

Protecting the Right to Identity Against Catfishing

A thesis submitted in fulfilment of the requirements for the degree of

MASTER OF LAWS

of

RHODES UNIVERSITY

By

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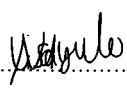
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ACKNOWLEDGEMENTS

Firstly, I would like to thank the Rhodes University Post Graduate Funding office for providing me with financial support while I completed my LLM. I would also like to thank the staff members of the Rhodes University Law Faculty who provided their support in their various capacities. With their kindness and support, I was able to complete three degrees at Rhodes University. Special thanks go to Mr Phumelele Jabavu, who offered valuable insight into the law of delict for this thesis.

Secondly, I would like to express my sincerest gratitude to my supervisor, Ms Nomalanga Mashinini. Without Ms Mashinini's expertise, continuous support and mentorship, this thesis would not be what it is. Her immense knowledge steadied me on the right path. She believed in me and patiently encouraged me. She never tired from answering my endless questions and talking about topics not particularly aligned with my research. I cannot thank her enough for playing such an essential role in my academic career and for being an inspiration.

Thirdly, I thank my parents, who have both been pillars of strength, consistent sources of support and encouragement throughout my studies. My mother was never shy to offer her love and pray for me to achieve any of my goals. My stepfather always wanted to hear how my thesis was progressing and was ready to share insightful views on the law.

Lastly, I thank my friends Adivhaho Ramaite, Goodness Maumo for encouraging me and always having a good joke to share. I express special gratitude to Tsukudu Moroeng for his constant motivation and support.

ABSTRACT

Catfishing is a form of impersonation occurring on social media that interferes with a person's right to identity. It involves creating a fake profile online using another person's images. The facets of the right to identity are image, name, and likeness, among others. Catfishing affects a person's right to identity and human dignity. Hence, the thesis aims to determine whether the right to identity adequately protects individuals against catfishing. This thesis is a desktop analysis considering the South African legal framework related to the right to identity, including the common law, the Constitution of the Republic of South Africa, 1996, and legislation. The thesis is also a comparative analysis assessing the adequacy of addressing catfishing through the right to identity. The study evaluates the right to identity's adequacy by juxtaposing the South African legal framework with California and Oklahoma's common law and statutory interventions.

The study reveals that the right to identity protects South African social networking website users against catfishing. Like the common law right of privacy in California and Oklahoma, a person infringes the right to identity when they use another person's identity facets to portray them in a false light, and like the statutory right of publicity in California and Oklahoma, a person infringes identity when they appropriate facets of another person's identity for commercial gain. The infringement of the right to identity entitles a person to legal remedies, including a claim for damages, among other things.

The thesis also considers principles of conflict of laws to determine the operative law in an instance where a victim resides in South Africa and the perpetrator resides in the US, or vice versa. The study recommends that developing the common law to recognise that identity can be infringed by mere appropriation not linked to a commercial purpose would be beneficial for addressing catfishing adequately in South Africa. Legal development contributes to the constitutional imperative to align the common law with society's shifting needs and address novel legal issues, such as catfishing.

Keywords: catfishing, impersonation, identity, publicity, delict, torts, social media.

ABBREVIATIONS AND ACRONYMS

Cal. Civ. Code	California Civil Code
Cal. Pen. Code	California Penal Code
ICT	Information and communications technology
ISP	Internet service provider
SCA	Supreme Court of Appeal
TOS	Terms of Service
US /USA	United States of America

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CHAPTER 1: INTRODUCTION

1.1 Description and context of research

Social media is an integral part of daily social life.¹ There are approximately 3.96 billion people globally who use social media actively. More than half of the world's population uses social media platforms to conduct business, network and socialise.² Social media is a collective term referring to social networking websites and platforms where users can communicate virtually with others by uploading content.³ The three main features of social media websites are (1) the sharing of information without a specific target, (2) posting information that can be engaged with by anyone who can see it on the platform regardless of geographical location, and (3) distributing the information to people who were not in the initial author's connection list.⁴

Social media is popular because it is easy to access through mobile smartphones. In 2020 it was reported that an individual has an average of eight social media accounts.⁵ Creating a social media account is easy. One only requires a valid email address or an active mobile phone number. There is no formal identity verification mechanism. People may portray themselves as they wish.⁶ The lack of regulation is one of the reasons that a portion of all active social media accounts are fake or duplicates.⁷ Although some social media platforms require persons to use their real name to create an account,⁸ users are free to express themselves by assuming "idealised identities".⁹ This freedom has given rise to a phenomenon called catfishing.

