous person a celebrity. His theory is

that what all celebrities have in common is that they are living out narratives that capture our interest and the interest of the media narratives that have entertainment value.\textsuperscript{86}

According to Brenda G. Pitts and Dr. David K. Stotlar the sport industry represented the eleventh fastest growing industry in the world.\textsuperscript{87} This accelerated growth fuelled the desire of many people to pursue careers in the sport industry. Sport is now a major component of the entertainment and leisure industry competing for the discretionary income of households.

While the commercial dynamics of sport and entertainment have always overlapped, the two are now closer than ever before.\textsuperscript{88} Kenya’s sports industry is projected to generate estimated revenues of US$150.4 million in 2017, up from US$79.2 million in 2012, a CAGR of 13.7\%.\textsuperscript{89} This growth is predicted to be driven primarily by rapid growth in media rights and sponsorship deals.\textsuperscript{90}

This indicates that the commercialization of sports is very real in Kenya and developing fast. Legislative intervention is imminent to avoid issues disrupting this growth of the industry. Sports persons who have achieved greatness in their specific field of sport are famous and have a large following by the public and media.\textsuperscript{91} Such sports persons are therefore celebrities in their own right and they too have the right to control the commercial use of their image.\textsuperscript{92}

Through sports marketing, sports transformed from a mere recreational activity into an industry. The sports industry is now connected with many other industries in Kenya through commercial transactions such as endorsements, sponsorships, TV rights, and merchandising.

This commercialization has made sports a revenue generator and with increasing commercialization and involvement of finances, there is imminent need of law to regulate the transactions.

Money is generally made through marketability of sports persons. The commoditization of sports persons has led many states to apply a set of laws generally dealing with IPRs to protect the investment of the people involved in sport.

According to a leading Kenyan intellectual property Scholar Professor Ben Sihanya, Kenyan sport persons have not been left behind in this phenomenon. Famous sports persons in Kenya lend their names to all manner of goods and services, whether it is perfumes, sports, leisure wear, food, or drink; the recognition of the marketing potential of this influence has driven advertisers to cleverly advertise their products by associating the products with famous identities through merchandizing, endorsement, and sponsorship deals.93

Some famous sports persons in Kenya include Dennis Oliech94, MacDonald Mariga95, David Rudisha96, Julius Yego97, Paul Tergat,98 and Collins Injera99. The commercialization of sports in Kenya is discussed in depth in chapter four.

97 Julius Kiplagat Yego is a Kenyan track and field athlete who competes in the javelin throw. He is a record holder and gold medalist after he gold medal at the World Championships in Beijing, China.2015. He was also named as EABL’s Tusker lager brand ambassador Kenya in 2015. See Ayumba Ayodi (Daily Nation, August 15 2015) ‘‘YouTube Man’ Julius Yego wins javelin gold in Beijing’ at http://www.nation.co.ke/sports/athletics/Julius-Yego-wins-javelin-gold-at-Beijing-World-Championships/-/1100/2846890/-/ussd9z/-/index.html/Accessed 24/4/2016). Also see Hilary Kimuyu(Nairobi News,September
It is certain that Kenya’s sport industry is thriving commercially as sports persons are exploiting their image. The question remains as to whether there is need for legislative intervention in regulating and protecting sports image rights in Kenya.

2.5 Legal and Institutional Framework of the Sports Industry in Kenya

Sports started off as social recreational activity but has over time been politicized meaning Governments have intervened and control sports. In Kenya, this is done through the Sports Act implemented by various institutions created by it. Under the Act, regulation of sport occurs on five levels: the formulation of the rules of sports; the application of immediate sanctions during the course of sports should a breach of the rules occur; Disciplinary proceedings performed by administrative bodies who punish those who contravene the rules and provide an opportunity for review of decisions; Intervention by State when a participant’s behaviour infringes the criminal law or a civil action is brought and international interaction through international institutions.

This segment discusses the laws and institutions regulating and overseeing the sports industry in Kenya.

2.5.1 Key Constitutional Provisions that Regulate Sports in Kenya

Kenya’s Government’s long term support for sports involves the building of a just and cohesive society that enjoys social development in a clean and secure environment, as established in Kenya’s vision 2030. This therefore casts the duty to see to legislation that


100 JS Nteere “The Structure and Organization of Sports in Kenya and Malawi: A Comparative Analysis”


protects the interests of sports persons and at the same time, maintaining public policies. The Constitution of Kenya 2010 provides for two levels of government; the national government and county governments with separation of powers between legislative, executive and legislative arms of government. It further provides for the distribution of functions and powers between the two levels of government. The national government is tasked with the promotion of sports and sports education in Kenya. The same schedule assigns to county governments the role of developing sports and cultural activities and facilities at the county level.

In Kenya, sports incorporate the society’s existing values and reinforce these values, meaning it can be a useful political tool to promote culture, social values, and peace. The sports industry also contributes to the country’s economy; however its success depends on the legislative and economic support it receives. In order to ensure the social-economic development of the sports industry, the Government has the obligation to ensure sports industry in Kenya develops by creating the necessary infrastructure and providing financial support needed. The overall objective of these functions is to develop sports in Kenya. Creating a standalone right to image is one such legislative support that will protect economic rights of sports persons and contribute to financial support of the industry, propelling development of revenue generated by the industry.

2.5.2 The Sports Act, 2013
The first legislation regulating sports in Kenya, the Sports Act, was promulgated on 14th January, 2013. The act was established to harness sports for development, encourage and promote drug-free sports and recreation; to provide for the establishment of sports institutions, facilities, administration and management of sports in the country, and for connected purposes.

103 Under the fourth schedule, part 1, paragraph 17 of the Constitution (2010) Article 185 (2), 186 (1) and 187
Before 2013, there was no Act regulating sports in Kenya.\textsuperscript{106} The organization of the sports industry in Kenya goes back to the colonial era where a framework of sports clubs was established to cater for the administrators, missionaries, teachers, and the rest of the white settlers. Interaction between clubs led to formation of national bodies to create order and facilitate competition at national level.

In order to compete at international level, there was need for umbrella bodies to represent national bodies internationally. The Kenya Amateur Athletic Association (KAAA) was the first to be created. It has since been replaced by Athletics Kenya (AK)\textsuperscript{107}, followed by the Commonwealth Games Association and the Kenya Olympic Association. Over the years, national sports organizations and sports clubs have cropped up under the societies act\textsuperscript{108}.

However, in 2013, the sports Act was promulgated, formalizing the industry and replacing all policies and practice rules applied in sports. All existing sports organizations were required to register under the act to be recognized as such.

Before 2013, the Kenyan government took a non-interventionist approach to sport\textsuperscript{109}. However, the issues that developed in the industry with the professionalization and commercialization of sports led to development of sports law.

The Sports Act is silent on the issue of sports image rights which has already stirred conflict in Kenya. There is need for law to intervene to establish what sports image rights are, how they can be acquired, who owns them and provide a dispute resolution mechanism in case of conflict.

2.5.3 Anti Doping Act, 2016
Kenya is renown international for the prowess of her athletes. Amid the glory of this success, major attention was given to Kenya’s anti doping policy when some Kenyan athletes failed doping tests at international events. This raised an issue that the Sports Act, 2013 did not


\textsuperscript{107} Athletics (Track and Field) in Kenya was governed by an organization known as Kenya Amateur Athletics Association (KAAA) from 1951 until 2002 when the organization changed the name to Athletics Kenya (AK), the current governing body of athletics see Soft Kenya ‘Athletics Kenya’ at http://softkenya.com/sports/athletics-kenya-ak/(Accessed 24/4/2016).

\textsuperscript{108} Ben Aketch ‘Public Regulation of Sport in Kenya’ ibid.

\textsuperscript{109} Ben Aketch ‘Public Regulation of Sport in Kenya’ ibid.
adequately provide for, calling for a separate, comprehensive legislation as well as an investigative governmental agency. In a bid to meet international standards, and enable Kenyans to participate in international competitions, the Government promulgated a new legislation, the Anti-doping Act, 2016 to regulate doping in Kenya. Kenya has ratified United Nations Educational, Scientific and Cultural Organization Convention against Doping in Sport and the act implements it through the authority of ADAK.

This Act specifically deals with doping and is therefore not relevant to the issue of sports image rights by virtue of its limited scope.

2.5.4 Institutional Framework of the Sports Industry in Kenya

The industry has been restructured in compliance with the Sports Act, 2013 to facilitate high level performance within the sports industry in Kenya.

Currently in Kenya, sports regulation can be broadly categorised into two: Private and public sports regulation. Private sports regulation is created by the rules of organized sports. These rules are established universally dictating how a particular sport is played and each sport is organized structurally with international organizations and national organizations for each sport. Public regulation on the other hand consists of the Government’s intervention primarily through government agents and legislation. The sports industry therefore has both government agencies as well as private entities regulating the industry. This research refers to them, collectively as institutional organizations.

The institutional organization of the sports industry in Kenya can be categorised based on their role in the industry.

The institutions fall under three categories;

First, there are regulatory institutions which are involved in the creation and application of legislation that governs the sports industry. These are public offices created by law to govern sports in Kenya. They include the department of sports under the ministry of Sports, Culture

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and the Arts, the Sports Disputes Tribunal and Registrar of sports organizations make up the regulative institutions. They are discussed further in the chapter in 2.6.3.1, 2.6.3.2 and 2.6.3.3 respectively.

Secondly, supervisory institutions that oversee implementation of law created by the regulatory institutions. Sports Kenya, National Sports Fund Board of Trustees and Kenya Academy of Sports are such institutions. They oversee implementation of sports policies by co-coordinating their respective area both at the national level and county level.

Thirdly, there are private, administrative institutions which organize and conduct sports events. Sports organizations fall under this category. Every sport has an international and national organization that regulates the sports.

This segment briefly discusses the role of each of these institutions in the sports industry.

2.5.4.1 The Role of Ministry of Sports, Culture, and the Arts in the Sports Industry
The sports industry falls under the ministry of sports, culture and the arts. The ministry is tasked with the development of sports and the arts as industries for wealth and employment creation and also as tools for national cohesion and de-ethnicization of the Kenyan society.

The ministry governs through the cabinet Secretary in charge of sports. The mandate of the ministry in relation to sports generally is to develop and coordinate sports by promoting and develop sports facilities and spearhead the expansion of the sports industry.

The ministry is represented by the Cabinet secretary, Principal Secretary in the Ministry for the time being responsible for sports and the Registrar for sports appointed under section 46 of the Act.

The cabinet secretary in charge of sports has the responsibility to oversee the industry. Duties attached to this office include approval of industry regulation fees and practice rules, appointment of trustees and committee members and intervention of sports organizations when the Act is contravened.\footnote{Section 55 Sports Act 2013.}
The Ministry is responsible for formulation and articulation of sports policies through which it provides an enabling environment for all stakeholders.\textsuperscript{112} It acts by creating and passing laws to regulate sports which also include dispute resolution mechanism.

\subsection*{2.5.4.2 The Role of the Sports Disputes Tribunal}

The Sports Disputes Tribunal is established under section 56 (1) of the Sports Act to arbitrate sports disputes in Kenya. The tribunal’s main role is to provide a dispute resolution mechanism relating to sports disputes. It falls under the judicatory obligation of the Government in settling sports dispute.

It has jurisdiction to determine appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including appeals against disciplinary decisions and appeals against not being selected for a Kenyan team or squad; appeals from decisions of the Registrar of sports and other sports related disputes that all parties to the dispute agree to refer to the Tribunal.

The tribunal’s jurisdiction is set under the Sports Act which is silent on sports image rights and therefore unless sports image rights are recognized, defined and conceptualized by law, the tribunal has no power to determine disputes arising out of sports image rights disputes.

\subsection*{2.5.4.3 The Role of Kenya’s Registrar of Sports Organizations}

The office of the sports registrar is established under the Sports Act\textsuperscript{113} as a public service office. The sports registrar is appointed by the Public Service Commission.

The registrar is responsible for registration and regulation of sports organizations and multi-sports bodies representing sports organizations at the national level, licensing of professional sports and professional sports persons, arbitration of registration disputes between sports organizations and maintaining a register of the registered sports organization among other functions as directed by the cabinet secretary responsible for sports.\textsuperscript{114} The registrar would

\begin{flushright}
\textsuperscript{113} S. 46 (1) Sports Act.
\textsuperscript{114} Section 46 (2) Evidence Act, 2013.
\end{flushright}
play a role in registration and protection of sports image rights if mandated by law. This is because of the important regulatory position accorded the office.

2.5.4.4 The role of Sports Kenya in the Sports Industry
Sports Kenya is established by section 3 of the Sports Act as a body corporate with perpetual succession and common seal. It replaces the Sports Stadia Management Board (SSMB) that managed Kenya’s national stadia. Sports Kenya plays a supervisory role. It’s primarily aim is to promote, co-ordinate and implement grassroots, national and international sports programs for Kenyans. It is mandated to establish, manage and maintain the sports facilities in Kenya.

It also has several other functions. It has power to oversee identification and development of sporting talent, provision of sports equipment, facilities and technical training County Governments, learning institutions and other stakeholders. Further, it facilitates the preparation and participation of Kenyan teams in various international events and the hosting of similar events in the country. It also controls the clearance of foreign sports persons and technical personnel before engagement by national sports organizations and other sporting bodies in Kenya. The management of Sports Kenya is vested in the Board of Sports Kenya which has the power to appoint a Director General to run Sports Kenya.

2.5.4.5 The Role of National Sports Fund Board of Trustees in the Sports Industry
The Sports Act establishes the National Sports Fund which is run by a Board of Trustees, a public body. The fund holds all the proceeds of any allocations by Parliament, gifts, grants, donations, investment proceeds, sports lottery and any other payments required by this Act to be paid into the Fund created to develop sports in Kenya by financially supporting sports persons and sports organizations in Kenya.

The Chief Executive Officer of the board is appointed by the President while the board members, referred to as trustees are appointed by the Cabinet Secretary upon nomination. This falls under the state’s mandate to support the sports industry financially as the Kenyan Government recognizes that the promotion and development of sports is in the public interest,

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116 This includes developing stadia standards, licensing and inspecting stadia used for sports activity in Kenya.
117 Section 13, Sports Act 2013.
118 Section 8 Sports Act 2013.
119 Section 13, Sports Act 2013.
and therefore the State and its bodies naturally play a major role in the funding of sports in Kenya.\textsuperscript{120}

The board’s main objective is to manage, control and administer the assets of the Fund in such manner and for such purposes as to best promote the purpose for which the Fund is established. The fund is made up of financial allocation by the Government, gifts, grants, donation or endowments made to the Fund, funds raised through sports lotteries, investments. The trust fund therefore operates to develop planning, training of sports persons in national teams such as those discussed in section 2.5.3.7 of the chapter and mobilization of financial resources in the sector.

However, the Government’s financial support can not sufficiently sustain the whole sports industry and to make up for deficit, the board is allowed to enter into contracts and make transactions that would generate funds. Legislative intervention in sports image rights can help towards generating funds for the board as taxation of the income generated would increase funds for the Government. Sports persons and organizations will also be able to trade their image rights for funds through monetary compensation for endorsements, character merchandising or sponsorship deals. There would be increased funding for the sports industry.

2.5.4.6 The Role of the Kenya Academy of Sports in the Sports Industry

The Kenya Academy of Sports is established under the Sports Act\textsuperscript{121} as a body corporate with perpetual succession and a common seal. Its primary objective is to oversee and manage sports training in Kenya. It does this by establishing and managing sports training academies which administer sports courses for technical and sports administration personnel.\textsuperscript{122} It also promotes research and development of talent in sports, in collaboration with institutions of higher learning, national sports organizations and other stakeholders.

Sports build character, team spirit and loyalty, attributes that reinforce existing social values and this positive influence needs to be maintained, thus integrating sports with education at primary, high school and college level of learning.\textsuperscript{123} The Government has to intervene to


\textsuperscript{121} Section 33(1) Sports Act, 2013.

\textsuperscript{122} Section 34 Sports Act.

\textsuperscript{123} Nteere S. Jacob ‘The Structure and Organization of Sports in Kenya and Malawi: A Comparative Analysis’ at
ensure that all sports adhere to societal values and principles by promoting sports and treating it as education.

The academy of sports maintains and disseminates tangible and intangible historical sports material to the public, sports organizations, researchers and institutions of learning in a bid to promote sports.

The management of the Academy is vested in a Council and the academy is run by a Chief Executive Officer appointed by the Council.\(^\text{124}\)

### 2.5.4.7 Sports organizations

Sports organizations associations include sports associations, businesses, and social institutions that contribute to the promotion and development of physical and sports activities. National sports associations are the top followed by county associations, sports federations, and sports clubs and at the bottom of the hierarchy are the sports persons themselves.\(^\text{125}\) This organization is based on cooperation between public authorities and private entities to achieve goals in the public interest including those of promoting and developing physical and sports activities.

