

COPYRIGHT OWNERSHIP IN PHOTOGRAPHY: UNRAVELLING NIGERIA GAME-CHANGING LEGISLATION

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Abstract:

Nigeria's ground breaking Copyright Act of 2022 has ushered in a new era of copyright protection, particularly in the realm of photography. This article delves into the transformative elements of the Act, shedding light on its impact on the ownership of photographic works. Notably, the Act affirms that photographers retain primary copyright ownership, irrespective of commissions or employment arrangements, reinforcing their creative rights in the digital age. The Act's implications for the copyrightability of everyday cell-phone snapshots are explored, highlighting the significance of creative input in establishing robust protection. Complexities surrounding exceptions to copyright ownership, including fair dealing, transfers, and specific entity usage, are dissected, providing clarity on the legal landscape. Duration of copyright is addressed, as well as the intricate interplay between image rights, privacy, and the art of photography. The article underscores the responsible practice of seeking consent when photographing identifiable individuals for commercial purposes, underscoring the importance of ethical considerations in the field of copyright. As the global community observes "World Photography Day" every 19th of August, these insights offer a timely reflection on the enduring importance of copyright law in fostering a vibrant atmosphere for creative expression.

Introduction:

On March 17, 2023, Nigeria promulgated a new copyright era with the enactment of the Copyright Act 2022. This new law replaces the previous Copyright Act CAP C28 LFN 2004 and brings significant changes that will affect creativity and strengthen their rights, especially in the digital domain. The Act acknowledges digital copies of works, grants the Nigerian Copyright Commission the authority to enforce compliance, recognizes audiovisual works for copyright protection, sets the tenure of moral rights, and establishes licensing regulations for photography and arts, among other provisions.¹

The primary objective of the Act is to protect authors' rights, ensuring fair rewards and recognition for their intellectual efforts, while also providing appropriate limitations and exceptions to guarantee access to creative works and achieve other objectives.² Photography is classified as an artistic work and is eligible for copyright protection.³ Overall, the Act incorporates many elements from the previous law but introduces noteworthy changes to accommodate developments in the digital era. Some of the keywords in the Article are: Copyright, Photograph, Ownership, Author, Creative, Work, Artistic, etc.

The subject matter of copyright revolves around communication and aims to control the copying of protected works by unauthorized individuals. Copyright grants the exclusive right to perform certain acts concerning the work in question. It is important to note that copyright primarily focuses on safeguarding the expression of ideas rather than the ideas themselves. In the case of *Donoghue v. Allied Newspaper Limited*,⁴ Lord Farewell emphasized that copyright does not extend to the protection of mere ideas.

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¹ An overview of the Copyright Act 2022 - [Businessday NG](https://www.businessday.ng).

² Section 1 (a & b) of the Copyright Act 2022.

³ Section 2(c) of the Act

⁴ *Donoghue v. Allied Newspaper Limited* (1937) 3 Ch. D. 503 Chancery Division in the United Kingdom

An individual may have a brilliant idea for a story, picture, or play, but copyright protection comes into play only when that idea is expressed and embodied in a tangible form, such as a book, play, or artwork. In such cases, the person who transforms the idea into a concrete medium holds the copyright, while the originator of the idea does not possess any rights to the resultant production. However, for an expression of ideas to be eligible for copyright protection, it must satisfy certain criteria. It needs to be original, meaning it should not be copied from someone else's work, or should be novel, implying that not all photographs are protected by copyright; they must meet a certain threshold of originality. Furthermore, the expression must be fixed in a definite medium of communication, whether existing at the time of creation or later developed, that enables it to be perceived directly or with the aid of a machine device.⁵

According to Will Kenton,⁶ Copyright infringement is the use or production of copyright-protected material without the permission of the copyright holder. Copyright infringement means that the rights afforded to the copyright holder, such as the exclusive use of a work for a set period of time, are being breached by a third party. Copyright is infringed by any person who without the authorisation of the owner of the copyright does or causes any person to do an act, which constitutes a violation of the exclusive rights conferred under the Act;⁷ as such Copyright is a legally actionable wrong.⁸ Anyone claiming their copyright has been infringed can seek damages, injunctions, or accounts, depending on the circumstances of the infringement.