¹ A Santi "Catfishing: A Comparative Analysis of US v Canadian Catfishing Laws and their Limitations" (2019) 44 *Southern Illinois University Law Journal* 75 at 77; K Belz "Nev Schulman Explained Why Catfishing is More Common Than Ever" <https://ca.news.yahoo.com/nev-schulman-explained-why-catfishing-174543825.html> (accessed 5 March 2021); CM Koch "To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation" (2017) 88 *University of Colorado Law Review* 233 at 237.

² B Dean "Social Network Usage and Growth Statistics: How Many People Use Social Media in 2021?" <https://backlinko.com/social-media-users> (accessed 7 February 2021).

³ G Mushwana and H Bezuidenhout "Social Media Policy in South Africa" (2014) 16 *Southern African Journal of Accountability and Auditing Research* 63 at 63. *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Sooknunan t/a Glory Divine World Ministries* [2012] JOL 28882 (GSJ) para 42; *Heroldt v Wills* [2014] JOL 31479 (GSJ) para 10.

⁴ AW Brooks "Social Media 101" (2012) *GPSolo* 53 at 54.

⁵ Dean "Social Network Usage and Growth Statistics: How Many People Use Social Media in 2021?"

⁶ D Mangan and LE Gillies *The Legal Challenges of Social Media* (2017) 2.

⁷ M Armstrong "16 % of All Facebook Accounts Are Fake or Duplicates" <https://www.statista.com/chart/20685/duplicate-and-false-facebook-accounts/> (accessed 7 February 2021) reported that 16% of all Facebook accounts are fake or duplicates.

⁸ For example, Facebook has a policy encouraging users to use their legal name or nickname when creating an account, see <https://web.facebook.com/legal/terms> (accessed 4 February 2021) and AA Adams "Facebook Code: Social Network Sites Platform Affordances and Privacy" (2014) 23 *Journal of Law, Information and Science* 158 at 162. However, Twitter allows its users to operate an account under a pseudonym, see <https://twitter.com/en/privacy#chapter1> (accessed 16 January 2021).

⁹ Mangan and Gillies *Challenges of Social Media* 2.

1.2 Catfishing

Catfishing occurs on multiple platforms across the web and possibly through other mediums offline.¹⁰ Catfishing is creating fake profiles on social media and using them for deceptive purposes.¹¹ It amounts to impersonating other people on social media by using their images to create fake online profiles.¹² The following scenarios illustrate that people have varying reasons for catfishing. Some have malicious intent, such as to cyberbully or humiliate.¹³ Others are motivated by less sinister reasons such as seeking notoriety and social validation, loneliness, and digital anonymity.¹⁴

Five years ago, a Reddit¹⁵ user asked: "have you ever been catfished? Or have been a catfish? What was the outcome?".¹⁶ Today over 800 users have replied to the post. One user wrote that she met Zack, who lived in Pennsylvania. They developed a friendship and communicated daily for close to two years through the social networking website MSN.¹⁷ Zack shared information about his family with the user. For instance, his mother and sister had abandoned him, and he had never met his father. One day, the user began to notice that Zack was not his usual self. She questioned his mood and whether something had happened. The pair never had an interest in video calling before, but Zack wanted to video call on this day, so they did. When the camera turned on, there was a teenage girl. The user believed that she had been speaking to this little girl all along. The teenager informed the user that Zack had passed away a few years previously, and as his little sister, she had taken over his online personality.¹⁸

Another user explained that they had become aware that someone had been using their pictures for catfishing for the past ten years. He said that a woman had been pretending to be a young man and forming online relationships with two 11-year-old girls. The lady created over 15

¹⁰ M Pearl "How Catfishing Worked Before the Internet" <https://www.vice.com/en/article/5gk78n/how-did-people-catfish-before-the-internet> (accessed 17 February 2021).

¹¹ LR Smith KD Smith and M Blazka "Follow Me, What's the Harm: Considerations of Catfishing and Utilizing Fake Personas on Social Media" (2017) 27 *Journal of Legal Aspects of Sport* 32 at 33.

¹² M Reznik "Identity Theft on Social Networking Sites Developing Issues of Internet Impersonation" (2013) 29 *Touro Law Review* 455 at 455; E Kambellarl "Online Impersonation: I Have a Right to be Left Alone V. You Can't Mandate How I Use my Privacy Toolbox" (2017) *The University of Illinois Timely Tech* 1 at 1.

¹³ Smith Smith and Blazka 2017 *Journal of Legal Aspects of Sport* 39.

¹⁴ Santi 2019 *Southern Illinois University Law Journal* 81-82.