The regulatory institutions discussed in section 2.5.3 of this chapter create legislation and rules to govern sports, while supervisory bodies over see creation of the infrastructure to implement the law while administrative bodies apply the law, forming the governed population.

In Kenya, a body can only operate as a sports organization if it is registered as either a sports club, county sports association or a national sports organization under the Sports Act.\(^\text{126}\) Applications for registration are made to the sports registrar, whose role in the industry has been discussed in detail in section 2.5.3.3 of this chapter. A sports organization is an entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate.\(^\text{127}\) These are administrative in nature as their main objective

\(^{124}\) S 37 (1) Sports Act, 2013.

\(^{125}\) Section 2, Sports Act.

\(^{126}\) Section 47(1) Sports Act, 2013.

is to organize and schedule sports events locally or internationally, following regulation and infrastructure already established by the state.\(^{128}\)

National sports organizations are at the top of the sports organizations hierarchy. They include national umbrella bodies responsible for Olympic\(^{129}\), non-Olympic\(^{130}\), Paralympics\(^{131}\) or deaflympic\(^{132}\) sports or multi-sport organization responsible for all sports disciplines or recreational bodies or body responsible for a particular sport nationally\(^{133}\).

All national sports organizations registered under the Act are open to the public in their leadership, activities and membership. Further, there can only be one national sports organization for a particular sport discipline.\(^{134}\) These national organizations have sports persons who are members and a question as to ownership of sport image rights may arise for a sports person who is a member of the team. Ownership of sports image rights is discussed in chapter 4 but it is clear that without legal direction, such question will lead to a conflict.

County sports associations on the other hand operate at county level and can liaise with other county sports organization and the national sports organization. Such associations have the objectives to promote sports at the county level and come in after the national organizations. Next in the hierarchy are sports federations which are central to the organization of sports in Kenya.\(^{135}\) They act as relays between the world of sports and of Olympic sports, on the one hand, and the public authorities on the other and they generally serve to organize the practice of one or several sports disciplines.

\(^{129}\) The Olympics is a leading international sporting event featuring summer and winter sports led by the IOC(http://www.olympic.org/), National Olympics Committee of Kenya (NOCK), Athletics Kenya, Kenya Hockey Union, Kenya Rugby Union (KRU), Kenya Swimming Federation (KSF), Football Kenya Federation and Boxing Association of Kenya are some of National sports organizations in Kenya.
\(^{130}\) Non-Olympic sports refers to popular sports not recognized as Olympic sports (http://www.nonolympic.org/ifs.html)
\(^{131}\) Paralympics is a major international multi-sport event, involving athletes with a range of physical disabilities (https://www.paralympic.org/)
\(^{132}\) The Deaflympic (previously called World Games for the Deaf and International Games for the Deaf) are an International Olympic Committee (IOC)-sanctioned event at which deaf athletes compete at an elite level.
\(^{133}\) IOC, Ibid.
\(^{134}\) Section 47 (2) Sports Act, 2013.
They are comprised principally of the sports associations affiliated with them such as professional clubs, individuals, and organizations for the purpose of gain and profit such as health and recreational clubs, specifically in the practice of one or several sports disciplines for example the FKF, KBF, and KRU. These federations are organized in a decentralized manner; for the most part, this is in the form of leagues, committees, sections, or clubs representing the federation at the local levels. In this position, they organize sports events and give sports persons in various sports disciplines compete professionally. They are also responsible for issuing technical rules on discipline, rules on the organization of events open to their licensed athletes.

These organizations require money to organize events and fall under the beneficiaries of the Government fund set aside to support the sports industry as discussed in section 2.5.3.5 of this chapter. However, the commercialization of sports image rights creates another avenue to raise funds through sponsorship deals. Problem is, not all will amicably pay for rights they do not need to pay for and unless sports image rights are recognized as legal rights.

At the bottom of the sports organization are the professional sports persons who are registered as such in various sports disciplines played in Kenya. These sports persons are subject to the Sports Act and their federation’s rules and regulations. Laws are put in place to avoid conflict and in any case where conflict arises, to give a dispute resolution mechanism. The lack of law recognizing sports image rights means sport persons do not have an avenue to solve disputes arising out of misappropriation their image rights and therefore, need a standalone right to image that will protect their sports image rights.

These federations include sports clubs. Sports Clubs’ main objective is to satisfy a community’s motivation to practice physical activity and socialization by designing and

offering sport activities at a recreational and competitive level. Examples of sports clubs include school sports clubs such as colleges, universities or secondary schools sports clubs; social clubs open to the public and professional clubs such as football, basketball and other sports clubs in Kenya.

Professional clubs are restricted to professional sports persons whereas the rest are open to the general public that qualifies for membership as set by the club’s constitution. The sports organizations and individual sports persons engage in commercial transactions to source financial support through merchandizing, endorsements, and sponsorship deals.

The significance of sports image rights in sports marketing is discussed in chapter 4. Sports image rights have more importance to sports organizations than the regulatory institutions because sports organizations are primarily involved in the commercialization of sports. The regulative and supervisory institutions create the legislative framework in which businesses can be established and flourish.

2.6 Significance of Sports Image rights in Kenya’s Sports Industry

Chapter 1 introduces an issue concerning the protection of sports image rights arising in the Kenyan sports industry. In reality, no one is going to pay to be associated with a sports person, team or sports organization without those rights being recognized by law and as such, be legally enforceable against others. Where there is no law to determine rights between parties, conflict is bound to arise and therefore there is need for legislative intervention. The sports industry in Kenya was self regulatory before arising issues led to the Government to intervene in through the promulgation of the Sports Act. Currently, as established by the foregoing, sports persons rely on contracts to exploit their image. For this reason, this chapter will also briefly consider the role of the law of contract and its significance in the protection of sports image rights in the next part of the chapter.

However, the author notes that issues arising out of contracts, some relating to commercialization of sports, sports governance, gender equality, violence in sports, doping

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139 Section 2, Sports Act 2013.
141 Ben Aketch ‘Public Regulation of Sport in Kenya’.
and children in sports, the professionalization, is what led to development of sports law. This perhaps shows that even though the law of Contract is wide in its application and has so far enabled some sports persons who are aware of the commercial value of their rights exploit such right, it does not sufficiently protect from misappropriation of image.

The Sports Act is silent on sports image rights despite the fact that issues of unauthorised commercial exploitation being raised.

2.7 The Law of Contract and Sports in Kenya

The law of Contract plays an essential role in the commercialization of the sports industry in Kenya. This is based on the fact that all commercial agreement in Kenya are formulated and performed as contracts. The majority of obligations that occur within sports industry are contractual in nature.\(^{142}\) In Kenya the law of contract is derived from the English common law as well as some statutes that apply to specific types of contracts. This position is established by the Law of Contract Act.\(^{143}\)

Ultimately, the law of contracts lays down the framework that enables individual sports person to be employed individually, to also come together to form associations recognized under the Sports Act. These relationships are created through contracts which provide the regulative bodies an avenue to set rules according to which sports are played in Kenya. As a result, no commercial transaction involving sports, sports persons or professional sport can take place without a contract.

Contracts in sports are entered into for various purposes but the focus of the research is on contracts that involve sports image rights in Kenya and therefore sponsorship, endorsement and merchandizing agreements are discussed in this context.

The commercialization of sports, also referred to as commoditization of sports, is the relationship between sports and commerce that involves the sale, display, or use of sport or some aspect of sport so as to produce income.\(^{144}\) The sports industry in Kenya is no exception

to this, as sports is now professional and the need to generate revenue to finance sports events has led to commercial interactions with other industries.\textsuperscript{145} With increasing commercialization of sports, sports organizations and sports persons need funds to finance sports events. They require sources of finance which cannot be generated solely by their usual operations.\textsuperscript{146}

The need to earn money as well as attract funding caused the exploitation of popularity attached to the image of sports persons. This in turn caused disputes relating to the value of image rights and ownership of the rights between sports persons, clubs, sponsors, and other parties, as a result, new questions at law have arisen, including whether the law should protect sports persons against the unlawful use of their image rights and, if so, to what extent should such protection be granted.\textsuperscript{147}

Dr. Marisella Ouma argues that because Kenya has no law regulating sports image rights, the absence of a legal structure asserting the right to image and establishing a dispute resolution mechanism, chaos is bound to happen resulting in conflict.\textsuperscript{148} She however fails to clearly establish the theoretical underpinnings of sports image rights as well as the best approach to solving the problem. This gap led this research to examine if there is need for legislative intervention in regulation of sports image rights and the best way to meet this need by considering lessons learnt from the comparative study of the US and South Africa.

### 2.7.1 Sports image rights and sponsorship in Kenya

Popularity of sport among consumers gives commercial business a wide field for promotion of brands, simultaneously enabling sports rights holders to have additional income.\textsuperscript{149} Companies seeking to promote their brand build their reputation and develop deeper customer relationships often team up with a sports person, team, sporting organization or associate themselves closely with a sporting event. This deal offers them massive exposure as


\textsuperscript{146} Mukul Mudgal (2011) \textit{Law & Sports in India}, LexisNexis, Haryana, India.


the millions of fans and viewers who tune into sports events across the globe see the brands in question many hundreds of times.\textsuperscript{150}

Likewise in Kenya, contemporary sport has strong association with commercial enterprises in different ways. Examples of such commercial relationships include stadiums and arenas bearing the names of businesses that pay to buy the naming rights to these venues.

Sponsors can also have their logos appear on sports persons’ attires and kits, on the facilities in which they play, and in the titles of the events in which they compete. For instance, the Kenya sevens rugby team don kits displaying the sponsor, Kenya airways’, logo\textsuperscript{151}. In relation to this, Weldon Korir notes that revenue in sports is generated through advertising, endorsements, merchandising, and sponsorship.\textsuperscript{152}

Bernard James Mullin, Stephen Hardy, and William Anthony Sutton define the term sponsorship as the acquisition of rights to affiliate or directly associate with a product or event for the purpose of deriving benefits related to that affiliation or association. The sponsor then uses this relationship to achieve its promotional objectives of promoting business using the platform to make the public aware of its services and products\textsuperscript{153}. Sponsorship also has its benefits to a club or individual sports person.

According to Nigel Pope and Doug Turco sponsorship is the provision of resources such as money, people and equipment by an organization directly to an individual, authority or body to enable the latter to pursue some activity in return for benefits contemplated in terms of the sponsor’s promotion strategy, and which can be expressed in terms of corporate, marketing, or media objectives.\textsuperscript{154} Sponsors, in exchange, supply sports persons or teams with athletic footwear, sports apparel and sporting goods or cash and in return sponsors’ logos appear on


\textsuperscript{153}Bernard James Mullin et al (2007) Sport Marketing, Human Kinetics, USA (10\textsuperscript{th} ed).

\textsuperscript{154}Nigel Pope & Doug Turco (2001) Sport & event marketing McGraw-Hill, Roseville, Australia 2
athletes’ clothing and equipment, on the facilities in which they play, and in the titles of the events in which they compete.\textsuperscript{155}

Sports sponsorship is therefore a corporate strategy that involves a business relationship created by an investment for promotional benefit by purchase of rights and association for commercial advantage.\textsuperscript{156}

As Professor Sihanya points out, the lack of the right to image in Kenya denies sports persons the right to license their image and challenge the use of their image rights where 3\textsuperscript{rd} parties imply false sponsorship or affiliations.\textsuperscript{157}

Commercial advantage in the marketing context means financial or material support in return for exposure, to achieve brand awareness and promote sales through publicity opportunities. Many companies nowadays are fully aware of the fact that they need their customers to stay in business and many of them know the high significance which marketing plays in making them compete successfully amongst their competitors.\textsuperscript{158}

According to Water Machio, Kenya’s sports corporate sponsorship has been on the rise.\textsuperscript{159} It is a relationship that benefits both parties. Sports persons and sports organization get the financial or material help they need to compete in events while publicizing the sponsor’s image thereby promoting and advertising the sponsor’s business.\textsuperscript{160} Professor Sihanya confirms the increased commercial exploitation of sports image rights his article on Character Merchandising, Endorsement and Sponsorship in Kenya and Africa\textsuperscript{161} in which he also

\textsuperscript{156} Melissa Jane et all (2005) Sports Marketing, Thomson, Southbank Victoria 12
recommends a standalone right to image as necessity in light of commercialization of sports in Kenya.

The commercialization of sports in Kenya through corporate sponsorship in sports is evident by events such as the Standard Chartered annual marathon and the Safaricom Lewa Marathon sponsored by Safaricom Ltd. Sports persons and teams in Kenya also benefit from the financial support sponsorship agreements generate.

Some examples of teams supported by sponsors include Vegpro FC, Sony Sugar FC, Chemelil Sugar FC, Posta Rangers FC, tusker FC and AFC Leopards among many other football clubs in Kenya. All these teams have corporate sponsorship from respective companies. Other sport disciplines also have sponsorship. For example in basketball, companies and the universities are reported to provide the biggest support for the existing basketball clubs.

However, the lack of legislative regulation of sports image rights means that there is no dispute resolution mechanism in case of disputes arising in exploitation of sports image rights. Disputes can be between individual sports persons and their club concerning transfer of sports image rights. Disputes can also occur between sports persons and sponsors as in the case of Dennis Oliech and EABL discussed in chapter 1.

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168 All Footballers’ Confederation Leopards Sports Club, officially abbreviated as AFC Leopards and commonly known as simply AFC, Leopards or Ingwe, is a Kenyan association football club based in Nairobi. Betaway has been announced as their shirt sponsors. See ‘AFC Leopard’ at http://afcleopards.co.ke/the-club/partners (accessed 29/4/2016).
Despite these challenges, increase in commercialization of sports is inevitable and where the market fails in self regulation, there is need for legislative intervention.

Sponsors need the image rights of sports persons and clubs as a marketing tool. If there was no mass influence, no sponsor would be bothered with sports marketing.\textsuperscript{170} Therefore popularity of sports persons in Kenya among customers gives commercial business a wide field for promotion of brands, simultaneously enabling sports rights holders to have additional income.\textsuperscript{171}

The problem is that in spite of the increased commercialization of sports and the substantial revenue generated, the in no law preventing the unjust enrichment caused by unauthorised exploitation of sports image rights.\textsuperscript{172} Sports persons and clubs need to have control over how their image rights are exploited and a sponsor, on the other hand, would want to have exclusivity such that the sports person, sports team, or organization sponsored does not engage in other sponsorship agreement that conflict with their interests. Without any legal structure to set boundaries, leaving it to the industry players to self regulate will lead to chaos and crippling of the sports industry.

However, in the meantime, the protection granted under the law of contract should be exploited fully by establishing a legally binding agreement that offers adequate consideration for a sports person’s image. Because sponsorship contracts have a number of particularities and without special legal care may cause substantial loss to both sports persons and sponsors.\textsuperscript{173} Sports persons in Kenya therefore need to seek professional help and guidance to ensure such agreements are properly negotiated and structured to ensure fair exploitation of such rights to their benefit.

\textbf{2.7.2 Sports image rights and endorsements}

When an individual sports person enters into an agreement with a producer of a service or product to advertise the party’s service or product, such agreement is referred to as

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endorsement agreement. Sports persons provide several important benefits to advertising: such as increasing brand name recognition, creating positive associations by transferring different qualities to the product like physical appeal or likeability, and aiding in the development of distinct brand personalities.

Advertising in Kenya has become part of our everyday lives, and we are exposed to over 1,500 advertising messages from a variety of sources including television, radio, billboards, flyers, mobile phones, grocery stores, public restrooms, cinemas, e-mails and many more.

In Kenya the concept of celebrity endorsement is not a new concept. Professor Ben Sihanya argues that despite there being limited legal development on the subject in Africa, the practice and culture of celebrity endorsements is rapidly emerging. Sports persons and other celebrities are earning from endorsements where they associate with certain products. The advertisers ride on the fame of these stars such that endorsing the product, a sportsperson gives her name as a stamp of approval, letting the general public know that she approves of the product or service.

However, because Kenya does not have any legislation dealing with sports image rights and as such, sports persons do not have a cause of action to seek remedies where their image is exploited commercially without consent. A sports person would not want their image exploited commercially without their compensation and without any financial benefit when the party exploiting it is making money off of it. Recognition of sports image rights would protect sports persons from such incidents.

Besides, recognition of sports image rights as an intangible asset would inspire sports persons to work hard at becoming marketable. They would work harder in their sport to become noticeable, hence boosting sports marketing. A standalone right to image would be an

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economic incentive for Kenyan sports persons because they would be rewarded due to their moral claim on their fame, which means they will horn their skills and reward the general public for their loyalty.