The landmark case of *Burrow-Giles Lithographic Company v. Napoleon Sarony*,⁹ played a pivotal role in establishing photography as an artistic work deserving of copyright protection and also one of the historic court case that helped shape scope of copyright protections. In this case, photographer Napoleon Sarony filed a lawsuit against Burrow-Giles for reproducing his photograph of Oscar Wilde without permission. Burrow-Giles contended that photography did not fall under the category of "writings" in the U.S. Constitution and, hence, was not eligible for copyright protection. However, Justice Samuel Freeman Miller disagreed with this argument, asserting that photography could, indeed, be considered an original work of art. He emphasized that Sarony's creative decisions, such as posing the subject, arranging the setting, and eliciting the desired expression, showcased the artistic nature of his photograph. This ruling crucially recognized the creative process involved in photography and solidified its status as an artistic medium deserving of legal safeguards through copyright protection. The case set a precedent that paved the way for photography's recognition as a form of art under the law.

The question of copyright ownership in photographs often arises when a photographer is commissioned to capture images by a client. In Nigeria, the Copyright Act 2022 established the fundamental principle that the author of a photograph is granted initial copyright ownership, irrespective of whether the work was carried out during the course of employment or commissioned by a client¹⁰; normatively, this means that copyright is automatically granted upon the act of creation, without the need for formal registration as can be seen in patent & trademark rights. This legal analysis aims to explore the rights of photographers as original creators and copyright owners of their work, while also addressing exceptions to this rule through contractual agreements and few others.

⁵ Section 2(2) of the Copyright Act 2022

⁶ Kenton Will; Copyright Infringement: Definition, Meaning, Example and Criteria

⁷ Section 36 of the Copyright Act 2022

⁸ Section 37 of the Act

⁹ *Burrow-Giles Lithographic Company v. Napoleon Sarony*, 111 U.S. 53 (more) 4 S. Ct. 279; 28 L. Ed. 349; 1884 U.S. LEXIS 1757

¹⁰ Section 10 of the Copyright Act 2022

Copyright Ownership in Photographs:

Nigerian Copyright Act unequivocally grants the initial and inherent copyright ownership of a photograph to the person who takes the picture,¹¹ commonly referred to as the author of the work. This principle applies regardless of any financial arrangement or engagement with a client or employer. Therefore, photographers retain exclusive rights over their work, including reproduction, publication, display, and licensing. Belgore, J in *Oladipo Yemitan v. The Daily Times (Nig) Ltd & Anor.*,¹² asserted that "copyright fundamentally resides with the author, the individual responsible for the actual efforts, labor, knowledge, and skill invested in creating the work".

The definition of an "author" becomes pertinent, which in the context of a photographic work refers to the individual who took the photograph.¹³ See the case of *Banire V. NTA - Star TV Network Limited*,¹⁴ where the Appellant; Banire, sued the Respondent NTA Star TV for their unauthorised use of her image. In the instant case, the court of appeal held that copyright of photograph belongs to the photographer. The implication is that a photographer has the right to produce, reproduce and commercialize photo-images of the Photographed without his/her knowledge or consent.

In April 2017, the New York Daily News¹⁵ reported a case involving Celebrity Khloé Kardashian. She was sued for copyright infringement due to posting a paparazzi photograph of herself on her Instagram feed while visiting a Miami restaurant. The photograph had been exclusively licensed to the Daily Mail, and Khloe used it without their permission, removing their accreditation in the process.

Copyrightability of Casual Cell-phone Snapshots in Photography:

With the proliferation of cell-phones equipped with high-quality cameras, casual cell-phone photography has become ubiquitous. These snapshots capture everyday moments and often find their way onto social media platforms, but the question of their copyrightability has become a topic of discussion in the realm of photography. Photography has long been recognized as an art form deserving of full copyright protection. These creative choices include elements like posing the subject, using lighting and shade, determining the angle of the shot, selecting the camera and film, applying filters, and employing various developing techniques to produce the final result.