¹⁵ <https://www.reddit.com> is a social networking website where users can share news, rate web content, and participate in discussions. It is a conglomerate of forums or communities called "subreddits" each covering a different topic.

¹⁶ https://www.reddit.com/r/AskReddit/comments/3i2us1/reddit_have_you_ever_been_catfished_or_have_you/ (accessed on 9 February 2021).

¹⁷ <https://www.msn.com/en-za/> (accessed 13 March 2021).

¹⁸ https://www.reddit.com/r/AskReddit/comments/3i2us1/reddit_have_you_ever_been_catfished_or_have_you/ucxnjm?utm_source=share&utm_medium=web2x&context=3 (accessed 11 March 2021).

Facebook¹⁹ profiles of his friends and family, all with fake names. She recorded the user's Facebook videos and uploaded them to YouTube and pictures of the young man embracing one of the girls. The user detected that the woman lived within 16km of where he lived, but he could not determine who she was.²⁰

While the above examples are drawn from the United States of America (USA), catfishing also affects South African citizens. A woman from Cape Town was scammed out of R844 000 by a person she met on Tinder.²¹ The woman believed that she had met a successful businessman and began a relationship with him. The man tricked her into giving him money to help with business challenges and had said he would repay her. When the man stopped communicating with her, she then realised she had been scammed and reported the issue to the police. It turned out that the man she referred to as "the love of her life" was not real. Instead, three people ran the Tinder profile and had created it using a fake name and picture. The three people were later arrested.²²

A retired man from the USA flew to Cape Town to meet a woman he met online named Caryl Jones. They dated online for three months with the hopes of getting married. When he arrived at the Cape Town International Airport, he could not find Caryl. It turned out that he had been talking to a catfish, and Caryl Jones did not exist.²³

1.2.1 The legal challenges of catfishing

Users can upload pictures on social media, and they can see the content on that platform, depending on each author's privacy settings.²⁴ It is easy to download another person's content

¹⁹ <https://www.facebook.com> is a social networking platform that allows users to share posts on what is known as a "wall". Posts are shared with "friends" and may consist of captioned picture uploads, or written messages that will be visible to anyone on the platform who visits one's profile. Users have the option to limit privacy of their account and who can see their content.

²⁰ https://www.reddit.com/r/AskReddit/comments/3i2us1/reddit_have_you_ever_been_catfished_or_have_you/ucyggg?utm_source=share&utm_medium=web2x&context=3 (accessed 11 March 2021).

²¹ <https://www.help.tinder.com/hc/en-us/articles/115004647686-What-is-Tinder-> is a dating mobile application and network providing a networking service for users. (accessed 21 February 2021).

²² N Shange "Cape Town Woman Scammed of R844K by Catfish She Met on Tinder" *Sunday Times Live* 30 October 2019 <https://www.timeslive.co.za/news/south-africa/2019-10-30-cape-town-woman-scammed-of-r844k-by-catfish-she-met-on-tinder/> (accessed 21 February 2021); K Geldenhuys "Scammed Out of Love" (2020) 113 *Servamus Community-Based Safety and Security Magazine* 24 at 27.

²³ P Saal "Falling in love Online? Beware the Catfish" *Sunday Times Live* 15 March 2018 <https://www.timeslive.co.za/sunday-times/lifestyle/2018-03-15-falling-in-love-online-beware-the-catfish/> (accessed 30 March 2021).

²⁴ Websites such as <https://www.instagram.com> are particularly designed to be platforms where users primarily post pictures and video content with a caption. Platforms such as Facebook also allow users to post pictures and videos in addition to written posts which resemble blog posts. A Roos and M Slabbert "Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)" (2014) 17 *Potchefstroom Electronic Law Journal* 2845 at 2847.

to use or re-post on another platform.²⁵ One of the issues that arise from social media is the easiness of downloading another person's images, combined with the unimpeded account creation.²⁶ Image or likeness is one of the features of identity.²⁷ One's image represents who one is as an individual.²⁸ The right to identity protects these features.²⁹ The problem with catfishing is that it violates the right to identity.³⁰

Catfishing involves three parties: the individual who downloads another person's images to create a fake account is known as the catfish. The catfish's target is the third person whom the catfish misleads and for this thesis' purposes, the victim is the person who owns the images used to catfish.³¹ The victim is the person who experiences an interference with their identity.³² Unfortunately, social media platforms lack the mechanisms to protect individuals against having their identity appropriated.³³

Some social networking platforms encourage freedom of expression through parody or pseudonymous accounts.³⁴ Platforms such as Reddit and Twitter do not have strict policies on usernames.³⁵ However, other platforms, such as Facebook, expressly prohibit the creation of impersonation accounts.³⁶

²⁵ Adams 2014 *Journal of Law, Information and Science* 163.