Legislative intervention is also likely to motivate more sports persons to work harder to attain fame that makes them commercially viable. It seems that a higher percentage of sports persons exploiting their image rights in USA, South Africa and other countries compared to Kenya. Perhaps knowing their rights are safeguarded by law gives confidence to exploit their sports image rights. In view of these arguments, Kenya needs legislation that will protect sports persons’ image from false endorsement and giving the control of how their image can be used in endorsement deals.

2.7.3 Sports image rights and character merchandising in Kenya

Character merchandising is the adaptation or secondary exploitation of the essential personality features such as the name, image, or appearance of a character in relation to various goods and/or services with a view to creating in prospective customers a desire to acquire those goods and/or to use those services because of the customers’ affinity with that character.\(^{179}\). This can be done by the creator of a fictional character or by a real person or by one or several authorized third parties.

Merchandising varies in form and is categorised into character merchandising, personality merchandising, image merchandising, trademark or corporate merchandising and event merchandising.\(^{180}\)

Other than the different forms, it must also be distinguished from endorsements. Character merchandising is different from endorsements and is distinguished in the intended purpose. Professor Sihanya explains that endorsement refers to a person informing the public that she approves of or is happy to be associated with a certain product or service while character merchandising involves exploiting features such as the name, image or appearance of a


character in relation to various goods or services. He asserts that character merchandising is done with a view of creating in prospective customers a desire to acquire those goods or use those services (or both) because of the customers’ affinity with that character.

Character merchandising therefore involves the use of the essential attributes of a real person’s image such as name, image, voice and other personality features in the marketing and advertising of goods and services. Famous sports personalities can also appear in advertising campaigns in relation to goods or services because the appeal for the potential consumer is that the personality represented endorses the product or service concerned and is regarded as an expert if the product or service advertised is linked with the activity of the personality.

From the foregoing, a potential consumer would consider that the said product or service is endorsed and approved by that personality. For example an athlete advertising running shoes is taken to endorse the particular shoes and their fans will be inclined to buy the particular shoes not because of the product itself but because the name or image of the athlete appealing to that person and that appeal is reproduced on the product.

Further, it is important to note that even though different from the right of publicity, character merchandising is closely related to the right of publicity. According to Professor Sihanya, both relate to the exploitation of image commercially and argues that the lack of a standalone

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right to image in Kenya has resulted to an inability to protect characters from unscrupulous advertisers and vendors who exploit the image of sports persons without their consent.\(^{186}\)

In addition, because of the lack of a standalone right to image, sports persons and other famous persons are yet to merchandise their characters; instead, many third parties exploit the images and depiction of characters without consent or authority diluting the value of sports persons image by indiscriminate use and further causing loss earning opportunity for sports persons in royalty earnings or licence fees associated with character merchandising.\(^{187}\)

It is therefore evident that all forms of exploitation of sports image rights need the legal recognition of image as a property right. In Kenya, sports persons are yet to exploit character mechanization because of lack of awareness perhaps and considerate value in image rights. Businesses have also been slow in exploring character mechanization as a marketing tool.\(^{188}\)

It therefore stands that without legal recognition of image as property, sports persons cannot control the commercial exploitation of their image or character merchandising. Sports persons need to be protected from false endorsements which are as a result of unauthorised commercialization of image in personality merchandising.

2.8 **Significance of the African philosophy of property in the Commercialization of Sports in Kenya**

In African countries, IPRs are generally based on westernized philosophy of property, which is a legacy from the colonial era. Upon independence many African states incorporated the western philosophy of property ownership in their property regimes without much consideration as to how the westernized philosophy will impact the indigenous people.\(^{189}\)

This author opines that perhaps IPRs awareness is very low in Kenya as it is viewed as a foreign concept that has no value to an African.

Before the western influence, indigenous Africans had developed an Africanized philosophy of property ownership based on African culture, traditions, and environment. Based on the


African intergeneration and communal nature, property was owned communally. Ownership of property was collective as opposed to the individualized ownership under western philosophy. The western approach may not be suitable because, firstly, sports in Kenya are not primarily commercial in nature. Therefore, money and privatization of property cannot be the core basis of IP if the African philosophy is to develop, instead, a balance of equities should be considered. Sports image rights are important in the commercial exploitation of sports to generate revenue that is needed, however, the general public that also have a right to sports need access to sports.

The westernized protection of IP is so strict it limits access to sports if the common man is not in a position to purchase access to a sports event, because eventually in a bid to make profits, costs add up and are then passed on to the spectator. Secondly, sports image rights should be granted to the extent that the grant and protection does not cause any harm to the community as a whole.

In tandem with the African property theory, sport cannot be owned by one individual. Sports hold very important cultural and traditional significance to Kenyans. Sport has a cultural significance in Kenya.

As a social activity, whether it is in terms of participation as a recreational pastime, competitive playing at amateur levels, the elite and mainly professional level or in terms of a leisurely activity, sport assumes immense cultural significance in Kenya because of the relationship between sport and culture. Sports have been a tool of social integration and peace in Kenya. Sports events have been organized based on the relationship between sports and politics. Sports events have also been used to move masses in support of other causes.

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191 Culture here refers to the way different threads of similarly placed individuals’ lives, work, leisure, family, religion, and community are woven into a fabric or tradition, consisting of customs, ways of seeing, beliefs, attitudes, values, standards, styles and ritual practices, giving them a definite character and identity. It is a major political institution in controlling society as sports reinforce a societies ethics and morals. See John Hargreaves (1987) Sport, Power and Culture: A Social and Historical Analysis of Popular Sports in Britain, Polity, Cambridge, London.
192 An example of the role of sports in Kenya is the Tegla Loroupe Peace Foundation (TLPF). Tegla Loroupe is a Kenyan long-distance track athlete. She has held many world records. She now spends a lot of time on peace keeping activities, through her Tegla Loroupe Peace Foundation. The Tegla Loroupe Peace Foundation promotes peaceful co-existence and socio-economic development of poor and marginalized people and
In order to protect and maintain the African cultural and political significance, Kenya and other African states need to develop an IP protection system that reinforces African culture.

Laying aside for the moment, the theory that property belongs to the whole community; this research considers the interests of individuals who invest private funds in sports to propel the development of the sports industry. The genesis of the westernized philosophy of property is based mainly on the Lockean property theory. The Lockean theory springs from the belief that a person who labours upon resources that are either owned or held in common has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right. This western philosophical approach to property rights in orientation and thinking is capitalistic in nature and advocates for strong private property rights.

In the US, the principal justification of individual property ownership is grounded on the Lockean labour which asserts that an individual is entitled to the fruits of their labour. Following this argument, this theory applies to sports image rights in that sports persons have carefully and judiciously developed their public image and expended much time and effort in training and field to attain celebrity status such that legal protection of this image from unauthorised commercial exploitation is warranted. Still on morals, the theory applies to stop communities in Northern Kenya. See Bibliography Online ‘Tegla Loroupe’ at http://www.biographyonline.net/sport/talgla-loroupe.html(Accessed 27/4/2016); Tegla Loroupe Peace Foundation at http://teglapeacefoundation.org/.

In Chapter V of the Second Treatise of Government, Locke begins the discussion by describing a state of nature in which goods are held in common through a grant from God. God granted this bounty to humanity for its enjoyment but these goods cannot be enjoyed in their natural state. An individual must convert these goods into private property by exerting labour upon them. This labour adds value to the goods, if in no other way than by allowing them to be enjoyed by a human being. See John Locke “Second Government Treatise” at http://oregonstate.edu/instruct/phl302/texts/locke/locke2nd-a.html (accessed on 11/10/2013).

This is essentially a moral argument which accepts that a person who expends effort and labour upon a resource that is held in common or is unwon has a natural proprietary right to the outcome of the effort. See Rosina Zapparoni (2004) ‘Propertising Identity: Understanding the United States Right of Publicity and its Implications - Some Lessons for Australia at http://www.mulr.com.au (Accessed 27/7/2016).
any person seeking unjust enrichment by exploiting, commercially, the image of sports persons who have earned fame through their exploits on the field.\textsuperscript{197}

Basically, the Lockean theory primarily recognises that people need an incentive to expend effort and resources to produce a socially beneficial product and the institution of private property ownership provides this incentive.

In relation to sports image rights, the incentive is the right to commercially control exploitation of image rights, giving sports persons the opportunity to earn an income off the field while at the same time bar third parties that exploit their image for commercial benefit without consent or paying license fees. This was reiterated in the case of \textit{Uhlaender v. Henricksen} where Neville J relied on the labour justification stating that;

“A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity embodied in his name, likeness, statistics and other personal characteristics is the fruit of his labour and is a type of property”.\textsuperscript{198}

Likewise in Kenya, the fame or popularity that makes a sports person’s image commercially exploitable is an individual right, based on individual effort, in such instance, it is unjust to allow other to enrich themselves through the unauthorised exploitation of sports image rights.

This research argues that where an individual invests labour, time and financial resources in sports and out of this individual effort gains popularity and fame, the individual should have the right to exclusively control the commercialization of their image. This control includes the freedom to negotiate and voluntarily consenting to another person exploiting their image, at a price.

Therefore in the application of the African philosophy on property, a significant departure is made from the communal ownership of property when dealing with IPR. The objective of


\textsuperscript{198} Uhlaender v Henricksen 316 F.Supp. 1277 (1970).
this research’s theoretical framework is to contribute to Kenya’s social, economic, and political development by emphasizing the judicious balancing of a private right of an individual to protection with the right of the community to access and enjoy sports.

It has been established that the western notion of IP rights is adverse to the African philosophy of common ownership and sharing where as western IP relies on John Locke’s natural law labour theory as a foundation. However, even while appealing to the Africanized notions in IP protection, there is the possibility of an individual to which they have attached their “labour”.

2.9 Conclusion to the Structure and Regulation of the Sports Industry in Kenya

Despite the sports industry in Kenya being commercially active there is no specific legislation that provides a distinct property right in image of sports persons. This chapter discussed the structure and regulation of the sports industry in Kenya to meet the research objective of analysing the legal framework in Kenya and identify the need for sports image rights in Kenya’s sports industry in order to answer the research question on if there is need for legislative intervention in regulation of sports image rights in Kenya.

This chapter establishes that The Kenyan Government recognizes the promotion and development as a matter of public interest and through organized structures the State and its bodies in cooperation with private sports organizations play a major role in the organization of sports in Kenya. The Government however has failed to realize the economic importance of sports image rights in Kenya’s sports industry and further, the unjust enrichment caused by the unauthorized commercial exploitation of sports image rights.

The Sports industry contributes to the overall national development through promotion and exploitation of Kenya’s diverse culture for peaceful co-existence and preservation of Kenya’s heritage for national pride and harmony. It is also a big contributor to the Country’s economy. Kenya’s sports industry is currently estimated to contribute US$138 million in revenue and is predicted it will generate revenues of up to US$150.4 million by 2017. However, this can only be achieved if there is legislative protection of the economic rights of

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all parties involved in the commercialization of sports. The recognition and protection of sports image rights will secure confidence and order in the commercialization of sports.

Kenya therefore needs a sui generis right to image that can protect sports image rights without interfering with the cultural, social and political disposition of sports in Kenya. The laws of Kenya and of most African states do not sufficiently address the growing commercial reality regarding the exploitation of image rights. Because Kenya needs to create suitable right, guidelines, and regulatory regime on sports image rights chapter 3 the IPR framework in Kenya, in a bid to determine if the current IP laws in Kenya can be extended to protect sports image rights.
CHAPTER 3

3 LITERATURE REVIEW AND FINDINGS ON SPORTS IMAGE RIGHTS AS INTELLECTUAL PROPERTY LAW IN KENYA

3.1 Role of IP in Sports Image rights

This chapter sought to explore the relationship between sports image rights and IP law in Kenya based on the researcher’s argument that no existing laws in Kenya can adequately protect a sports person’s image from commercial misappropriation, hence the need for a standalone right to image. It considers the second research question, that is the role of IP in protection of sports image rights in Kenya and whether the existing IPRs can be extended to protect sports image rights as they exist now or if there is need for further legislative intervention through the creation of a new type of IPR in Kenya, which is the right to image.

Sport was traditionally a leisure and recreational activity but as modernity set in sport became professional, with participants engaging in sports for monetary remuneration. Increased emoluments of sports persons and image marketing led to gradual transformation of sports into an industry. The sports industry is now connected to other industries through business transactions. This gives sports persons in Kenya a new source of income, off field, but on the other hand, it opens up to issues when the attributes of a person are used without consent for commercial gain.

Intellectual property rights refer to the various rights that protect innovation and creative endeavours and include protection of artistic works such as photographs, paintings, drawings and literary works under copyright and logos and brand names under trade mark law. IP recognizes these creations as property and protects interests of the creators or authors.

The proprietary nature of individual’s fame, popularity and recognition was first recognized in the US through the right of publicity, a landmark development in IP law as it developed a new type of right protected as IPR.

In this chapter, importance is placed on the relationship between image rights and IP law. The right of publicity is a form of intellectual property right that protects against the misappropriation of a person’s name, likeness and perhaps other indicia of personal identity for commercial benefit.\textsuperscript{204}

This research is theoretically grounded on the African philosophy of property, in a bid to convince Kenyans to embrace their uniqueness and culture without mindlessly copying everything the European countries do. However, Kenya as a state has developed laws to distinguish between property held in common and property that an individual has a right to own. Ownership of property is no longer common and traditional.

Based on this private ownership view and the Constitutional right to own property, this research opines that a sports person, who is considered a celebrity, having invested years of practice, money and other resources to professionally compete and as a result earn fame and popularity public which eventually becomes marketable has a right to control its exploitation.\textsuperscript{205} That the popularity and recognition expressed in his name, likeness, nick name and other personal characteristics is the fruit of his labour and is a type of property.

Based on the foregoing, an individual sports person who has acquired fame and popularity ought to benefit from if it acquires marketable status. It also means that exclusive ownership and exclusivity can only be granted by law that requires prompt payment of just compensation in order for another to exploit such image rights commercially. This is means also realizing the unjust enrichment gained by those that exploit sports image rights without authorization.

\begin{footnotesize}
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\item \textsuperscript{205} Article 40 (1) of the Constitution of Kenya, 2010 provides that every person has the right either individually or in association with others to acquire and own property of any description.
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This establishes that in deed property can be acquired by an individual in the form of image rights. There is therefore need for Kenya to recognize a standalone IPR, the right to image, in order to protect commercial interests of sports persons especially from the unauthorised commercial exploitation.  

Accordingly the economic rationale for IP is established in that it encourages development of new products and ideas thus generating surplus income. Where new products or ideas are introduced into a market without regulation, there is bound to be disputes over rights, especially where money is involved. In such cases where self regulation fails, intervention of law is imminent. The need for a standalone right to image in Kenya is expressions of failure in the market to self regulate and threaten to self destruct. Intellectual property therefore is granted by a State to perform different economic and social functions than tangible property. The need for the State intervention through legislation has been established in chapter 2 of the thesis.

Ultimately, since IPRs can only be granted by the State, the Kenyan Government needs to recognize a standalone right to image so that sports persons whose image can satisfy the criteria set by such law for protection can apply.

The review of the US and South African legal approaches to protection of sports image rights reveals that the right to image encompasses both the economical value attached to image and right of privacy of the sports persons in relation to their image or aspects of their image. The lesson for Kenya here is the balance of interests between famous sports persons’ interests and public interests. The protection of sports image rights should not be based purely on economic rights and interest of sports persons; the recognition of such right must consider public interests as well.

Therefore, there must be equal respect for free expression and the economic value of a celebrity’s publicity rights by having a compulsory licensing system that provides a


208 See Chapter 2.2 of the thesis on development of the sports industry in Kenya.

percentage of revenues if the celebrity is willing to pursue them allows for both parties to benefit from celebrity impersonation. Further, the celebrity does not have to worry about false endorsement or over use of their image. In light of these arguments, sports persons in Kenya face the same danger of misappropriation of image and therefore, the recognition of the standalone to image will facilitate protection of this valuable asset from misappropriation.

According to Professor Sihanya, IPRs contribute to social-economic development in at least two ways. First off, IPRs are a source of income to the owners and secondly, they are also a source of national revenue in form of taxes. Similarly, sports image rights will contribute to national revenue as income earned from commercial exploitation will be taxable and sports persons will be subjected to registration fees. Further, the recognition of the stand alone right to image would motivate sports persons to commercially exploit their image while at the same time discouraging unscrupulous third parties from unauthorized exploitation of such image; all these translate to economic development.

