Intellectual Property II (LPB 406)

Group 1

Lecturers: **Dr. Ifeoluwa Olubiyi**

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Question: Recently Ella has been commissioned to take a photograph for a pop-group, it was intended that the photograph will be used as the cover for their forthcoming album. The photograph was taken in Trafalgar square. Ella spent a considerable amount of time arranging various props to serve as the background. Ella also designed and made the costumes which the members of the group wore for the photo session. She also designed and applied elaborate face make-up to the members of the group. Just before she was about to take the photograph, another photographer took a photograph of the group over Ella’s shoulder. Ella wishes to prevent the photographer from selling copies of her photograph. Advice Ella.

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The two legal issues presented in the case scenario are:

1. Whether Ella has copyright of the photograph.
2. Whether Ella has the right to prevent the other photographer from selling copies of the photograph.

Photography which is what the case scenario is based on, is classified as artistic works by virtue of **Section 51 (1)(d)** of theCopyright Act1988 (as amended) (hereinafter referred to as the Copyright Act);which therefore makes it eligible for copyright.

Copyright as defined by Oyewunmi[[1]](#footnote-1) is a proprietary right which confers exclusive rights to authorise or prohibit a wide range of activities relating to qualified subject matter. These activities include the performance, translation, adaptation, publication and other forms of use or exploitation of the protected works.

Works eligible for copyright are stipulated in **Section 1** of the Copyright Act and includes artistic works which photographs fall under.

It is important to note that authorship and ownership as distinct concepts under the copyright law are very important in laying any claim to copyright protection and that ownership flows from authorship. Copyright as provided by **Section 10** of the Copyright Act, initially vests in the author of the work and author is defined in **Section 51 (1)** of the Copyright Actas the creator of the work. **Section 10 (2)** of the Copyright Act also stipulates that copyright in the work shall belong in the first instance to the author unless otherwise stipulated in writing under the contract.

The basic principle of copyright is provided for in **Section 6** of the Copyright Act which gives the owner of a copyright work an **exclusive right** to do or authorize the doing in Nigeria of any certain acts such as the reproduction, publication, production, performance, distribution, translation, etc. of the work.

Furthermore, **Section 15** of the Copyright Act provides for a wide range of actions that constitute infringement of copyright. These include the unauthorized doing of acts in respect of which the copyright owner has been accorded exclusive rights as well as various dealings, usually of commercial nature, in infringing copies of copyright works.

The doing of any of these acts, without the consent of the copyright owner constitutes infringement, unless such act falls within the scope of the exceptions from copyright control as provided for in the **Second Schedule** of the Copyright Act. A person may further incur liability not only for direct acts, but also for causing or authorizing another to infringe on a person’s copyright.

**Issue 1:**Whether Ella has copyright of the photograph.

This issue is answered in the negative as Ella cannot be considered as the owner of a photograph taken by another person.

On the position of the law, the general rule is that copyright in a photograph belongs to the person who takes the picture except in the course of employment or in a work commissioned by the government and this is supported by **Section 10 (2) and (5)** of theCopyright Act.Furthermore, **Section 51 (1)** of the Copyright Act provides thus:

*‘“author” in the case of a photographic work, means the person who took the photograph’*

Applying the clear and unequivocal provisions of the above sections to the issue, an author is the person who pressed the shutter and thus made the picture a permanent record. Ella cannot therefore claim copyright of the work as she is not the person that took the photograph, regardless of the amount of time and creativity she put into the preparation of the photo session.

**Issue 2:**  Whether Ella has the right to prevent the other photographer from selling copies of the photograph.

Again, we answer this issue in the negative and this is due to the fact that the Copyright Act already prescribed that only the author of a photograph has such rights to prevent their works which they have copyright of from being commercialized without their consent by another party. This position is clearly supported by the provision of **Section 51** of the Copyright Act.

By virtue of the provisions of **Section 51** of the Copyright Act which defines who an author in a photographic work is, and the facts and circumstances of the case scenario, Ella cannot be regarded as the author of the photograph and therefore has no ownership of same and since she does not possess ownership, she lacks the power to prevent the other photographer from selling copies of the photograph. The author in this case scenario is the other person who took the photograph.

Our advise to Ella is that she cannot prevent the other photographer from selling copies of the photograph; as it has been shown above that she is not the owner of the photograph regardless of the considerable amount of time she spent in the preparation and organization of the props, costumes and face makeup since she did not take the photograph. An author of a photograph as defined by **Section 51** of the Copyright Act is the person who takes the photograph. More so, only the owner of a copyright can institute an action in court and this is provided for by **Section 16 (1) and (2)** of the Copyright Act.

However, the people who commissioned the work to Ella whose photograph was taken can institute an action against the other photographer on the ground that they did not give their consent or permission to the other person to take their photograph and to circulate same. They can also seek an injunction from the court to prevent the other person from commercializing the photograph.

 In the case of **Joseph Ikhuoria v. Campaign Services Ltd & Anor[[2]](#footnote-2)** the court noted that when a person commissions the taking of a photograph… and pays or agrees to pay for it in money’s worth and the work is made in pursuance of that commission, the person who commissioned the work is entitled to any copyright in it as an original work.

This implies that the people who commissioned the work to Ella would have copyright over it and as such, they would have the right to ask the court for an injunction to prevent the other photographer from selling copies of the picture.

In conclusion, based on the available facts and circumstances of the case scenario as well as the provisions of the Copyright Act, Ella does not have copyright of the photograph and cannot prevent the other photographer from selling copies of same. However, Ella may have a common law remedy under torts.

1. Adegoke Oyewunmi, Nigerian Law of Intellectual Property (University of Lagos Press and Bookshop Ltd. 2015) [↑](#footnote-ref-1)
2. (1986) FHCR 308. [↑](#footnote-ref-2)