²⁶ Koch 2017 *University of Colorado Law Review* 246.

²⁷ J Neethling JM Potgieter and A Roos *Neethling on Personality Rights* (2019) 54.

²⁸ Koch 2017 *University of Colorado Law Review* 241.

²⁹ J Neethling "Personality Infringement" *LAWSA* Vol 20(1) 2ed (2009) para 436.

³⁰ Neethling Potgieter and Roos *Personality Rights* 353, 354 the infringement of a subjective right is contrary to the convictions of the community when there is a violation of identity by falsification. This is most common when false personal facts are attached to a person and publicised. *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 383; JC Van der Walt and JR Midgley "Infringement of a right" *LAWSA* Vol 15(3) (2016) para 80.

³¹ A Derzakarian "The Dark Side of Social Media Romance: Civil Recourse for Catfish Victims" (2017) 50 *Loyola of Los Angeles Law Review* 741 at 744; Koch 2017 *University of Colorado Law Review* 262; Santi 2019 *Southern Illinois University Law Journal* 90.

³² *Grütter v Lombard and Another* 2007 (4) SA 89 (SCA) para 12.

³³ For example, social media platforms do not have identity verification mechanisms at account creation stage. Rather, platforms have a reporting function that allows users to report suspicious accounts or catfish. Some platforms will only require identity authentication when a report has been made. *Heroldt v Wills* para 38 is a good example where the reporting mechanism was used. However, the trouble with this mechanism, as the court noted in this case, is that there is no guarantee that the platform will comply with a request to remove offending content or an account.

³⁴ In *Laugh it Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) para 35 the court defined parody as literary or artistic work imitating another. It has a comical effect or an effect that makes the work seem ridiculous. Parody accounts are used to mimic famous or popular people. According to Nel, S Nel "Freedom of Expression" in DP Van der Merwe (eds) *et al Information and Communications Technology Law* 2ed (2017) 506, parody accounts are most likely to be dealt with under the law of defamation because such accounts have a defamatory impact on a victim's name and image. *Cele v Avusa* [2013] 2 All SA 412 (GSJ) para 51 is an example of a case where a politician's image was used to create a mimicry to comment on statements he made publicly.

³⁵ Twitter: <https://twitter.com/en/privacy#chapter1> (accessed 16 January 2021).

³⁶ <https://web.facebook.com/legal/terms> (accessed 4 February 2021).

Catfishing poses such a unique legal problem that the state of Oklahoma in the USA passed the Catfishing Liability Act.³⁷ The statute provides civil remedies for victims of online impersonation.³⁸ However, it excludes liability where the purpose of impersonation is satire or parody.³⁹ The state of California also provides legal protection against catfishing by criminalising online impersonation through the California Penal Code §528.5.⁴⁰ In contrast, South Africa's body of information and communications technology (ICT) law does not address catfishing or online impersonation. Our courts have neither had the opportunity to adjudicate on catfishing, nor have they decided on catfishing as a violation of identity. As such, there is a gap in our law.

1.3 The South African courts' approach to protecting the right to identity

The right to identity is one of many personal rights capable of legal protection.⁴¹ Identity comprises a bundle of unique characteristics that make individuals who they are. These characteristics include name, image, and likeness, among other things.⁴² Using the indicators of one's identity contrary to their true personality and the convictions of the community infringes the right to identity.⁴³ The infringement of identity occurs in two ways: (a) by falsification and (b) by appropriation for commercial gain.⁴⁴ In some instances, both infringements of identity are present simultaneously and in other instances only one type of infringement is present.

³⁷ Catfishing Liability Act of 2016 H.B. 3024, 55th Leg., 2d Sess. (Okla. 2016). Subsection B of OK ST T. 12 § 1450 provides that using another person's image, likeness, signature, name, voice intentionally and without permission to create a false identity through social media to harm, intimidate, threatening or defrauding is an actionable offence. Suggesting that the impersonator will be liable under the Act if the impersonated person suffers harm.

³⁸ Derzakarian 2017 *Loyola of Los Angeles Law Review* 744.

³⁹ OK ST T. 12 § 1450 (B).

⁴⁰ S 528.5(a) provides that impersonating another person through the internet or other electronic means is a punishable offence. Furthermore, the statute makes provision for a claim of damages in addition to criminal sanction.

⁴¹ *Grütter v Lombard* paras 8 and 12.

⁴² J Neethling "Personality rights: A Comparative Overview" (2005) 38 *The Comparative and International Law Journal of Southern Africa* 210 at 214; J Neethling J Potgieter *Law of Delict* 7ed (2015) 373.