This chapter discusses the existing IPRs to determine the extent to which they can protect sports image rights. The underlying argument is that, despite Kenya’s established IPRs system, there is still need for a standalone IPR to image in Kenya leading to the hypothesis that sports persons in Kenya lose economically because there is no right to image. This chapter considers the existing IPRs in Kenya to determine that they do not comprehensively protect sports persons from unauthorized commercial exploitation of their image.

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213 Ben Sihanya ibid.
Intellectual property refers to the creations of the mind such as inventions; literary and artistic works; designs; symbols, names and images used in commerce. Law protects intellectual property to enable people to earn recognition and benefit financially from what they invention create. IPRs refer to the various rights that protect innovation and creative endeavours. There are various commercial rights available to the sports industry in Kenya under IP law. IPRs available to sports persons and sports organizations in Kenya are copyrights, trademarks, and patent rights. The use of trademarks is acquired through registration of marks, logos, or trade names; copyrights are acquired when an original work is created and patents, when a new invention is registered.

However, it must be noted that sports image rights are separate standalone rights from other established IPRs. The existing IPRs were created to protect rights that different and distinct from sports image rights, such that they cannot sufficiently protect sports image rights. The economic rationale for IP is that it encourages the development of new products and ideas thus generating surplus income. The need for a standalone right to image in Kenya is expressions of failure in the market to self regulate and threaten to self destruct.

Intellectual property therefore is granted by a State to perform different economic and social functions than tangible property. The need for the State intervention through legislation has been established in chapter 2 of the thesis.

Further, even though similarities between these IPRs may lead an overlap where some attributes of a person’s image may fall under copyright, trademarks and other IPR protection, however, the right to image is distinct and the question to be determined is whether the existing IPRs in Kenya can sufficiently protect sports image rights. According to Professor

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216 Ibid.
220 See Chapter 2.2 of the thesis on development of the sports industry in Kenya.
Thomas McCarthy, the right of publicity is not a kind of trademark or a species of copyright and neither is it another kind of privacy right, even though it bears some family resemblance to all of these; it is the inherent right of every human being to control the commercial use of their identity. Therefore in order for sports persons in Kenya to control the commercial use of their image, the Kenyan Government needs to recognize a standalone right to image so that sports persons whose image can satisfy the criteria set by such law for protection can apply.

Sports image rights are intangible assets that combine both extra-patrimonial and patrimonial interests in property rights and following the right of publicity established by USA, count as intangible property. Chapter 2 adopted Marios Papaloukas definition of sports image rights as sports persons’ right to their own image as well as the right to exploit commercially a sports event. Chapter 2 further establishes that sports image rights are commercially viable and exploited in Kenya, and there is no existing legislation protecting the commercial value of these exploited images.

The legal recognition of a new IPR right to image would enable sports person’s in Kenya control how their image is used commercially and at the same time have a right to claim damages against unauthorized exploitation.

Sports image rights can be abused in Kenya in several ways, for example using a sports person’s image in advertising, falsely implying that they endorse or support the product or service advertised. This not only dupes consumers but might tint the reputation of the sports person, who may not want to be associated with the product or service. Sports image rights

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222 He explains further that for an individual to claim this right however, it is necessary to establish that image is a form of property and the only way to do this is through law recognising image as property. See J. Thomas McCarthy (1995) ‘The Spring 1995 Horace S. Manges Lecture - the Human Persona as Commercial Property: The Right of Publicity’ 19 Colum VLA JL & Arts at http://heinonline.org/HOL/LandingPage?handle=hein.journals/cjla19&div=12&id=&page= (accessed 27/7/2016).


224 See Right of publicity in the USA in Chapter 3.3 of the thesis.


in relation to unfair competition and false endorsements in Kenya are discussed later on in the chapter.227

Further, their image rights can be infringed by unauthorised character merchandizing by associating a sports person to a good or service.228 The relationship between sports image rights and character merchandising is also discussed further in the chapter. Ultimately, infringement of sports image rights robs sports person in Kenya of the economic value attached to their image. The commercial value of their image is as a result of their hard work in respective sports and it is unfair that 3rd parties can use their images to gain financially, without paying sports persons for the use of their image.

Such acts also happened in the US and South Africa, leading to recognition of a right to image which in turn enables sports persons seek judicial remedy in form of damages in cases of misappropriation of image rights.229 According to the cases highlighted in chapter 3, the US and South African sports persons’ have two common remedies available.230 The first is injunctions to stop the infringer continuing to infringe the right. Secondly the remedy of damages as compensation to recover the lost economic value attached to the exploited image of the sports person. The courts in these jurisdictions however are very cautious in granting these remedies. The remedies are granted on case to case basis to ensure no Constitutional rights are infringed.

Likewise, the Kenyan Government needs to regulate sports image rights and a standalone right to image is necessary not just to protect the commercial value of sports image rights but also avail a dispute resolution mechanism upon infringement of the right.

In its modern form, the right of publicity, also known as image rights enables celebrities to prevent others from making use of the “depiction” or “endorsement” value of their identities.231 Chapter 3 established the importance of legal protection of sports image rights because without it, sports persons have nothing to commercialize or sell. Many scrupulous business owners in Kenya would avoid paying to be associated with a sports person, team or

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227 See Chapter 4.5 of the thesis.
229 See Chapter 3 of the thesis on sports image rights in Kenya, US and South Africa.
230 See chapter three of the thesis on sports image rights in Kenya, US and South Africa.
sports organization but those image rights being recognized by law would make such rights legally enforceable against others, deterring unauthorized use.\textsuperscript{232} This establishes the need to recognize sports image rights as IPR in Kenya.

IP law therefore plays a big role sports as IPRs play an important role in the protection and commercialization of sports image rights and sports events marketing in general as majority commercial rights that arise in sports fall within the ambit of IP law.\textsuperscript{233} In Kenya, IPRs are governed by the Industrial Property Act, the Trade marks Act and the Copyright Act.\textsuperscript{234} In context of the sports industry in Kenya, the commercial exploitation of sports persons’ image is popular because of their huge fan base and failing to give them control of their image, albeit limited to commercial exploitation, leaves them vulnerable to not only unwanted association to goods and services but unjust enrichment to producers of goods and services that commercial exploit such image rights without consent.\textsuperscript{235} Recognizing this valuable asset as property also means that it would be subject to taxation as capital asset like other IPRs, and in turn this also benefits the Government.\textsuperscript{236}

\subsection*{3.1.1 Patrimonial rights in sports image Rights}
Sports image rights have a dual nature. They have commercial value because they can be exploited for monetary benefit. Sports image rights can be exchanged for cash or sponsorship which attached the patrimonial value. On the other hand, there is also the aspect of privacy which is also a right attached to image rights and this right has no monetary value as discussed below. Kenya therefore needs to recognize a right that encompasses the dual nature

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of sports image rights even as the position in US and South Africa is considered.237 This chapter considers both aspects of sports image rights, starting with the patrimonial and then the extra-patrimonial nature of sports image rights.

In law, patrimonial rights generally relate to property. The word property in a technical legal sense can mean rights of ownership, but in its everyday sense property refers to the thing owned in an extremely loose and wide way.238 There are different types of property in law under two major categories property; tangible property and intangible property.239 The relationship between a person and an asset is called a property right and in principle the law specifies which powers and possibilities the proprietor of a property right has with regard to the asset to which his property right is attached.240 In this regard property describes the right to the thing rather than the thing itself. Patrimonial rights refer to all property rights with a certain monetary value. Patrimonial rights are therefore valuable rights in any property, tangible or intangible.

All IPRs have this similar characteristic, but any legislative action considered by Kenya must ensure that the right IPR applied is capable of protecting both patrimonial and extra-patrimonial rights in an Africanized set up.242

In the case of Proactive v. Rooney243 Arden LJ expressly highlighted the economic value of image rights:

“The endorsement of goods encourages the purchase and consumption of goods, and the court is entitled to assume that it is in the interests of the public that image rights should be fully realisable for this economic purpose.”

239 See Chapter 3.2.1 of the thesis.
241 Valuable rights can be defined as rights which can be transferred or which intend to give its proprietor material benefit or which have been given in exchange for material benefit that has already been given or will be given in future such as: land ownership, easement, long leasehold, apartment right, right of superficies, pledge, mortgage; intellectual property rights in copyrights, trademarks, patents, image rights and other IPRs. See ‘Legal System of Civil Law in the Netherlands: Principles of Dutch law’ at http://www.dutchcivillaw.com/content/legalsystem022.htm (Accessed 28/4/2016).
242 See Chapter 1.8 of the thesis.
These economic rights attached to sports image rights include: the right to commercially exploit sports image rights, the right to receive benefits from the exploitation of such image rights, and the right to dispose of or transfer these rights. None of the existing IPR protects these aspects of image. Not only do sports persons lack control of who uses their image, they also lack authority to make a claim for damages based on unauthorised commercial use. Regulation of sports image rights requires an IPR that can combine both patrimonial and extra-patrimonial interests of sports image rights and in this case, a standalone right to image is the most protective right that Kenya can adopt to ensure sports persons have control of their image in commercial exploitation.\textsuperscript{244}

The protection of sports image rights should not be based purely on economic rights and interest of sports persons; the recognition of such right must consider public interests as well. This is because sports fall in the public domain, especially in Kenya where sports is a culture. Privatizing image of sports persons may affect the public’s right of expression and involvement is sports, after all, it is fans that make a sports person valuable as established in chapter two.\textsuperscript{245}

3.1.2 Extra-patrimonial rights in sports image rights

Extra-patrimonial rights are rights which are not capable of sale, or transmission. Such rights are not capable of being sold or transference: for example human rights such as the right to privacy, dignity, or life.\textsuperscript{246} The “dignity” aspect of a person’s image is very crucial, especially in Kenya because a person’s status in the African context is based on a standard of morals and culture set by the Kenyan people. An individual has the right to choose if they want their image commercial exploited, and if they do, the right to determine what products or services to be associated with that do not go against their beliefs, traditions, culture, or religion. The right to control commercialization of sports image rights will give Kenyan sports persons this power which would then give them the authority to challenge unauthorised exploitation of


\textsuperscript{245} See chapter 2.4 of the thesis on professional sports persons as celebrities in Kenya.

image rights and also at the same time, be able to demand a license fee to transfer the
patrimonial rights attached.\textsuperscript{247}

Recognition of sports image rights can also be based on the right to own property, intangible
property, but still property, and the Government has the obligation to enact laws that protect
and promote this right.\textsuperscript{248} Cathy Mputhia argues that there is need to protect celebrity image
from dilution by giving them the power to control when and how their image may be used;
this will not only protect sports persons from false endorsements but also establish their
image as valuable brands.\textsuperscript{249}

The relationship between a person and an asset is called a property right.\textsuperscript{250} In principle the
law specifies which powers and possibilities the proprietor of a property right has with regard
to the asset to which his property right is attached: which not only describes what the entitled
person may do with a specific asset, but also how he can defend himself against other persons
who disturb him in exercising his rights to that asset.\textsuperscript{251}

For example in Kenya, the Copyright Act\textsuperscript{252} provides the statutory protection of both the
intangible aspect as well as the monetary value attached to copyright protected works.\textsuperscript{253}
Such rights therefore only exist because the law says so and as such, for sports image rights
to be effectively protected in Kenya, legislative intervention must first happen as this research
sought to establish. There is therefore need for legislative intervention in protection of sports
image rights.

\textsuperscript{247} This would be able to guide disputes such as the one involving Dennis Oliech and EABL, discussed in
chapter 1.1 of the thesis.
\textsuperscript{248} Article 40 of the Constitution provides for the protection of right to property and provides that the state will
not deprive a person of such rights.
\textsuperscript{249} Cathy Mputhia “Public figures should seek intellectual property rights” at
http://www.businessdailyafrica.com/Public-figures-should seek-intellectual-property-rights/-/539444/2909224/-
/8gte5x7/-/index.html (Accessed 19/7/2016).
\textsuperscript{250} ‘Legal System of Civil Law in the Netherlands: Principles of Dutch law’ at
\textsuperscript{251} KECOBO “Enforcement of Copyright & Related Rights” Copyright News 7 at
19/7/2016).
\textsuperscript{252} Copyright Act,2001.
\textsuperscript{253} Delia Lipszyc (1999) Copyrights and Neighboring Rights
3.2 Ownership of Sports Image Rights in Kenya

The concept of sports image rights is a developing concept globally. It has raised concern over what they are and also who owns them. The question of ownership is particularly important in the case of sport persons then they participate in organised sports events or as met to members of a team.254 The same question has been raised in Kenya. The dispute between EABL and Dennis Oliech of Harambee stars, where EABL had used their images in one of their billboard advertisements images became an issue when the he claimed that he did not authorise EABL to use their images.255 Two questions were raised by the case, firstly who owns the image rights where the sports person belongs to a club and the club has sponsorship contract with a sponsor and secondly, whether player claim image rights in a photo taken during the course of the game.256 There are no established legal answers to this question in Kenyan laws at the moment; however, lessons can be learnt from the US, Guernsey and South African approach in answering these questions. Kenya needs to establish the position regarding sports image rights as the sports industry converges with commerce as established in chapter 2.257

Ordinarily, a sports person has the right to own the proprietary title attached to their image but this right can be transferred, without any legislative rules on transfer or licensing of such right, sport image rights will always be at risk. It is therefore important to consider the existing IP laws to determine if they can be extended to protect a sports person's proprietary interest in their image.

3.3 Sports Image Rights and the IPR Framework in Kenya

There is currently no recognition of a right to image in Kenya that sports persons can use to control the commercial exploitation of their image even though the sports industry is thriving commercially.258 However, even though there is no specific law recognising the right to

255 See Introduction and background of the study on sports image rights in Kenya in chapter 1.1.
257 Chapter 2 of the thesis focuses on the sports industry in Kenya, reportedly, a huge contributor of reported revenue in Kenya. If the Government wants to keep this up, legislative intervention is imminent. See chapter 2.4 of the thesis.
image, sports persons in Kenya, however, can still rely on existing IPRs to protect their image to some extent, meaning a sports person can rely on various existing legal instruments to protect one’s image. This section of the thesis considers the extent to which existing IPRs in Kenya can be used to protect sports image rights, discussing their inadequacies, making reference to lessons learn from the US and South Africa in a bid to find a comprehensive and suitable law that Kenya can adopt to protect sports image rights.

3.3.1 Sports image rights and IPRs in Kenya: Convergence and divergence

There are two main categories of the IP, the Industrial property and Copyright. The Industrial Property includes patents for innovation, trademarks, industrial designs, and geographical indications while Copyright covers literary works, films, music, artistic works, and architectural design. The law of copyright protects various original forms of expression including novels, movies, musical compositions, and computer software programs. For the purposes of this research, focus was on if the exiting IPRs are sufficient to regulate and protect sports image rights in Kenya or there is need for a separate right to be created because as explained earlier, sports persons in Kenya can use existing IPRs in protection of their image rights to some extent.

3.3.1.1 Sports image rights and copyright Law in Kenya

This part analyses the relationship between sports image rights and copyright law. Copyright covers literary, musical and artistic works, audio-visual works, sound recordings and broadcasts. Under the Act image of a person is not recognized as part of any of these categories of eligible works. The only related item is photographs.

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261 WIPO, ‘What is Intellectual Property?’ ibid
263 See chapter 3 of the thesis.
264 Copyright Act, 2001, S. 22(1).
265 Copyright Act, 2001, S.2.
The Copyright Act operates by granting the person who first takes a photograph or makes sounds or film recording or a broadcast, the right of exclusive ownership over their work.\(^\text{266}\) It further provides that infringement occurs when a person deals with copyrighted material in a manner inconsistent with the copyright owner's interests; where the defendant does any of the activities protected or restricted by copyright without right holder’s licence.\(^\text{267}\) Following that definition, it is clear that the activity that athletes perform while playing does not qualify as a work of authorship for the purposes of copyright law. This is a divergence between copyright and sports. Copyright law is only applicable to the extent that it is dealing with the underlying copyright issues, where a sports person is the holder of a copyright in relation to a photograph or any copyright eligible work.\(^\text{268}\)

Therefore, in relation to sports image rights, the relevance of copyright law in Kenya is primarily in relation to photographs. The creation of copyright protected works of mind based on another person’s image can take various forms, such as taking a photo without the person’s consent, unauthorised use of another person’s photo in an artistic project, either with or without modifications, use of a legitimately taken photograph in the private sphere in an artistic context or using a performer’s image in an advertisement or a video game. The ownership lies with the person who captures the image, not the owner of image.