Undeniably, many cell-phone photographers demonstrate artistic talent and produce visually stunning images using their devices. In such cases, where significant creative decisions are made during the process of capturing the photograph, the full copyright protection traditionally afforded to professional photographers' works appears justified. In many "do you mind taking our photo" scenarios, the "photographers" do little more than click the button, without adjusting the phone's settings, and without making material contributions to any creative choices. Maybe the picture takers will tell the subject to "smile" or "squeeze in closer so I can get you all into the frame," but should that be enough to vest copyright ownership in them? (Isn't that sort of like a music producer claiming copyright protection because he shouted "play louder" during the recording process?) In any event, it is worth keeping in mind that copyright protection for many of these photos will be on the thin side.¹⁶

¹¹ *Supra*, Section 10 of the Act

¹² *Oladipo Yemitan v Daily Times (Nig) Ltd & Gbenga Odusanya* (1980) FHCR 180 at 190

¹³ Section 108 of the Copyright Act 2022

¹⁴ *Banire V. NTA - Star TV Network Limited* (2021) LPELR-52824(CA).

¹⁵ <https://www.nydailynews.com/entertainment/gossip/khloe-kardashian-hit-copyright-infringement-lawsuit-article-1.3107149>.

¹⁶ Advertising Law Update, available at ><https://advertisinglaw.fkks.com/post/102i6or/cellphone-photo-etiquette-do-you-mind-taking-our-picture-sure-but-i-own-the->< accessed 19 August, 2023.

The rise of casual cell-phone photography raises the question of whether all snapshots should have the same copyright protection as professional works of art. In situations where minimal creative input is involved, like simple point-and-click photos, the strength of copyright protection might be questioned. Factors like the level of creative input and artistic choices should be considered when evaluating the copyrightability of cell-phone snapshots, as some may showcase artistic flair while others may be more like everyday snapshots with limited copyright protection. As the world continues to witness an explosion of cell-phone photography, the copyright landscape should adapt to address these nuanced distinctions. By recognizing the varying degrees of creative input in cell-phone snapshots, copyright laws can ensure that photography's artistic integrity is preserved while providing appropriate protection for the works that genuinely merit it.

Exceptions to Copyright Ownership:

- **Transfer:**

Photographers typically retain copyright ownership of their work, but there are situations where this ownership can be transferred to the photographed/employer or client through explicit contractual agreements.¹⁷ To effect the transfer of copyright, the agreement must be in writing and clearly state the intention to transfer the copyright from the photographer/author to the photographed/client. In the absence of such agreements, the default position remains in favor of the photographer as the rightful copyright owner.

Other salient points to note here are as follows;

- **Non-Exclusive License for Non-Commercial Use:** When a person commissions such a work for their private and domestic use, they are automatically granted a non-exclusive license. This license allows them to use the commissioned work for their personal purposes, without the intention of making money or conducting any commercial activities with it. In simple terms, they have the right to enjoy and use the work themselves, but not to profit from it commercially.¹⁸

- **Control over Publication and Distribution:** Additionally, the person who commissioned the work has the right to prevent the work from being published, exhibited, broadcasted, communicated, distributed, or shared with the public. This means they have the authority to decide whether the work can be shown or distributed to others beyond their personal usage. This control allows them to maintain privacy and control over the work's accessibility to the public.¹⁹ These rights are subject to any agreements made between the person who commissioned the work and the author.

- **Work Created under a Contract for Services or Employment:**

If a person creates a work under a contract for services or during their employment by a government, ministry, department, agency, international organization, or inter-governmental organization, the copyright in that work belongs to the entity that the person is working for.²⁰

- **Fair Dealing:**

Fair dealing is a legal doctrine that allows limited use of copyrighted material without the need for permission from the copyright holder. In the Act, activities such as private use, parody, non-commercial research, criticism, and reporting of current events, are allowed without infringing on

¹⁷ Section 28(1) of the Copyright Act 2022.

¹⁸ Section 28(3) of the Act.

¹⁹ *Ibid.*

²⁰ Section 28 (2) of the Copyright Act 2022.

the photographer's rights.²¹ However, when determining whether a particular use is fair dealing, factors like the purpose, nature of the work, amount used, and its effect on the market must be considered. This exception permits limited use of copyrighted photos for specific purposes without obtaining explicit permission from the photographer or copyright holder.