⁴³ Neethling Potgieter and Roos *Personality Rights* 353.

⁴⁴ Neethling Potgieter and Roos *Personality Rights* 352. In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 386H-387A the court acknowledged that the US equivalents of these infringements are the tort of false light and the misappropriation of name or likeness tort. M Loubser and R Midgley *et al The Law of Delict in South Africa* 3ed (2017) 404; Neethling Potgieter and Roos *Personality Rights* 353.

1.3.1 Falsification

Falsification refers to using a person's identity indicators to create a false or untrue impression or image of them.⁴⁵ There are two requirements to establish the infringement of identity by falsification. First, there must be a falsification of a person's identity, and second, the false impression must be connected to a specific person.⁴⁶ The Supreme Court of Appeal (SCA) dealt with the falsification of the appellant's identity in *Grütter v Lombard*.⁴⁷ The appellant sought an order prohibiting the respondent from using his name in a manner inconsistent with his true identity.⁴⁸

The appellant and respondent were attorneys running two separate practices in the same premises and operated under a joint name "Grütter and Lombard". The appellant terminated their agreement, and the respondent continued to practise under the joint name.⁴⁹ The issue was that the appellant was known as the person portrayed in the joint name practising with the respondent. He brought an application to prevent the misrepresentation of his identity by the unauthorised use of his name⁵⁰ because he was no longer associated with the practice.⁵¹

The SCA ruled that features of a person's identity are capable of legal protection in delict under the *actio iniuriarum*.⁵² The court noted the scholarly debate on whether this was an identity or a privacy concern.⁵³ Nevertheless, the court cautioned that whilst public policy could justify conduct that violates features of identity, the case before it was not one for which there was a legal justification.⁵⁴ In conclusion, the court found that the unauthorised use of the appellant's name for commercial advantage amounted to an infringement of identity by falsification.⁵⁵ The continued use of the appellant's name was a misrepresentation that conveyed to the public that he was still professionally associated with that practice or that he wanted to be portrayed as being associated with that practice. This, the court said, was a misrepresentation of the "true state of affairs" that could not be legally justified.⁵⁶

⁴⁵ Loubser and Midgley *et al The Law of Delict* 404.

⁴⁶ Neethling Potgieter and Roos *Personality Rights* 353.

⁴⁷ 2007 (4) SA 89 (SCA).

⁴⁸ A Roos "The Right to Identity Recognised for the First Time by the Supreme Court of Appeal" (2008) 71 *THRHR* 515 at 517.

⁴⁹ *Grütter v Lombard* para 2.

⁵⁰ Roos 2008 *THRHR* 517.

⁵¹ *Grütter v Lombard* para 3.

⁵² *Grütter v Lombard* para 9.

⁵³ *Grütter v Lombard* para 7- 10; *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) para 19.

⁵⁴ *Grütter v Lombard* para 13.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

Another case that dealt with the falsification of identity is *Kumalo v Cycle Lab (Pty) Ltd*.⁵⁷ The plaintiff sought damages after the defendant took a picture of her and used it for an advertisement without permission. The court highlighted that identity individualised a person and was expressed by different facets such as physical appearance or image.⁵⁸ The court defined falsification as the unauthorised use of one's image for advertising and creating a false impression that the person endorses such a business or product.⁵⁹ The court held that the defendant's conduct infringed both identity and privacy simultaneously.⁶⁰

Disclosing a person's information contrary to their will and determination infringes their privacy.⁶¹ Again, the court implicitly toys with the academic debate surrounding the infringement of identity and privacy by acknowledging that image could be regarded as a personal fact.⁶² According to the court, the disclosure was an infringement of privacy because the right to privacy included the liberty to determine private information's destination.⁶³ It was concluded that the way the defendant used the plaintiff's image generated the false impression that she endorses certain products sold by the defendant. The court said the defendant used the plaintiff's image misleadingly. Moreover, this violated her right to identity and privacy because her image was publicly exposed without her permission, determination and will.⁶⁴

Both *Grütter v Lombard* and *Kumalo v Cycle Lab* illustrate that there is no real separation between falsification and appropriation for commercial gain. Although the main type of infringement found in both cases was falsification, the judgments highlight elements of appropriation for commercial gain.⁶⁵

1.3.2 Appropriation for commercial gain

The misrepresentation of identity will not always occur in conjunction with the appropriation of identity. However, in most cases, the two types of infringement do occur concurrently.⁶⁶ Misappropriation of identity is the unauthorised appropriation of a facet of identity for an

⁵⁷ [2011] JOL 27372 (GSJ).