This means that Copyright law in Kenya aims at protecting the rights of the photographer as creator of an original piece of work and not the rights of the sportsman pictured in it, meaning it cannot aid sports persons in protecting their image rights if the person who took the photo can exploit it commercially, without having to seek consent or pay a license fee.\(^\text{269}\)

Another reason that makes Copyright law insufficient is that there is no need to register copyright because in its nature, it applies once the work eligible for protection is created and published. Sports image rights are dynamic, they can be exploited in so many ways and its


diverse nature doesn’t always involve authorship or publication, meaning its application is limited.

However, the Copyright Act is not completely obsolete in protection of rights related to sports image rights. The act may apply where the creative work is a fictional character, based on a famous sports person. Even though the act provides that fictional characters are protected if used outside the context of the original work, the fictional character must have been sufficiently and clearly delineated and acquired such distinctiveness and notoriety as to be recognized by the public separately from the work in which the character originally appears.\textsuperscript{270} Meaning that commercial exploitation of a fictional character can be questioned in context of how and why it was acquired. This provision can apply in cases of unauthorised merchandizing of character.\textsuperscript{271}

Further, drawings or cartoons\textsuperscript{272} and three dimensional works like sculptures, dolls, puppets, or robots made in the image of sports persons may be protected independently if they meet the substantive requirements of copyright protection.\textsuperscript{273} Copyright protection provides authors with a legal mechanism to control the use and exploitation of their creations.\textsuperscript{274} Copyright laws allow authors to mould the future of their creations, prevent abuses, and reap financial benefits. This kind of protection would benefit Kenyan sports persons in character merchandizing.\textsuperscript{275}

In light of the above, it is evident that Copyright law in Kenya does not converge with sports image rights in so far as protecting the commercial value of sports image rights in all its forms. However, sports image rights and copyrights are both intangible assets that combine

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both extra-patrimonial and patrimonial interests of property. In this respect, copyright law could serve as a model for the eventual creation of sports image rights in Kenya.

3.3.1.2 Sports image rights and trade mark law in Kenya

A trade mark is a sign which serves to distinguish the goods of an industrial or a commercial enterprise or a group of such enterprises. Such sign may consist of one or more distinctive works, letters, numbers, drawings or pictures, monograms, signatures, colours or combination of colours; capable of being represented graphically which is capable distinguishing the goods or services of one person from those of another. The Trade Mark Act prevents the use of similar or identical marks thus stopping the owner of certain goods or services from deceiving consumers as to the source of the goods or services, because consumers would purchase the goods or services because it carries the name or likeness of a celebrity and not because they believe the celebrity made them.

Therefore trade marks in Kenya seek to assist the proprietor of a registered mark distinguish their product or service from those of another. Meaning if a celebrity’s name or image is used on a wide range of mementos and souvenirs without implying any trade connections it would be difficult to attribute such use to infringement of image rights. The Trade Marks Act is silent on image rights but a lesson can be learnt from the US approach in the decision in the case of Sid Shaw Elvisly Yours v. Elvis Presley enterprises where J Laddie held that there was no reason why anyone should not sell memorabilia and mementoes of Elvis Presley including products embellished with pictures of him and such traders are likely, in the ordinary course of their business if they had no improper motive or desire to use the name Elvis or Elvis Presley upon or in connection with their own goods.

It is also important to note that trademarks are very useful to sports marketing when it comes to events and sports merchandise. Sports organizations can register a logo to represent the organization, club, or any merchandise sold by the club. Known marks in sports include the

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280 Sid Shaw Elvisly Yours v Elvis Presley enterprises (1997) RPC 543
Olympic symbol, Addidas and Nike. These marks are now brands, associated with sports merchandise. Likewise in Kenya some teams and clubs have become brands in Kenya. For example Gor Mahia and AFC Leopards football teams that exploit their image to get sponsorship and even use the mark on t-shirts and other garments. Such marks can be protected under the trade mark act in relation to similar goods, but not strongly against general commercial exploitation.

Considering the primary function of trademarks outlined above, divergence between trade mark and sports image rights occurs when comparing the purpose of trade marks against that of sports image rights because while a trademark is a sign which allows the identification of the origin of the product or service traded, sports image rights protects the name, voice and personal portrayal of the individual. An important difference between these two rights is the use requirement. A trade mark right rests on the fact that the mark has been used in trade to distinguish source of a good or service, whereas in the case of image rights, there is no need to use the image actually and effectively in order to guarantee its validity.

Sports persons can therefore register their distinct names or nicknames as trademarks as a tool of trade in character merchandizing but as Professor Sihanya points out, not all names are registrable, sports persons can only register their names as trademarks if they meet the criteria of registrability. Further, because Trade Mark Act in Kenya does not recognize the right to image, the identity of a sports person cannot be comprehensively be protected under trade mark law in Kenya as this law applies to the extent a registered name or mark is used in connection to a good or service. These divergences do not render trademarks useless to sports persons.

According to Professor Sihanya sports persons in Kenya to still need register their names or signatures under the Trade Marks Act if such names or signatures meet the registration criteria outlined in the Trade Marks Act.

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282 These are football clubs in Kenya
criteria for trademarks as this would be useful in character merchandising and would prohibit any third party from using such name or signature to market their product.  

Following the foregoing discussion, it is evident that the current IP regime in Kenya is not equipped to protect sport’s persons image from unauthorised commercial exploitation as none embrace image in its complete sense and both patrimonial and extra patrimonial sense. The divergences between the purpose and scope of sports image rights and those of copyright and trade mark laws outweigh any convergence, which leads to the conclusion that legislative action is needed in Kenya for the protection of sports image rights by creating a separate standalone right to image. A lesson can be learnt from the US and South African approach discussed in chapter 3.

The law in USA treats image, an aspect of personality as a kind of property that may be misappropriated by commercial exploitation without consent and protects it via statutory provisions. South Africa’s Constitution also protects right to image under the right to privacy and protects sports image rights under several provisions of common law.

Accordingly, adopting a standalone right to image in Kenya will protect against economic loss caused by the commercial appropriation of an individual’s image while the right to privacy protects against the intrusion of an individual’s private sphere, meaning the right to privacy does not sufficiently protect image rights.

There is therefore need for legal recognition and protection of sports image rights as an intangible asset in Kenya, to enable sports persons control the commercial exploitation of their image. It will also give sports persons, sports organizations and institution rights that can be sold to sponsors, merchandisers, broadcasters, producers of products and services and other parties who wish to be associated with sports persons and sports events in Kenya. This would generate income for sports persons and provide financial support for clubs. These economic interests can only be established and protected if backed by law, calling for a response from the Government in its capacity inform of legislation.

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287 Ben Sihanya (2015) *ibid*.
289 See chapter 3 of the thesis.
289 See chapter 4.2 on the dual nature of sports image rights.
290 See chapter 2.5 of the thesis.
3.4 Sports Image Rights and Other Laws in Kenya

There are other laws, other than IP laws that greatly impact the commercialization of sports in Kenya and in extension, the commercialization of sports image rights. The most essential law in this context is the law of contract, discussed in chapter 2 of the thesis. In addition, the laws protecting consumers and regulating fair Competition can be useful as well.

3.4.1 Sports Image Rights and Unfair Competition in Kenya

The Kenyan Competition Act seeks to uphold and protect competition in the economy while protecting consumer rights. This act is primarily consumer oriented. Under section 55(a), it is an offence to falsely represent that a product has a sponsorship, approval, or affiliation it does not have. Any person charged with this offence and found guilty is liable to imprisonment for a term not exceeding 10 million shillings or a prison term or both. This offence is a criminal offence, meaning that the sole concern is to protect consumers from deception about the approval of a celebrity to endorse or associate himself with an advertised product or service. The commercial value of the celebrity in question is not considered such that that person cannot obtain relief for the misappropriation of their image rights, because such right is not recognized. Neither is it concerned with the unjust enrichment caused by the false endorsement. This section however establishes that it is not only wrong to misappropriate image, it is unfair.

This connection is created by the need to protect consumers from deceiving trade practices, like false representations of endorsements, sponsorship or merchandising. In relation to sports image rights unscrupulous producers of products may manipulate consumers by representing a connection or approval of a famous sports person with their product or service and through this deception, lead consumers buy the product or service. According to Professor Treece, the right of publicity, by affording celebrities a private cause of action for unauthorized

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292 Competition Act, 2010. Is an Act of the Kenyan parliament An Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.

293 The Competition Act 2010 S. 55(a) (VI).

294 The Competition Act 2010 S. 70.

advertising use of their names and likenesses, operates to protect consumers from being misled about the willingness of a celebrity to associate himself with a product or service.\textsuperscript{296}

This supports the finding that there is need for a standalone right to image, such that now where an individual is found guilty of misrepresentation of sponsorship or endorsement under section 55 of the Competition Act, a civil cause can also arise for a sports person to sue to recover damages attached to their IPR, putting an end to the unjust enrichment.

\subsection*{3.4.2 Sports Image Rights and Consumer Protection}

In Kenya, consumer welfare is protected under the Consumer Protection Act\textsuperscript{297} as well. The Consumer Protection Act protects consumers from unfair trade practices such as making false, misleading or deceptive representations that goods or services have sponsorship approval or that the person supplying sponsorship or affiliation the person does not have.\textsuperscript{298} Any person that commits any of these unfair trade practices is guilty of an offence and this gives the consumer a right to rescind the agreement and even a remedy of damages through an action in court.\textsuperscript{299} The focus here is false endorsement or sponsorship claims that influence a consumer to purchase a good or service, in belief that it have been approved by a person they idolize. It does not protect the celebrity’s proprietary right in the image misappropriated and therefore, this law does not extend to the protection of sports image rights.

The Consumer Protection Act and Competition Act might be useful in protecting a sports person’s image from false endorsements and mechanising, only if a consumer claims false representation by the supplier of the goods or service however, they do not give sports persons the right to control their image because they are primarily concerned with consumer rights.

Therefore, to comprehensively protect the economic and proprietary interests of sports persons, the Government therefore needs to create a legal right to image.

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\item \textsuperscript{296} James M Treece (1973) ‘Commercial Exploitation of Names, Likenesses, and Personal Histories’, 51 TEX. L. REV. 647
\item \textsuperscript{297} The Consumer Protection Act, 2014 is an Act of parliament to provide for the protection of the consumer by preventing unfair trade practices in consumer transactions.
\item \textsuperscript{298} The Consumer Protection Act 2014, S. 12 (1), (2).
\item \textsuperscript{299} The Consumer Protection Act 2014, S.15-16.
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3.5 Conclusion on Literature Review and Findings on Sports Image Rights as Intellectual Property Law in Kenya

This chapter explores the relationship between sports image rights and IP law in Kenya based on the research’s hypothesis that sports persons in Kenya lose economically because there is no right to image and therefore they do not have cause of action to stop unscrupulous parties from unjustly enriching themselves by commercialization of sports image rights. This is because no existing laws in Kenya can adequately protect a sports person’s image from commercial misappropriation, hence the need for a standalone right to image. It answers the second research question that is the role of IP in protection of sports image rights in Kenya.

The objective of this chapter was to justify the need for sports image rights and determine the extent to which the current IPRs can be extended in protection of the proprietary characteristics of sports image rights. This chapter expounded on the political economy of sports image rights, establishing that there is need for the legal recognition of a right to image.

Image rights can be generally defined as the commercial appropriation of someone’s personality including their image; the right to one’s own image is the ability to decide when, where, how and by whom one’s image can be captured, reproduced, published and distributed and under what circumstances. 300

From the foregoing, copyright, trade mark, unfair competition and contract law do provide some legal protection; however, the existing IPRs do not comprehensively protect both the patrimonial and extra-patrimonial attributes of sports image rights. 301 This is in line with this research’s argument that there is need for a standalone right to image in Kenya because existing IPRs in Kenya do not sufficiently protect sports image rights from commercial misappropriation. This means that there is need to create a new IPR in Kenya. The recognition of image rights in law will enable the definition, establishing the pecuniary value, commercial exploitation and protection of image rights associated with a sports person.

The next chapter was focused on finding the best practices that Kenya can emulate. In the interim sports persons are advised to continue seeking professional help and guidance in commercial exploitation of their image through sports image rights contract, especially when it involves aspects of their image and character merchandising rights. Skilled legal representatives should oversee drafting of sports image rights contract to properly negotiated and structured agreements to ensure fair exploitation of such rights to the benefit of the sports person. Further, use should be made of existing IPRs that overlap with existing such as trade mark registrations, wherever possible.
CHAPTER 4

4 COMPARATIVE ANALYSIS OF THE BEST PRACTISES IN REGULATING SPORTS IMAGE RIGHTS IN US, GUERNSEY AND SOUTH AFRICA

4.1 Introduction to Comparative Analysis of the Best Practises in Regulating Sports Image Rights in US, Guernsey and South Africa

This chapter aims to accomplish the research’s objective of establishing the necessity of a standalone right to image rights for sports persons in Kenya based on the hypothesis that sports persons in Kenya lose economically because there is no right to image in Kenya. It entails a comparative study of the US, Guernsey and South African’s legal approach of issues arising from unauthorized commercial exploitation of sports image rights establishes and justifies the proprietary nature of sports image rights.

Sport at the professional and elite level is big business. The sports industry accounts for over 3 per cent of world trade; the role of the law in sport can therefore be premised on the argument that, as law regulates business, it therefore must regulate sport in a similar way.\(^{302}\)

The reality of the commercialised nature and wider globalisation of sport makes sports image rights an issue that sweeps across all states with thriving sports industries. Chapter 1 set out the background of the study and research questions that arose as a result of the evident commercial exploitation of sports image rights in Kenya. The problem in Kenya is, despite the sports industry in Kenya being commercially active there is no specific legislation that provides a distinct property right in image of sports persons to give them commercial control of their image.

The lack of legislation also means no definition of sports image rights, no measurable value and no protection of image rights associated with a sports person from unauthorised commercial exploitation by unscrupulous persons.

Many jurisdictions recognize and protect the right to image. Notably the United States has had a big contribution to the development and protection of image rights. Kenya can learn from the approaches taken by the US, a developed country which is economically stable and further, the right to image was developed as the right of publicity by US. It is credited as the

proponent of the right and therefore provides appropriate guidance on how to protect sports image rights.

Guernsey was chosen as it has also made a significant contribution to the jurisprudence of image rights. In 2012, the Bailiwick of Guernsey made a landmark move in the recognition and protection of sports image rights by promulgating the first ever legislation in the world to provide for and protect image rights. It not only created a new type of IPR, it created a new regime in legal infrastructure. South Africa on the other hand, is a developing an African state and has been recognized among the countries where IPR protection is given priority. It therefore provides a suitable basis for purposes of benchmarking how law is important in regulation of sports image rights.

Having established that there is need for a new IPR, a right to image, an analysis of image rights in the US and South Africa, outlining the possibility of its introduction into the Kenyan legal system, is very timely.

4.1.1 The US Right of Publicity

The United States is one of the largest democracies in the world and is recognized as the most powerful nation on earth, politically, economically and militarily. The US is a federal republic of 50 states separated into three levels of government; federal, state, and local government, with the American people electing officials to serve in each level. The American legal system recognizes the innate right of publicity, which encompasses the right to image. This was as a response to conflict arising between famous persons such as sports persons, actors, and singers and other famous people and third parties regarding exploitation of their image. However, in the United States, the right of publicity is not protected under federal law meaning that in the US, the right to one’s own image is protected via the courts of

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303 South Africa was one of the countries listed; Kenya was not included in the Index. See Taylor Wessing (2011) ‘Global Intellectual Property Index’ at www.taylorwessing.com/ipindex (accessed 24/4/2016).


each either under common law through case law or statute. The right of publicity is not created by federal law but by the laws of each individual state. These laws vary greatly in their details, but most states recognize a general right for a person to control the commercial use of their name, likeness, and other aspects of personal identity.

Similarly, in Kenya with the commercialization of sports and use of sports persons in advertising campaigns, there are emerging issues between sports persons and third party as to ownership of sports image rights and commercial exploitation without consent. The legislative intervention by the US sets an alternative to settling such disputes. The Right of Publicity can be defined as the right to control the commercial use of one’s identity. The Right of Publicity refers to the property interest inherent in an individual’s name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms. It is the ability to decide when, how and by whom physically recognizable features such as image, voice, and name can be captured, reproduced, or published.

As established in chapter 2, Kenya’s sports person’s name and image are considered valuable commodities in our star struck society. They can be commercially marketed and reap substantial rewards if done with expertise and intelligence. However, a Kenyan sports person, just like any celebrity in the public limelight has concerns that go beyond their popularity. First concern is to safeguard against intrusions to their privacy. Secondly, there is the need to protect the value of the sports person’s name, image, and other attributes surrounding the person and lastly, the sports person’s concern is that others, without authorization, will attempt to exploit their name or image.

