



KENYA COPYRIGHT BOARD



ADVISORY ON THE USE OF THIRD-PARTY PHOTOGRAPHS AND IMAGES

The Kenya Copyright Board has noted that the use of third persons photographs by schools and Tertiary and other educational Institutions in advertisement and other publicity material without their consent continues despite recent High Court decisions.

The Board wishes to advise that use of people's images for commercial or noncommercial purposes without the express authority of those appearing in the photos is an abuse of their image rights and may attract legal sanctions.

Image rights are rights to own, protect and commercially exploit one's image, likeness or identity. Image right laws guard against unauthorized reproduction, dissemination and commercial exploitation of a person's image, likeness, or identity. The right includes the right to authorize, control or object to the use or publication of the personal attribute.

Laws that protect image rights in Kenya overlap between Copyright laws, data protection laws and the Constitution of Kenya. The common law tort of passing off is also relevant in protecting image rights.

However, Copyright laws only apply to the ownership and authorship which belongs to the photographer or the person who plans for the photograph to be taken. In many recent court decisions, the matter of the right to privacy has taken precedence over Intellectual Property Rights.

These breaches have seen many institutions made liable to pay substantial damages for breach of rights to privacy under the Data Protection Act and the Constitution for the use of photographs

without consent. Under the Data Protection Laws, a person's attribute such as a person's likeness, name and image are protected.

The Court in *Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR described personality right as encompassing the right to privacy and the right to publicity. It described the Image right as follows: ***"The right to privacy and the right to publicity where the right to privacy is the right to keep one's image and likeness from exploitation without permission or compensation and applies to members of the general public, whereas, the right to publicity is the exclusive right of an individual to market his /her image, likeness or persona for financial gain."***

Note that institutions may be liable even in the case of use without requiring proof of financial gain as per Catherine Njeri Wanjiru v Machakos University (Petition E021 of 2021) [2022] KEHC 10599 (KLR).

And while the advisory has drawn from decisions on cases against educational institutions, the principle has been extended to other sectors including media and public sector organizations.

This is, therefore, to advise that anyone interested in the use of someone's image such as image-based advertisement are therefore advised to obtain authorization from those appearing in their photos before using such photographs. It is recommended that such authorization should be in writing or through the use of release or authorization forms, so that it can be verified in the event of a disagreement.

Issued by

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Kenya Copyright Board

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