⁵⁸ *Kumalo v Cycle Lab* para 15.

⁵⁹ *Kumalo v Cycle Lab* para 17.

⁶⁰ *Kumalo v Cycle Lab* para 18.

⁶¹ *Kumalo v Cycle Lab* para 23.

⁶² *Ibid.*

⁶³ *Kumalo v Cycle Lab* para 19.

⁶⁴ *Kumalo v Cycle Lab* para 22- 23.

⁶⁵ *Grütter v Lombard* para 13; *Kumalo v Cycle Lab* para 19.

⁶⁶ Neethling Potgieter and Roos *Personality Rights* 357. For example, *Grütter v Lombard and Another* 2007 (4) SA 89 (SCA) and *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) are cases where identity was both falsified and appropriated for the defendant's commercial gain.

economic purpose.⁶⁷ In *W v Atoll Media*⁶⁸ the plaintiff sought damages on behalf of the minor child, T, whose photograph had been taken while on a beach trip when she was twelve years old.⁶⁹ The defendant used the photograph in a surfing magazine without the plaintiff's consent and accompanied the picture with the word "filth".⁷⁰

Regarding the right to identity, in its *obiter* the court remarked that appropriating a person's image or likeness for commercial advantage would trigger legal intervention.⁷¹ The court clarified that when using a picture depicting a crowd, the principle would not apply. However, there was an unjustifiable invasion of individual personal rights if the image was used for the benefit of selling a magazine to make a profit.⁷²

Another critical case dealing with the misappropriation of identity is *Cele v Avusa*.⁷³ The plaintiff sought damages against the defendant for publishing a digitally altered image of him. The image depicted him as a sheriff from the Wild West,⁷⁴ and accompanied articles reporting on the plaintiff's utterances about crime control in Kwa-Zulu Natal. The plaintiff contended that the articles and the image falsified his identity.⁷⁵ He based his claim on the falsification of his identity by portraying his likeness in a false light.⁷⁶

The court stated that the publication of a person's image without permission violated a person's dignity, and a person could find protection in the *actio iniuriarum*.⁷⁷ However, the court held it was not wrongful to use a politician's image or likeness without consent to comment on their public statements on a matter of public interest.⁷⁸ This is because the purpose of using the person's image or likeness was not for commercial gain.⁷⁹ Moreover, the court distinguished this case from *W v Atoll Media* because there had been a commercial interest involved in the appropriation of the image.⁸⁰

⁶⁷ Loubser and Midgley *et al The Law of Delict* 404.

⁶⁸ *W (Wells) v Atoll Media (Pty) Ltd and Another* [2010] 4 All SA 548 (WCC).

⁶⁹ *W v Atoll Media* paras 1-3.

⁷⁰ *W v Atoll Media* para 5.

⁷¹ *W v Atoll Media* para 49.

⁷² *Ibid.*

⁷³ [2013] 2 All SA 412 (GSJ).

⁷⁴ *Cele v Avusa* para 25.

⁷⁵ *Cele v Avusa* para 32.

⁷⁶ *Cele v Avusa* para 39.

⁷⁷ *Cele v Avusa* para 50.

⁷⁸ *Cele v Avusa* para 51.

⁷⁹ *Ibid.*

⁸⁰ *Cele v Avusa* para 52- 53.

1.3.3 The impact of catfishing on identity

The South African common law has three personality interests, *corpus*, *dignitas* and *fama*.⁸¹ Identity and privacy fall under *dignitas* as they are considered attributes of a person's dignity.⁸² It follows that the constitutionally protected right to human dignity informs the common law *dignitas* and its ancillary rights.⁸³ The right to human dignity is a constitutional value that informs all law and all rights, including the right to identity and privacy.⁸⁴ These rights are legally recognised features of personality that find protection in both the common law and the Constitution.⁸⁵ As such, the right to identity has indirect constitutional protection.⁸⁶ The right to privacy differs from identity because privacy enjoys direct constitutional protection.⁸⁷

When applying the cases on identity discussed above, catfishing is an infringement of identity by falsification. The catfish uses the victim's image as the physical appearance of the fictional person represented by the account.⁸⁸ Thus, the misuse of the victims' image and the catfish's conduct create a false impression of the victim to the public. Catfishing is also a misappropriation of identity because it involves the unauthorised appropriation of one's image or likeness for commercial gain.⁸⁹ This applies where the catfish's sole purpose is to commit fraud using the victim's image.

Catfishing also affects a person's other personality interests, such as their dignity and privacy. Using the victim's image in reprehensible conduct injures the victim's dignity because their

⁸¹ Neethling Potgieter and Visser *Law of Delict* 341.