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This research’s hypothesis is that sports persons in Kenya lose economically because there is no right to image. This would mean that there is need for legislative intervention to regulate exploitation of sports image rights in Kenya to protect sports persons from unauthorised commercial exploitation of their image but at the same time, protect the rights of third parties investing in the sports industry as well as public interests representing fans of sports in Kenya. It is also this researcher’s belief that Kenya can benefit from the development and protection of the right of publicity and personality rights in the US and South Africa by considering the need for their development and extent of their application in protecting the economic and intellectual aspects of sport image rights.

Laura Lee Stapleton and Matt Mcmurphy assert that one of the driving factors behind an athlete’s ability to profit off of the commercial value of his name and likeness in the US is the development of the right of publicity. Athletes vigorously defend their right to be paid for the use of their name, and the right of publicity is one of their greatest weapons.

Likewise, the recognition of a standalone right to image in Kenya will aid sports persons defend their right to be paid for commercialization of their image and profit from it.

4.1.2 Origin and Development of the Right of Publicity in the US

In the US, the right of publicity arises from the concept of privacy, referred to in the Fourth Amendment of the American Constitution. The right of privacy was first introduced by Samuel Warren and Louis Brandeis in an article considering the protection of an individual’s privacy in the 1890. The two interrogated the then existing laws and developed a theory to support the need for legal protection of privacy. They argued that the existing laws did not adequately protect the dignity and privacy of an individual and suggested a new approach, the right of privacy. This new law was mean to cover the new ways in which an individual’s private life was invaded not only by the Government and media but curious individuals. They

contended that the right of privacy was one way out of the new issues cropping up in society such that an individual could seek damages and injunctions when his privacy is infringed.

The article did not have immediate effect as the rights to free speech and freedom of the press strongly applied, however with time the influence was realized and the legal right to privacy was adopted in the US. The state of New York set off the development of this right and was followed by other states.

These cases and statutory provisions show the role privacy played in development of the right of publicity. Kenyan law recognizes the right to privacy but the issue is whether it recognizes sports image rights. The constitution provides for the right of privacy; it states that every person has the right to privacy which includes the right not to have their person, home or property searched, their person, home or property searched, their possession seized; information related to their family or private affairs unnecessarily required or released, or privacy of their communication infringed.

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317 The case Robertson v Rochester folding Box Company (1902) NY 538 led to the development of the right to privacy in New York. The defendant was a milling business engaged in the manufacture and sale of flour. The claimant sued claiming that the defendant had distributed bags of flour with her photographs and likeness in the without her consent and knowledge. She claimed she suffered humiliation, physical and emotional distress as people made fun of her. She sought damages and an injunction to stop distribution of her image. It was held that there was no right to privacy and that no law forbade the defendant’s action. This ruling caused a public uproar that influenced legislature into passing law recognising the right to privacy. See Paul Czarnota (2012) “New York Civil Rights: The Right of Publicity in New York and California: A Critical Analysis” (2012) 19.2 Jeffrey S. Moorad Sports Law Journal at http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1012&context=mslj (accessed 15/5/2015).

318 Section 50 of the New York Civil Rights Law provides that a person, firm or corporation that uses for advertising purposes or for the purposes of trade, the name portrait or picture of any living person without having obtained the written consent of such person or if a minor of his or her parent or guardian, is guilty of a misdemeanor. See John Wolohan (2005) “United States” in Ian S. Blackshaw and Robert C R Siekman (eds), Sports image Rights in Europe, TMC Asser Press, Hague, 345-373.

319 Pavesich v New England life insurance (1905) GA; Art. 990,3444 of the California Civil Code provides that any person who knowingly uses another’s name, voice, signature, photographer likeness in any manner for the purpose of advertising or selling ….. without such person’s prior consent shall be liable for any damages sustained by the person or persons injured as a result thereof. See John Wolohan (2005) “United States” in Ian S. Blackshaw and Robert C R Siekman (eds), Sports image Rights in Europe, TMC Asser Press, Hague, 345-373.

With time, the popularity of sports persons and other celebrities in the US led to the increased use of their identity in advertising. An example of an American sports person exploiting their sports image rights include LeBron James, Tiger Wood, Michael Jordan, Venus and Serena Williams among others.

The unauthorised commercial exploitation of sports person’s identity led to questions as to whether the right to privacy was sufficient in protection of the right to image. According to William Prosser, tort of privacy can be classified into four categories; appropriation (misappropriation) of an individual’s image and likeness; intrusion into a person’s solitude; publication of private facts and placing an individual in a false light in the public eye.

These categories seek to protect an individual from shame, humiliation, and unauthorized use of identity. The common tort of privacy however did not sufficiently cover the unjust enrichment of other off a celebrity’s reputation.

The right of publicity was therefore detached from the right to privacy. This means that publicity rights differ from privacy rights and the same can apply in Kenya because advertisers are exploiting the image of sports persons without consent. This issue can only be addressed by giving sports persons the right to control commercial exploitation of their image.

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325 Venus William and Serena William, sisters, are US champion tennis players reported to have endorsement deals with Pepsi, Puma and other brands. See ‘Venus William’ and ‘Serena William’ at www.forbes.com/profile/serena-williams (accessed 10/7/2015).
The incapacity of the right to privacy to protect sportspersons and other celebrities from unauthorised commercial misappropriation and prevent unjust enrichment, the right of publicity was created and officially recognized in the case of Haelan Laboratories Inc v Topps chewing Gum Inc. \(^{329}\)

In this case, the Plaintiff had signed a contract with known baseball players for an exclusive right to use their picture on advertising his chewing gum. The defendant a chewing gum manufacturer and competitor of the Plaintiff induced the players to endorse his chewing gum. The Plaintiff sued arguing that the defendant’s action breached his exclusive right to use the image of the baseball players. The matter was dismissed in the first instance but upon appeal to the USCOA, the case was allowed and is was found that there was value and property right in the baseball players photograph used on the trading cards in the chewing gum packs. This case set precedence in American common law, recognizing ownership of image as property outside tort and separate from the law of privacy. The commercial exploitation of sportsperson’s image rights is big business, through advertising or merchandising. \(^{330}\)

Personal liberty, under privacy includes the freedom from restraint as well as the right to be left alone. \(^{331}\) Therefore, unless a sports person consents to exploitation of their image right, no one should exploit them; that is the right to be left alone.

Before the creation of the right of publicity, sports persons, and other celebrities were protected from misappropriation of their image by the right to privacy. The case of Ali v Playgirl Inc \(^{332}\) illustrates how privacy applied in the protection of sports image rights from unauthorized exploitation.

\(^{329}\) Haelan Laboratories Inc v. Topps chewing Gum Inc 202 F.2d 866 92nd Cir., 1979


\(^{332}\) Ali v. Playgirl Inc (1978) SDNY. Muhammad Ali, originally, Cassius Marcellus Clay, Jr was a renowned American world heavy weight boxing champion. See Thomas Hauser (2016) ‘Muhammad Ali’ at http://www.britannica.com/biography/Muhammad-Ali-boxer (Accessed 18/5/2016). Muhammad Ali sued the defendants for unauthorized printing, publication, and distribution of a portrait in his likeness. The portrait complained off depicted a nude black man seated in a boxing ring accompanied by the words ‘the greatest’. In their defence, playgirl argued that Ali was a public figure and as such forfeited any right of privacy. The court upheld section 51 of the New York Civil rights law and held that the defendant had used the Plaintiff’s portrait for the purpose of trade without his consent. The court further established that the privilege of using a public figure’s picture in connection with an item of news does not extend to commercialization of his personality.
The publicity right was created in the US by state common law, but several states recognize this concept differently and therefore each state can determine the parameters of recognition of the Right of Publicity; the current count is 38 states with some form of common law precedent, and 22 states with some form of Right of Publicity statute. This shows that having a statute on the books is not a prerequisite for the Right of Publicity to be enforceable in a given jurisdiction, since many states arrive at the same outcome via common law, what is important is the recognition of the right to image. There can be several ways to ensure protection from unauthorized exploitation such that Kenya can choose the most suitable way that aligns to the Africanized philosophy of IP.

Like their counter part in the US, Sports persons in Kenya have several arguments available to show why right of publicity should be allowed and establish actionable claim if the right is violated. The first argument is that as public figures, they should be allowed the right to profit from their personal achievement and public image. This justification can also apply in Kenya because a standalone right to image will enable sports persons to seek endorsement deals to further promote their talents and public persona. In addition, the ability to retain control over one's identity and image is critical for a public figure to secure compensation for their contribution to the enrichment of society.

As Professor Sihanya rightly observes, the lack of legal recognition of the right to image prevents sports persons in Kenya from stopping unauthorised parties exploit their image commercially without consent.

Another argument is that talented individuals will be more likely to utilize their skills if there is an economic incentive. Many sports persons make income through the commercial

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exploitation of their image. This makes them care about their sport and their performance because exploitation of image is based on the viewing public's appreciation of their talents.

Further, in addition, the contributions made by athletes and celebrities will benefit the viewing public's appreciation of their talents only as needed.  

In other words, right of publicity ensures that a sports person's image rights are used only when needed. Kenyan sports persons need legislation that can provide such protection help to ensure that their image rights are not overused making their marketability depreciate.

The protection of image from unauthorised commercial exploitation also protects sports persons from being associated with promoting a company's particular product or service they might not want to be associated with. Likewise, sports persons in Kenya need to control the commercial exploitation of their image in order to prevent consumers from mistaking a connection between them and an undesirable product or service. Such associations can damage a sports person's influence on the market if the subject matter of the endorsement is not held to be reputable, affecting future earning capacity in endorsements and merchandising deals.

According to Professor Thomas McCarthy, the right of publicity, like any other right, has its limitations in that it can give a person the right either to prevent or to permit for a fee, the use of his or her identity in an advertisement to help sell someone's product. He argues that the right of publicity cannot be used to prevent someone's name or picture in news reporting. It cannot be used to prevent the use of identity in an unauthorized biography, an entertainment parody or satire.

In order to make out a prima facie case for a violation of the right of publicity, the complaining party must prove three key elements. The first element is that there must be validity. Plaintiff owns an enforceable right in the identity of a human being recognized by law. This is the legal validity of the right to image. This element is based on law meaning

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there must be legislative recognition of such right through statute or common law. Secondly, there must be infringement of this right of publicity. The defendant must have, without consent, used some aspect of identity in such a way that plaintiff is identifiable for their personal use\textsuperscript{341} and lastly, there is the element of damage. Defendant’s use of a celebrities image rights must be of such nature that is likely to cause damage to the commercial value of that person.\textsuperscript{342}

These elements of the right of publicity mean that where a celebrity consents to commercial exploitation of their image, there is no cause of action. In context of sports image rights, where a sports person enters into image right agreements with a club through employment contracts or other third parties through merchandising, sponsorship and endorsement agreements. However, as Professor Sihanya points out, such agreements need to be done by professional legal advisors who can adequately consider the sports persons interest.\textsuperscript{343}

Further, if the exploitation of image rights does not affect the sports person in terms of damages, the defendant will not be liable. Exploitation of sports image rights for social, cultural, and educational purpose for the general public’s interest acts as defence. This shows that legislative intervention in regulation of sports image rights in Kenya will not depreciate the social and cultural role sports play in the Kenyan society, if anything, it will protect them.

There is no unanimous approach in the US regarding its nature and the scope of protection of image right but one thing is clear, there is need for legislative intervention. What differs is what it encompasses and how to protect it. This leaves room for Kenya to adopt a legislative mechanism that can work for Kenya. However, the need for a standalone right to image right stands.

\textsuperscript{341} Ali v. Playgirl, Inc ; Motschenbacher v. Reynolds Tobacco Co. 498 F.2d 821 (9th Cir. 1974).
\textsuperscript{342} Gautier v. Pro-Football Inc. 304 N.Y 354 (1952).
4.2 Sports Image Rights in Guernsey

The Bailiwick of Guernsey is an Island in the English Channel Island, 80 miles south of England.\textsuperscript{344} In 2012, the Bailiwick of Guernsey made a landmark move in the recognition and protection of image rights by promulgating the first ever legislation in the world to provide for and protect image rights.\textsuperscript{345}

The image rights legislation opened new developments in protection and exploitation of image rights. Being a common law entity, the Bailiwick of Guernsey applied the common law tort of passing off, defamation and breach of confidence to an extent in settling issues of image rights.\textsuperscript{346} However, upon realization that these common law actions did not fully meet the nature of image rights, the legislature, state of Guernsey passed the first World’s law for the registration and enforcement of image rights.

The common law alternatives ceased to apply when the Image Rights (Bailiwick of Guernsey Regulation 2012) was passed. The legislation seeks to establish a global system of image rights protection. The recognition of image rights will soon be global, another reason for Kenya to act now and not be left out in the developing jurisprudence.

4.2.1 The Image Rights (Bailiwick of Guernsey) Ordinance 2012 and the Image Rights (Bailiwick of Guernsey) Regulations 2012

The Guernsey Image rights legislation has been reviewed to address the needs of the modern market place where commercial exploitation of image is big commodity.\textsuperscript{347} The Image rights (Bailiwick of Guernsey) ordinance and image rights (Bailiwick of Guernsey) regulations (Guernsey image of rights legislation) are based on personage.


\textsuperscript{345}Although the Bailiwick of Guernsey is a common law state, the island’s legislature, known as the “State Deliberation of Guernsey” makes domestic legislation. See ‘About Bailiwick of Guernsey’ <http://www.channelislands.eu/about-channel-islands/about-bailiwick-of-guernsey/> accessed 14 December 2016.


This law gives a comprehensive definition of image. Image means the name of a personage, including any other name by which a personage known; the voice, signature, likeness, appearance, silhouette, feature, face, expression (verbal or facial, gestures, mannerisms and any other characteristics attributed to a personage, and any photograph, illustration, image, picture, moving image, electric representation of a personage.\textsuperscript{348}

According to this law a “personage” includes a natural person, a legal person, and even fictional characters.\textsuperscript{349} This means the stand alone right also extends to character merchandizing. Indeed without a standalone right to image celebrities have no authority to act against unauthorised character merchandizing.\textsuperscript{350} Further, for any registrable image must be distinctive and have actual or potential value. This moves to control the number and nature of applications, so that not just any citizen qualifies to register their image.

The ordinance also primarily protects registered images from commercial exploitation. It provides that protected image rights are considered to be infringed by use of a protected image for a commercial purpose or financial (economic) benefit. This creates balance between the economic interest of protected persons and public interests and policies.

4.3 Sports Image Rights in South Africa
South Africa, an African country, was colonized by Britain until 1934; this liberation was however limited as the white South Africans ruled until 1994 when full independence was attained.\textsuperscript{351} Despite that, South Africa is recognised as a common wealth country, just like Kenya, which was also colonized by the British. South African law is a combination of different legal systems, with its origin in Europe and in Great Britain. Its foundation lies in Roman-Dutch law, which is itself a blend of indigenous Dutch customary law and Roman law; however, statutory laws now stand superior to the common law.\textsuperscript{352} This is also another

\textsuperscript{348} Section 3, Section 1 (1) Image rights (Bailiwick of Guernsey) ordinance, 2012.
\textsuperscript{349} Section 1 (1) Image rights (Bailiwick of Guernsey) ordinance, 2012.
similarity between Kenya and South Africa where common law applies so far as written law, inhabitants, and circumstances in Kenya allow.\textsuperscript{353}

South Africa is a sporting nation has hosted a number of major international sports events to date, including the highly successful FIFA World Cup in 2010.\textsuperscript{354} Popular sports in South Africa include soccer, rugby, and cricket.\textsuperscript{355} Sportpersonals in South Africa are as popular as any other celebrity in South Africa. Some of them are exploiting their fame off the field in endorsement deals.

Ben Sihanya reports that South African sportpersonals earn substantial income not only from their on-field performances, but also from the sponsorship deals and endorsements concluded between them and the vendors of certain goods or services.\textsuperscript{356} For instance, Ernie Els, a high rated golfer has had a few endorsement deals.\textsuperscript{357} The professionalization and commercialization of sports in South Africa has made sports an industry in South Africa and the image rights of sportpersonals have immense commercial value.\textsuperscript{358}

These image rights are sought after by companies who wish to exploit them in order to enhance brand image, create brand awareness, and promote the sale of their products. Individual sportpersonals are therefore treated as commodities and are commercialised.\textsuperscript{359} This comodification of sportpersonals is also reality in Kenya as discussed in chapter 2.\textsuperscript{360}

South African law recognizes that every individual possesses the right to privacy under the Constitutional right of privacy and the South African law of delict.\textsuperscript{361} South African law does not expressly recognise the concept of a right of publicity like the US meaning there is no

\begin{flushleft}
\textsuperscript{353} S. 3 (1)(c) Judicature Act CAP 8 Laws of Kenya. \\
\textsuperscript{360} See chapter 2 of the thesis. \\
\end{flushleft}
specific legislative protection available to sports persons and celebrities.\textsuperscript{362} The Constitutional right to privacy is limited to protection of human dignity.