- **Inclusion in Audiovisual Works or Broadcasts:**

Photographs can be used in videos or broadcasts if they are publicly displayed.²² The concept of "incidental inclusion" in copyright law comes into play here, which means that if an audiovisual work or broadcast captures an artistic work (e.g., a picture, painting or sculpture) that is located in a public place, it may be considered permissible even if the artwork itself is protected by copyright.

- **Use by Government, Public Libraries, and Certain Institutions:**

In the public interest and without generating revenue, government entities, public libraries, and specific institutions are allowed to use copyrighted works of photographers.²³ For instance, let's say a government agency, such as a national parks department, wants to create an informational brochure to raise awareness about the natural wonders and wildlife in their region. They decide to include high-quality photographs taken by various photographers to showcase the beauty of their national parks. Under this exception, the government agency is allowed to use these copyrighted photographs without obtaining explicit permission from the photographers or without having to pay licensing fees.²⁴ This exception applies because the government entity is using the photographs for a non-commercial, public interest purpose - in this case, promoting the country's natural heritage to the public.

However, it's important to note that the use should genuinely serve the public interest and not result in generating revenue for the government agency. If they were to use the photographs for a commercial purpose or to make a profit directly, the exception might not apply, and they would need to secure appropriate permissions or licenses from the photographers.

- **Limited Copying for Educational Purposes:**

When an artistic work, such as a photograph, is copied for teaching or preparation for teaching purposes, it is not considered copyright infringement.²⁵ Such copying is allowed when conducted by either the teacher or the student, as long as it is not done using a machine or method that can produce multiple copies (reprographic process).

Duration for Copyright:

The copyright duration for photography is 50 years after the work's first public availability with the author's consent, or 50 years after its creation if not made available to the public during that time.²⁶ Therefore, the ownership rights granted to the author in photography under this section are not perpetual or everlasting.

Limitations on Usage and Publication:

Despite possessing copyright ownership, photographers/authors are subject to certain limitations when using or publishing photographs. Image rights and the right to privacy are crucial considerations in this context which is provided by our laws.²⁷ The Nigerian constitution

²¹ Section 20 (1)(a-e) of the Copyright Act .

²² *Ibid.*

²³ Section 20(1)(i) and 25 of the Act.

²⁴ *Supra*, Section 20(1)(i) and 25 of the Act.

²⁵ Section 21(1) of the Act 2022.

²⁶ Section 19(1)(c) of the Act.

²⁷ Section 37 of the 1999 Constitution of Federal Republic of Nigeria (as amended).

guarantees the privacy of citizens, their homes, telephone conversations and telegraphic communication. Image rights, which pertain to the use of a person's likeness for commercial purposes without their consent, are not explicitly recognized in Nigerian copyright law. However, they may be protected under other legal principles, such as privacy laws, depending on the specific circumstances and jurisdiction.

The recently signed Nigeria Data Protection Act of 2023 clarifies that personal data also encompasses any information that can identify a data subject physically.²⁸ This includes photographs or images, allowing the Photographed/Client to rely on the Nigeria Data Protection Act for civil actions against the author in case of perceived infringement on their data/image rights.²⁹

The Photographer's Obligations:

Even though photographers hold copyright ownership, they must still adhere to the limitations imposed by image rights and privacy laws. Publishing or using photographs of individuals without their consent may result in legal repercussions, particularly if it infringes upon their right to privacy which in Nigeria is protected by the Constitution.³⁰ Therefore, it is essential for photographers to exercise due diligence and obtain proper consent when dealing with images that involve identifiable individuals for Commercial purposes.

Conclusion:

In summary, during the celebration of "World Photography Day" on August 19th each year, it is important for photographers and their clients to be aware that Nigerian copyright law generally gives initial copyright ownership of photographs to the photographer or creator. This principle may change if there are specific contractual agreements transferring copyright to the client. It's crucial to note that having copyright ownership doesn't mean unlimited use of the photos, as one must consider image rights and privacy concerns. By comprehending these legal complexities and obtaining proper consent when needed, photographers can handle copyright matters responsibly while respecting the rights of the individuals depicted in their work.

²⁸ Section 65 of the Nigeria Data Protection Act 2023.

²⁹ Section 1 of the Nigeria Data Protection Act.

³⁰ *Supra*, Section 37 of the 1999 CFRN.