⁸² The Constitutional Court in *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 27 clarified that the common law *dignitas* was not the equivalent of the constitutional right to human dignity. However, there was an overlap between the two. *Dignitas* referred to a person's intrinsic and subjective self-worth, whereas the right to human dignity was a constitutional value that went beyond the subjective self-worth and concerned the worth of human beings in society. Human dignity was an all-encompassing right and constitutional value that informed all personality rights in our law. Neethling Potgieter and Roos *Personality Rights* 271; Loubser and Midgley *et al The Law of Delict* 91.

⁸³ The right to human dignity finds protection in S 10 of the Constitution of the Republic of South Africa, 1996. Loubser and Midgley *et al The Law of Delict* 380.

⁸⁴ S 1(a) of the Constitution of the Republic of South Africa, 1996. A Chaskalson "Dignity as a Constitutional Value: A South African Perspective" (2011) 26 *American University International Law Review* 1377; Carmichele *v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 56; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27.

⁸⁵ Neethling 2005 *The Comparative and International Law Journal of Southern Africa* 213, *Grütter v Lombard* para 9; Neethling *LAWSA* Vol 20(1) paras 395 and 409; s 10 and s 14 of the Constitution of the Republic of South Africa, 1996.

⁸⁶ Neethling *LAWSA* Vol 20(1) para 396; J Neethling JM Potgieter and PJ Visser *Neethling's Law of Personality* 2ed (2005) 255; *Grütter v Lombard* para 12; Loubser and Midgley *et al The Law of Delict* 92-93.

⁸⁷ The right to privacy is enshrined in s 14 of the Constitution of the Republic of South Africa, 1996.

⁸⁸ *Grütter v Lombard* para 13; *Kumalo v Cycle Lab* para 22 -23.

⁸⁹ *W v Atoll Media* para 49; N Shange "Cape Town woman scammed of R844K by catfish she met on Tinder" (accessed 21 February 2021).

identity and dignity are linked.⁹⁰ The victim may feel degraded or violated by being portrayed as a catfish.

As illustrated in *Kumalo v Cycle Lab*, it is possible for both privacy and identity to be affected in the same instance.⁹¹ However, this thesis assesses whether the right to identity adequately protects victims of catfishing on social media through the Constitution's normative values.⁹² This investigation entails considering the remedies available to a victim of catfishing in delict. The investigation includes an analysis of the Electronic Communications and Transactions Act (ECT Act),⁹³ since the ECT Act applies to all electronic communications and transactions, including interactions on social media.⁹⁴

Section 39 of the Constitution prescribes that the interpretation of statute and development of the common law must promote the spirit, purport and objects of the Bill of Rights.⁹⁵ It also provides that the interpretation of the Bill of Rights must promote the values of the Constitution.⁹⁶ Through the Constitution's indirect application, the right to identity must be interpreted and applied following the principles established in s 39(1) and (2) of the Constitution.⁹⁷ The study is vital for the development of the common law of delict and statute in light of constitutional values to address novel issues in society,⁹⁸ such as catfishing.

1.4 Limitations

The study does not consider the Protection of Personal Information Act (POPI),⁹⁹ which regulates the processing of personal information by a juristic person who determines the purpose and means of processing data.¹⁰⁰ Since natural persons carry out catfishing, the POPI

⁹⁰ Loubser and Midgley *et al The Law of Delict* (2017) 90-91.

⁹¹ *Grütter v Lombard* para 7- 10 and *Kumalo v Cycle Lab* para 18 -19. Neethling *LAWSA* Vol 20(1) para 395; Roos 2008 *THRHR* 517.

⁹² Identity has indirect protection under the constitution through section 10 the right to human dignity. The right to human dignity is an objective right and foundational constitutional value that informs all law including the common law. However, s 14 of the Constitution of the Republic of South Africa, 1996 entrenches the right to privacy. This means that privacy is afforded direct protection under the Constitution. Despite the direct protection, privacy also falls within the scope of dignity in section 10.

⁹³ Act 25 of 2002.

⁹⁴ Roos and Slabbert 2014 *Potchefstroom Electronic Law Journal* 2856. The ECT Act also applies to any electronic transaction or data messages, which are defined in s 1 read with s 4(1) of Act as the electronic representation of information in any form generated, sent, received, or stored electronically.

⁹⁵ S 39(2) of the Constitution of the Republic of South Africa, 1996.

⁹⁶ S 39(1) of the Constitution of the Republic of South Africa, 1996.

⁹⁷ The Constitution of The Republic of South Africa, 1996. I Currie and J De Waal *The Bill of Rights Handbook* 6ed (2014) 148.