This was because privacy primarily protects human dignity, not the commercial value of an individual’s image. However, over time, the economic value of image rights led to the distinct recognition of image rights under South African common law. This change of approach can be beneficial in Kenya because the right of privacy in Kenya is also limited in its application to protection of human dignity, not the monetary damage caused by misappropriation of image.

\subsection{4.3.1 Right to Privacy in South Africa}

Privacy is an individual condition of life characterised by exclusion from publicity.\textsuperscript{363} In South Africa the right to privacy is protected by both Common law and the Constitution.\textsuperscript{364} Section 14 of the South African Constitution, which protects the right to privacy, provides that everyone has the right to privacy, which includes the right not to have: their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed. Just like the Kenyan Constitution, this right of privacy does not extend to protecting the commercial damage caused by misappropriation of image. The position in South Africa is however salvaged by the common law right of privacy.

As for common law, there was no sophisticated concept of privacy in the Roman law, but the Roman jurists recognised a number of specific instances where a remedy was provided for a wrong which could be interpreted as an impairment of privacy for instance, invasions of sanctity of the home.\textsuperscript{365}

The Constitutional right to privacy and the common law right to privacy are interdependent as established in the case of \textit{Bernstein ao v Bester NO ao}.\textsuperscript{366} The Constitutional entrenchment serves as further support of the common law right. In terms of the common law every person

\begin{itemize}
\item[\textsuperscript{363}] J Neethling (2005) \textit{Neethling’s Law of Personality}, LexisNexis Butterworths, 2\textsuperscript{nd} ed.
\item[\textsuperscript{366}] \textit{Bernstein ao v Bester NO ao} (1996) 2 SÅ 751
\end{itemize}
has personality rights such as the rights to physical integrity, freedom, reputation, dignity and privacy. Sport image rights fall under dignity, reputation, and privacy.

The case of *O'Keeffe v. Argus Printing and Publishing Co Ltd ao* also stands as a landmark case as it is the first case to recognize the right to privacy as a standalone right in South African law. In this case the plaintiff who was a well-known radio personality had consented to the publication of her photograph, taken at a pistol range, being used for the purpose of a newspaper article. The photograph was, however, used in the press for advertising purposes. Watermeyer AJ interpreted *dignitas* so widely as to include the whole of legally protected personality excluding bodily integrity and reputation. The Supreme Court cited the US case of *Tolley v. Fry* noting that in the United States, the unauthorised publication of a person’s photograph for advertising purpose is actionable. The court concluded that 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’. Privacy is defined in South Africa as an individual condition of life characterised by exclusion from the public and publicity, embracing all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private. Following this definition, an individual personally determines the private nature of facts. In addition, he must exhibit the will or desire that facts should be kept private. However, the Constitutional right to privacy does not protect the patrimonial value of image rights. The common law right to privacy, however, does.

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368 *O'Keeffe v Argus Printing and Publishing Co Ltd ao* (1954) 3 SCA.
4.3.2 South African Common Law on Privacy

South African law does not have a standalone right to image. However, sports persons and other celebrities can protect the image rights under the common law right to privacy.\(^{373}\)

The common law is also referred to as the South African law of delict.\(^{374}\) The South African law of delict is a mixed system developed from a civilian (Roman-Dutch) background with English common law grafted into it. The Roman law of delict was a product of actions based on Roman law in particular *Actio Legis Aquiliae* and *Actio Iniuriarum*\(^{375}\) that provide for compensation in respect of damage caused intentionally or negligently.\(^{376}\) The general principles underlying these forms govern the field of delictual liability in modern South African law.\(^{377}\) Kenya still applies British common law which does not recognize the patrimonial nature in the image of a person because it does not fit into any of the existing torts. The British common law can apply only if it is developed to recognize the patrimonial aspect of a person’s image.

Following the general principles of common law, the South African law of delict or tort is essentially based on three remedies: the *Actio legis Aquiliae* action, with which damages for patrimonial loss is claimed; the *Actio Iniuriarum*, with which compensation is generally claimed for intentional conduct which results in injury to person or personality; and the *Action for Pain and Suffering*, with which compensation is claimed for negligence which results in impairment of the physical and mental integrity of an individual.\(^{378}\)

Therefore any wrongful acts that cause patrimonial loss and infringement of interest of personality are actionable in South Africa under the common law.\(^{379}\) The common law


\(^{374}\) A delict is the act of a person that in a wrongful and culpable way causes harm to another. See J Neethling (2005) *Neethling’s Law of Personality*, LexisNexis Butterworths, (2nd ed).


\(^{377}\) C G Van der Merwe & J E Du Plessis *Ibid*.


however applies in limitation; it must apply in consistency with the Constitution and in consideration of public interest. It is not absolute.\textsuperscript{380}

After the \textit{O'Keeffe} case established the right to privacy as a separate right in 1957, the next significant case impacting image rights was in 2007 in the case of \textit{Grutter v Lombard}.\textsuperscript{381}

In this case the appellant and respondents practised as attorneys in common premises under the name "Grutter and Lombard". In 2005 the appellant terminated his ties with the respondents and went into partnership with another attorney under the name "Grutter and Grobbelaar". The respondents nevertheless continued to practise under the name "Grutter and Lombard". The appellant demanded that the respondents cease the use of the name "Grutter" in the description of their practise, but they refused. He filed a suit to seek an order but his application was dismissed prompting him to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal at last got the opportunity to further investigate the rights of the individual with regard to the commercial exploitation of his or her image.\textsuperscript{382}

In a unanimous judgment, it was held that case rested on violation of the right to privacy. Judge Nugent held that privacy is merely one of a variety of interests that enjoy recognition in the concept of personality rights in the context of the \textit{action iniuriarum}. The interest which a person has to protect his or her identity against exploitation cannot be distinguished there from and is similarly encompassed by that variety of personality rights which is worthy of protection. The court defined the right to identity in rather broad terms so that more than just the name or outward appearance of the individual is considered worthy of protection.\textsuperscript{383} The extension of the right to privacy to protect image rights is another option that Kenya to consider, however, it would not sufficiently protect both the proprietary and monetary aspects of sports image right. A stand alone right to image would avoid such limitations.

Rachel Sikwane and Zaid Gardner contend that South African celebrities do enjoy protection against the intrusion of their persona rights arising from the unauthorised or unlawful


\textsuperscript{381} Grutter v Lombard (2007) 4 SCA.


commercial exploitation of their image rights.\textsuperscript{384} However, the common law of privacy only applies where a defendant has infringed one or more of a celebrity's personality rights, including their right to privacy, dignity, and identity. This means that image rights can only be invoked where unauthorised use has the effect of lowering the reputation of the celebrity in the eyes of the public.

In such case, a defamation action would be available; and where such unauthorised use infringes the privacy of the celebrity, an action for breach of privacy would be available either under the common law or by virtue of the constitutional protection afforded to the right of dignity in the South African Bill of Rights. Rachel Sikwane and Zaid Gardner make a further observation that this has resulted into South African sports persons and other celebrities to seek protection for the patrimonial value of their image rights in other areas of the law such as trade mark law which does not fully protect against all forms of image rights misappropriation.\textsuperscript{385} They further recommend the judicial recognition of a standalone right to image.\textsuperscript{386} Kenya also needs to recognize the right to image in order to keep up with the commercial realities of the sports industry.

The South African Trade Marks Act makes provision for the protection of, amongst other things, devices, signatures, words as trade marks.\textsuperscript{387} It allows sports persons and other celebrities to register their names and other images attributes as trade marks and trade mark infringement proceedings may be instituted against an infringer who makes unauthorised use of the image or an image confusingly similar to the registered image trade mark. The Kenyan Trade Marks Act does not provide for registration of image and can therefore not avail such protection.

However, the trade mark law does not and cannot sufficiently protect the proprietary and economical value of image rights because a trade mark is a mark used or proposed to be used in relation to goods or services for the purpose of indicating a connection in the course of trade between the goods or services and the registered owner. Amending the trade marks act

\textsuperscript{385} Rachel Sikwane & Zaid Gardner \textit{ibid}.
\textsuperscript{386} Rachel Sikwane & Zaid Gardner \textit{ibid}.
\textsuperscript{387} Trade Marks Act, 1993
would still not be sufficient protection and South Africa would also need a standalone right to image in order to keep up with the commercial realities of the modernised world.  

### 4.4 Summary of Comparative Analysis of the Best Practises in Regulating Sports Image Rights in US, Guernsey and South Africa

This chapter has examined the models used in the US, Guernsey and South Africa to regulate sports image rights. From the outset, one common theme was established, that all these three countries share a realization that an individual has a right to their image in all its forms and that there is need to protect it from unauthorized commercial exploitation.

Following the comparative analysis, it is deduced that the right to image as an IPR was developed from the right of privacy and that the right possesses both aspects of privacy, expressed in exclusivity, also referred to as extra-patrimonial right and pecuniary value, recognised and protected under IP as patrimonial rights.

This means that the right to image can be protected as one single right that possesses both the patrimonial and extra-patrimonial rights. In this case this will be through a standalone right and secondly, it can be protected as a piecemeal right, meaning it will have to rely on laws that exclusively protect the patrimonial right and others that protect the extra-patrimonial right. This right to image in this nature is based on broad interpretation of existing statutory provisions and common law.

The three countries studied in this chapter modelled their regulative mechanisms on one of these two approaches. The following summarizes these methods.

#### 4.4.1 Method 1: Amending various laws to accommodate stand alone right to image (Right of Publicity); Case of the US

After establishing that the right of privacy was not sufficient, common law developed the right of Publicity as established earlier in this chapter. Several states then went ahead to amend their laws to protect this right to image. For example the New York state legislature responded by amending the states civil rights law; California’s civil code as well; the federal trademark law also provides for false endorsements among other legislations.

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In this model, there is the legal recognition of a standalone right to image that has the dual patrimonial and extra-patrimonial rights. This model is easy to implement in terms of time, effort and finances as it takes into consideration, the process of creating a new specific legislation all together. If applied in Kenya, it means the recognition and definition of the right to image which can be added to the existing IP laws as new kind of IPR.

4.4.2 Method 2: Establishment of standalone legislation and a regulative body; the case of Guernsey

Being a common law entity, the Bailiwick of Guernsey applied the common law tort of passing off, defamation and breach of confidence to an extent in settling issues of image rights. However, upon realization that these common law actions did not fully meet the nature of image rights, the legislature, state of Guernsey passed the first World’s law for the registration and enforcement of image rights. The Bailiwick of Guernsey Image Rights legislation enables individuals to register their image rights and protection is granted through.

This gives a robust, certain and unequivocal protection to sports image rights but it would take time, a lot of money and other resources to set up the legal and structural infrastructure.

4.4.3 Method 3: Piecemeal Protection of the Right to Image under Existing laws: Case of South Africa

This approach does not offer a specific legislation that recognizes the right to image; instead, the right of image is interpreted and enforced by extending existing laws, both statutory and common law that protect privacy and laws that offer compensation where injury can be inferred in a case of unjust enrichment. This is South Africa’s approach where the right to image is protected by extension of the right to privacy and tort law.

This therefore means there is no specific right to own image in any law. This leaves image right issues uncertain and up to the discretion of the court as it interprets existing laws; there is no guarantee of redress for misappropriation of image. This research opines that an express statutory provision is necessary for certainty and avoidance of doubt as well as confusion.

4.5 Best Option for Kenya in Regulation of Sports Image Rights

Chapters 3 and 4 establish that without legislation, an individual who commercially exploits sports image rights without consent cannot be held liable to account for the unjust enrichment. This is the prevailing situation in Kenya. While the Law of Contract offers protection, because producers of goods and services who are willing to are seeking the consent of sports persons before exploiting their image. The consent is exercised through contractual agreement which must meet all essential elements of contract, among them, consideration. This has enabled some sports persons to benefit from the commercial exploitation of their image.

The problem however arises when unscrupulous producers of goods and services commercially exploit the image of a sports person without seeking their consent and refuse to voluntarily enter into an agreement that will enable them use the image rights for a price. It is clear the exploitation of sports image rights is big business.

To curb this injustice, there is need for the legal recognition of the right to image in Kenya. This will need statutory definition of the right because image is more than just a photograph; it extends to the identity of an individual. There is also need for a registration mechanism because as a type of IPR, protection is granted by registration. This also calls for a regulative body to oversee the registration, licensing of sports image rights and maintaining a register. There is need for a right to image which stops the unauthorised commercial exploitation of a sports person’s name, likeness, or other recognisable aspects of their qualities. This will give sports persons the exclusive right to license to others, the use of their identity for commercial exploitation.

Based on the fact that Kenya already has a functioning IPR structure, the researcher is of the opinion that there is no need for a new statute to create the right to own image. Instead, the US approach would be suitable.

This means the amendment of existing relevant laws to create, define and protect the right to image. There will be need to also establish an administrator to act as the registrar with the
power to determine what qualifies as image rights and register such qualifying image characteristics. This will enable sports persons to enjoy protection through registration.

Amendments can also be introduced in the competition and consumer welfare laws to require all advertisers to obtain written consent from sports persons and any other person whose image they wish to exploit in endorsements or merchandizing. Such that failure to do this will give the sports person cause to seek redress.

4.6 Conclusion to Comparative Analysis of the Best Practises in Regulating Sports Image Rights in US, Guernsey and South Africa

The sports industry today is a wide-reaching business that spans all over the world because sports events connect states internationally. As much as €450 billion ($620 billion) is spent every year in the sports industry, which is catering to an ever-more fervent fan base and this complex business environment features is not limited to the European region, it is a common feature in sports industries all over the world.

Because sports image rights have become valuable assets and they are susceptible to some form of risk and the danger usually comes from the misappropriation of a sports persons image rights by both unscrupulous entrepreneurs and big business leading to new questions at law have arisen, including whether the law should protect sports persons against the unlawful use of their image rights.

As a result, many states have created legislation to protect sports image rights, to enable sports persons the exclusive right to exploit their image commercially and also protect such image rights from misappropriation.

For example, in the US, an individual has the right to control and profit from the commercial exploitation of their persona under the right of publicity. This right is derives from the right

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to privacy.\textsuperscript{395} In Guernsey, sports persons can protect their image rights through registration under a standalone statute that specifically caters for the right to own image.\textsuperscript{396} Likewise, sports persons in South Africa also have the right to their image which encompasses a wide scope including identity and personal characteristics.\textsuperscript{397} Where the right of identity is violated or a personality right is infringed upon, a sportsperson can claim dignity through the \textit{Actio iniuriarum} and if there was any patrimonial loss, damages can be claimed through \textit{actio lagis Aquiliae}.\textsuperscript{398}

Therefore, even though there is no express recognition of a standalone right to image, personality rights extend to protect patrimonial losses caused by intrusion of privacy. There is no such extension of the right to privacy in Kenya. The right to privacy allows for an action for damages of the intrusion of privacy but does not recognise any monetary value of a personality; hence the right of privacy in Kenya cannot apply in protecting sports persons’ image from commercial misappropriation.

Kenya’s sports industry is also thriving on the exploitation of sports image rights. However, despite this commercialization, there is no legislation that recognizes and protects sports image rights. This research sought to establish the need for legislative intervention in sports image rights in Kenya. The objective of this chapter was to establish legislative practices in US and South African legal framework towards effective protection of sports image rights that Kenya may emulate having established the need for sports image rights in chapter 2.\textsuperscript{399}

Further, there is a widespread agreement regarding the need for legal protection of the patrimonial aspect of a person’s image, and Kenya needs to consider the recognition of a new property right to prevent the unauthorised exploitation of a sports person’s image.

\begin{footnotes}
\item[399] See chapter 2 of the thesis.
\end{footnotes}
From the foregoing, it is clear that protection of sports image rights is more developed in South Africa than in other African countries and even though there is no specific legislation that provides a distinct property right to image, South African sportspersons earn substantial income not only from their on-field performances, but also from the valuable sponsorship deals and endorsements concluded between them and the vendors of certain goods or services.\footnote{Ben Sihanya (2015) “Character Merchandising, Endorsement and Sponsorship in Kenya and Africa,” 8 UONLJ at uonlj.uonbi.ac.ke/sites/default/files/media/vol_8_2015_unlj.pdf (Accessed 20/5/2016).} Kenya has no such protection, hence leaving sportspersons vulnerable to unauthorised commercial exploitation of their image.\footnote{Ben Sihanya (2015) “Character Merchandising, Endorsement and Sponsorship in Kenya and Africa,” 8 UONLJ at uonlj.uonbi.ac.ke/sites/default/files/media/vol_8_2015_unlj.pdf (accessed 20/5/2016).}

The findings of this chapter further show that the legal recognition and protection of sports image rights will increase litigation. This is evident by the number of case law successfully decided by the courts and evidence of income generated by commercialization of sportspersons. The advantage of having a legal framework in place is that there is a dispute resolution mechanism in place and confidence to enforce the right. The same is likely to happen in Kenya with the recognition and protection of sports image rights.

The benefits outweigh any limitations considering the high number of sportspersons exploiting their image. It is clear that legislative recognition and protection of sports image rights creates legal clarity as to define the scope of protection of image by classification of sportsperson’s rights and public interest.
CHAPTER 5

SUMMARY FINDINGS, CONCLUSION, AND RECOMMENDATIONS OF THE STUDY ON SPORTS IMAGE RIGHTS IN KENYA

5.1 Introduction to the Summary Findings, Recommendations, and Conclusion of the Study on Sports Image Rights in Kenya

This study is premised on the argument that the existing IP laws in Kenya do not sufficiently address the growing commercial reality regarding the exploitation of sports image rights in Kenya and that hence there is a need for state intervention in regulation of sports image rights to resolve conflicts in the commercial exploitation of the image of sports persons in Kenya. In Chapters 1 and 2, it was established that there is no legislation regulating sports image rights in Kenya and that there is a need for legislative intervention to regulate the same.\(^{402}\)

This study had 3 specific objectives. The first objective of the study was to analyse the legal framework in Kenya and identify the need for sports image rights in Kenya’s sports industry. This was done in chapter 2. Chapter 2 established that Kenya needs a sui generis right to image that can protect sports image rights without interfering with the cultural, social and political disposition of sports in Kenya. This balance can be achieved by separating the identity of one individual sports persons from the rest as a result of individual effort and success in sports. This is because sports persons need to protect their identity from unauthorised commercial exploitation and further, the economic benefits attached to such right.

The second objective was to consider the best practices in US, Guernsey and South African legal framework towards effective protection of sports image rights that Kenya may emulate. This was guided by the research’s overarching argument that that there is a need for a standalone right to sports image.\(^{403}\) Chapter 4’s comparative study of the US, Guernsey and South African’s legal approach to issues arising from unauthorized commercial exploitation of sports image rights establishes and justifies the proprietary nature of sports image rights. It establishes the need for legislative intervention in Kenya for a proprietary a standalone right

\(^{402}\) See chapter 1 for the background of the research. Chapter 2 of the thesis explores the sports industry in Kenya.

\(^{403}\) Chapter 4 of the thesis looks at the right of publicity in the US, right to image in Guernsey and personality rights in South Africa.
to image through amending existing IP laws and other related laws to prevent unauthorized commercial exploitation of sports image rights.

The last objective was to make suggestions on appropriate ways of creating an effective IPR framework for sports image in Kenya based on lessons learnt the US, Guernsey and South Africa. Many jurisdictions recognize and protect the right to image. Notably the United States has had a big contribution to the development and protection of image rights. The right held by an individual to its “persona” is known in different jurisdictions by a variety of names, including “rights of publicity” in the USA, “rights of privacy” in the UK, and “rights of personality” in continental Europe. Chapter 5 ultimately establishes that IPRs can only be granted by the State and therefore the Kenyan Government needs to recognize a standalone right to image so that sports persons whose image can satisfy the criteria set by such law for protection can apply. There is need to ensure that the same is well regulated and third parties do not take undue advantage of the commercialisation of sports image rights in Kenya.

To meet its objectives, this research sought to answer 3 research questions. The first question to be determined was if there is need for legislative intervention in regulation of sports image rights in Kenya. This question is answered in chapter 2 of the thesis which explores the sports industry in Kenya. Kenya’s sports industry is a great contributor to the economy but the failure to self regulate sports image rights is evidence that there is need for Government intervention by creation of a standalone right to image. As Dr. Marisella Ouma observes, the use of images and personality rights is gaining currency in Kenya and there is need to ensure that the same is well regulated and third parties do not take undue advantage of the commercialisation of the same.

Chapter 3 also contributes by illuminating how despite Kenya having a functioning IPR framework, there is no redress for a sports person whose image has been commercially

406 See Chapter 2 of the thesis.
exploited without consent. This chapter looks at the role of IP and connection between IP and image be establishing the patrimonial and extra-patrimonial rights in the identity of a person.

Chapter 4 of the thesis studied and analyzed the protection of sports image rights in the US, Guernsey and South Africa, in a bid to learn if Kenya can benefit from taking a similar approach in regulating sports image rights. Chapter 4 also answers this question further by considering the IPRs framework in Kenya to determine if sports persons can rely of the current IPRs to protect their image rights from misappropriation. This chapter established that there is need for a right to image which stops the unauthorised commercial exploitation of a sports person’s name, likeness, or other recognisable aspects of their qualities. This will give sports persons the exclusive right to license to others, the use of their identity for commercial exploitation.

The last research question to be determined is what measures should be taken to create effective sports image rights protection framework in Kenya. This is answered by chapter 5 of the thesis which makes recommendations based on the findings of the research.

These research objectives and research questions led to the research hypothesis that sports persons in Kenya lose economically because there is no right to image in Kenya. This sets the overarching argument of the thesis that no existing laws in Kenya can adequately protect a sports person’s image from commercial misappropriation, hence the need for a standalone right to image. The legislative recognition of a standalone right to image would give sports persons’ control of the commercialization of their image because commercialization of sports image rights is big business. It is also unjust to allow unscrupulous persons to commercially exploit sports image rights and profit from the identity that is not theirs.

This research’s argument is that there is need for a standalone right to Image in Kenya, to protect against unauthorized commercial exploitation of sports image rights based on an Africanized IP system leading to the hypothesis that sports persons in Kenya lose economically because there is no right to image. This chapter seeks to analyze the findings of the research questions in order to determine whether or not the hypothesis is true and to also

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408 See Chapter 1 of the thesis.
make recommendations on the way forward regarding the protection of sports image rights in Kenya.

5.2 Research Findings of the Study on Sports Image Rights in Kenya

In pursuit of the three research objectives, this research sought to answer three questions. The questions determined were; if there is need for legislative intervention in regulation of sports image rights in Kenya; what is the role of IP in sports image rights and what measures should be taken to create a more effective sports image rights protection framework in Kenya.

It is this research’s finding that the IP laws of Kenya do not sufficiently address the growing commercial reality regarding the exploitation of sports image rights and there is need for state intervention in regulation of sports image rights to resolve conflicts in the commercialization of sports in Kenya.409

Further, the research focusing on finding workable answers that would embrace the Kenyan sports culture and ethics without blindly applying westernized IPR found that before the western influence, indigenous Africans had developed an Africanized philosophy of property ownership based on African culture, traditions, and environment and this research sought to add to the development of African IPR established in chapter 1.8 of the thesis.410 There is need for a standalone right to image based on African IP framework. This position is advocated for by established IP experts in Africa such as Professor Ben Sihanya411 and Dr. Marisella Ouma412 among others.

This research establishes that it is very possible to grant a sports person the right to control the commercial exploitation of their image without compromising the public’s interest in sports as well as communal privileges attached. In fact, The Government of Kenya already appreciates the social and cultural significance of sports in the political stability of Kenya and saw the need regulate the entire conduct of sport and business in order to control interests

409 Chapter 4 of the thesis sets out the political economy of intellectual property in sports image rights.
410 See chapter 1.8 on conceptual and theoretical framework of the study on sports image rights in Kenya.
of the parties involved, including fundamental issues of public interest.\textsuperscript{413} This intervention led to the development of sports law in Kenya, culminating to the Sports Act.\textsuperscript{414} It is this researcher’s contention that the Sports Act does not and cannot sufficiently protect both the patrimonial and extra-patrimonial duality of sports image rights and therefore calls for a new IPR, the right to image. This will prevent the unauthorised commercial exploitation of sports image rights because all advertisers as well as merchandisers will be required to seek consent before exploiting sports image rights. This will be done through contractual agreements.

This proves the research’s hypothesis that sports persons in Kenya lose economically because there is no right to image. There is need for state intervention in regulation of sports image rights to resolve conflicts in the commercialization of sports in Kenya.

This research finds that it is possible for states to create a separate and legitimate IPR that can protect a sports person’s image from unauthorised commercial exploitation, as illustrated by the US. It also finds that even though the African philosophy of property remains common and traditional to date, this only applies to certain types of real property, different from the privatization of property in western states.\textsuperscript{415} The Constitution of Kenya lays aside for the moment, the African property theory that property belongs to the whole community by granting an individual the right to own property individually or in common with others. Based on this, this research argues that where an individual invests labour and effort in sports and gains fame, popularity and an identity that has marketable status, without causing harm to the communal sports interest, the individual has a right Control the commercialization of that identity.

There is therefore need to create a standalone right to image that balances the Kenyan sports culture in pursuit of public interests on one hand and the interests of Kenya sportspersons’ in the commercial value of their image on the other.\textsuperscript{416}

\textsuperscript{414} Sports Act, 2013 Laws of Kenya.
\textsuperscript{415} See chapter 1.8 of the thesis.
The Constitution of Kenya provides the foundation for such a law\textsuperscript{417} and the opportune time is now for Kenya to be one of the sovereign states with a recognisable right to image. However, this must be done with caution in order to strike a balance between the right of a sportsperson to protect their image and freedom of expression as well as sports cultural interest of the public. This balance has been achieved elsewhere and this research suggests that legislation new IPR should be modelled on a combination approach, by considering the dual nature of image rights: the patrimonial and dignitary attributes in one right, not piecemeal legislation as in the case of South Africa. This then calls for a new IPR because IP laws protect privacy by granting exclusivity and the monetary value by allowing authorised licensing of a right capable of being transferred.

The Kenyan Government however needs to carefully determine the stand alone right to image to avoid Constitutional infirmities. The exceptions to IPRs enforcement established by Copyright, patent and trade mark laws should be used to set a guideline so that the right to image does not interfere with public interests. The courts will also have to be very cautious in granting remedies that such law will provide. The remedies should be granted on case to case basis to ensure no Constitutional rights are infringed.

5.3 Conclusion of the Study on Sports Image Rights in Kenya

This research has led to a better understanding of both the US, Guernsey and South African legal systems in relation to the right to image that protects sports image rights from unauthorised commercial exploitation. The comparative study has exposed theories, justifications, and difficulties in protection of sports image rights.

The US reacted to issues arising from unauthorised commercial exploitation of celebrity identity by creating a standalone proprietary right, the right of publicity. Guernsey outstandingly created the first ever standalone legislation that creates the right to image, allows for registration and grants protection. South Africa on the other hand responded by extending the traditional common law right to privacy to protect the unauthorised use of a person’s image.

The comprehensive comparative study has established that the right to image is a right that enables individuals, like sports persons, who have gained fame and popularity to protect

\textsuperscript{417} Constitution of Kenya, 2010 Art 109(1) provides that Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.
characteristics of their person from being exploited without their consent. The right consists of a framework allowing them to voluntarily transfer their marketable status to interested parties, at a fee.

First off, Kenya needs to create a standalone right to image; however, it should not be created without consideration of how the consequences will affect the sports industry and the sports culture in Kenya as well as the limitations of fair use in Kenya. South Africa’s approach illustrates that stretching already existing laws beyond their original purpose may not satisfactorily protect sports persons from unauthorised commercial exploitation of their image rights. This proves this research’s hypothesis that sports persons in Kenya lose economically because there is no right to image. This is because a standalone right to image would ensure 3rd parties cannot exploit sports image rights without consent of the sports persons upon paying the necessary licensing fees.

Secondly, Kenya can learn and benefit from the academic works, debates and theories put forth in the US, Guernsey and South Africa to assist our law makers think broadly about the legislative intervention to regulate sports image rights in an Africanized property context. This will allow Kenya to avoid controversies and issues that have been already dealt with in the development of the right to image.

Lastly, the comparative analysis of the US, Guernsey and South Africa establishes that due to the commercialization of sports, there is need for legislative intervention for protection and regulation of sports image rights through a well constructed, thought out comprehensive legislation that defines sports image rights, the scope of its protection, limitations of the right and ensures a balance of public interests in sports, sports persons as well as the sports culture in Kenya.

Therefore, this cements the argument that a sui generis right to image is needed in Kenya to help sports persons protect their image from unauthorised commercial exploitation.⁴¹⁸

5.4 Recommendations on Sports Image Rights in Kenya

The primary objective of this study was to evaluate the need for legislative intervention for sports image rights in Kenya in a bid to determine whether there is need for legislative intervention in regulating the commercial exploitation of sports image rights.

Even though sport is not capable of being owned, sports events can be owned.\(^{419}\) A lot of money is invested in sports events which are treated as commercial activities. The sports industry also generates a lot of revenue as return investments. In order to protect the investment of parties in the commercialization of sports and to maintain the industry, a set of laws dealing with IPRs has been applied in many jurisdictions, including Kenya, to protect the interests of the parties involved in sports.\(^{420}\)

Chapter 3 of the thesis has established that the current IPR framework does not protect the patrimonial and extra-patrimonial rights attached to sports image rights. This research’s findings highlight that Kenya needs to come to grips with the issue of sports image rights and deal with the issue effectively and comprehensively. Such that the next time a sportsperson, such as challenging the unauthorised use of his image or identity, he will have recourse and the courts will have a way forward in deciding the matter.

There is urgent need for the recognition and protection of sports image rights in Kenya. By creating a recognisable statutory enforceable right, opportunities can be created for sports celebrities to commercially exploit such a right and at the same time prevent unauthorized commercial exploitation of their image. This research therefore recommends creation of a new IPR that recognizes the right to image which includes: name of a person the voice, signature, likeness, appearance, silhouette, feature, face, expressions, gestures, mannerisms, photograph, illustration, image, picture, moving image or electronic or other representation and any other distinctive characteristic or personal attribute of a person\(^{421}\) as property.

The state also stands to gain from the tax imposed on revenue generated from sports image rights. As Professor Ben Sihanya rightly put, the lack of a standalone right to image is a big


\(^{420}\) Mukul Mudgal *ibid*.

challenge in Kenya.\textsuperscript{422} IP protection and promotion will foster development of wealth in the sports industry.\textsuperscript{423} There is therefore a need for state intervention in regulation of sports image rights by creating a standalone Africanized right to image in Kenya.

Given that Intellectual Property is a great contributor to the economy,\textsuperscript{424} it is also recommended that a regulative body be created to oversee granting of sports image rights at a fee, licensing, and dispute resolution of sports image rights issues. The regulator will be responsible for determining registration as well as maintaining a register of protected images.

The Government also needs to make sportspersons and other industry players aware of their image rights and the impact the commercialization of sports has on the economy. With proper awareness and security of legislative protection, there is bound to be increased commercial exploitation of sports image rights.

Considering that the sports industry is multi-national, this research recommends a harmonization of sports image rights in all states so as to avoid confusion and chaos internationally. An international agreement to set the minimum standards for the protection of sports image rights is needed. This would also grant African state the freedom to develop an Africanized right to image without being left out. It is evident that the control and economic incentive attached to the right to image will greatly benefit sports persons in Kenya.

In the interim sports persons are advised to seek professional help and guidance in commercial exploitation of their image through sports image rights contract, especially when it involves aspects of their image and character merchandising rights.\textsuperscript{425} Skilled legal representatives should oversee drafting of sports image rights contract to properly negotiated and structured agreements to ensure fair exploitation of such rights to the benefit of the sports person. Further, use should be made of existing IPRs that overlap with existing such as trade mark registrations, wherever possible.

\textsuperscript{424} See chapter 4 of the thesis.
The researcher also hopes to join forces with IP advocates in spearheading the presentation of a bill before the Kenyan parliament to initiate the legislative process that will ultimately lead to the creation of a regulatory infrastructure governing sports image rights in Kenya.
BIBLIOGRAPHY

BOOKS AND MONOGRAPHS


Cappelletti M, Merryman JH & Perillo JM, *The Italian Legal System: An Introduction*, SUP.


116


**BOOK CHAPTERS**


**JOURNAL ARTICLES**


119


Sihanya, Ben (2014) “Sihanya Mentoring Guidelines on LLM Research Project Citation, Punctuation, Formatting, Corrections, Submissions and Marking Scheme”.


William, van Caenegem (1990) “Different approaches to the protection of celebrities against unauthorised use of their image in advertising in Australia, the United States and the Federal

NEWSPAPER, MAGAZINE AND ONLINE PUBLICATIONS


YouTube at [https://www.youtube.com/](https://www.youtube.com/).

**THESES and DESSERTATIONS**