⁹⁸ Langa (2006) *Stell LR* 354; D Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) *Stell LR* 3 at 4.

⁹⁹ Act 4 of 2013.

¹⁰⁰ S 2 and s 3(1)(a) and (b) of Act 4 of 2013.

Act is not relevant because it deals with juristic persons' conduct. The research also does not consider the Cybercrimes Act¹⁰¹ because it is concerned with sanctioning criminal activity that occurs online. Notably, in the USA, the statutes that address catfishing also criminalise it. Equally, this thesis does not consider these criminal sanctions because it only focuses on the civil remedies available to victims of catfishing.¹⁰²

Section 73 of the ECT Act provides that immunity to Internet Service Providers (ISP) for content publication.¹⁰³ However, immunity is subject to the condition that the ISP does not initiate transmission or intervene in the identified methods.¹⁰⁴ It is vital to only focus on users' liability because ISPs have immunity since they are merely conduits. However, in discussing the remedies available to the victim, the ISP's role upon receipt of a takedown notification is considered.¹⁰⁵ Discussing whether or not liability should attach the role of ISPs is important because takedown notifications impose obligations on the ISP.

There is an academic debate on whether the appropriation of a person's image is a privacy or identity concern.¹⁰⁶ However, the courts have not settled the debate.¹⁰⁷ Nonetheless, the study explores the appropriation of image in the context of the right to identity. There is a lack of scholarly materials on catfishing in South Africa and addressing catfishing as an infringement of the right to identity. This limits the study because there is a lack of academic materials to rely on within our jurisdiction.

¹⁰¹ Act 19 of 2020.

¹⁰² See chapter 4 para 4.1.

¹⁰³ S 73(1) provides that a service provider is not liable for providing access or facilitating platforms for information systems or transmitting, routing, or storing data messages through an information system under its control. However, immunity is on condition that the service provider does not initiate, transmit or intervene in the manners identified in s 73(2) of Act 25 of 2002.

¹⁰⁴ S 73(1)(a)-(d) of Act 25 of 2002. The US equivalent of this provision can be found at s 230 of the Communications Decency Act of 1996, 47 U.S.C (2012). The Communications Decency Act also gives blanket immunity to ISPs. According to the provision, ISPs are not liable for content on their websites because they are not publishers. However, the exception indicates that ISPs do not have immunity where a website user has committed a tort affecting the right of publicity, the exception is triggered where intellectual property rights and the right of publicity are involved. See further AM Jung "Twittering Away the Right to Publicity: Personality Rights and Celebrity Impersonation on Social Networking Sites" (2011) 86 *Chicago Kent Law Review* 381 at 384 defines the right of publicity as the "right to control and license for the use of a person's image, likeness or name". Derzakarian 2017 *Loyola of Los Angeles Law Review* 763.

¹⁰⁵ S 77(1) of Act 25 of 2002. A takedown notification is a notice addressed to a service provider requesting that they remove or "take-down" any electronic content that is offensive. S Papadopoulos and S Snail *CyberLaw@SA III The law of the Internet in South Africa* 3ed (2012) 11.

¹⁰⁶ *Kumalo v Cycle Lab* para 19; *Grütter v Lombard* para 8. D McQuoid Mason "Invasion of Privacy: Common Law v Constitutional Delict Does it make a difference?" (2000) 14 *Acta Juridica* 227 at 23.

¹⁰⁷ *Kumalo v Cycle Lab* para 19; *Grütter v Lombard* para 8.

This thesis considers the policies of four social networking platforms or services. These policies are updated regularly. As such, some policies may be amended while this thesis is being written, which may affect the currency of the analysis.

1.5 Research goals

The thesis aims to determine whether the right to identity adequately protects individuals against catfishing. The objectives of the study are:

- a) To determine whether the right to identity offers protection against catfishing.
- b) To determine the remedies available to a victim of catfishing.
- c) To determine whether the common law right to identity effectively addresses catfishing compared to the statutory and common law protections offered in Oklahoma and California.
- d) To investigate the role of private international law in cross-border catfishing cases.

1.6 Methodology

The thesis is a desk-top research piece that facilitates an in-depth analysis of case law on the right to identity and legislation that deals with online communications, such as the ECT Act. It is also conducted as a doctrinal study, analysing legislative texts and judicial opinions on the law of delict and ICT law. The study engages in a comparative analysis of the civil protections between two states in the USA and South Africa. The two states are Oklahoma and California. A comparative analysis is vital for the study because catfishing is a novel issue in South African law, whilst some states in the USA have had the opportunity to address catfishing and electronic impersonation.¹⁰⁸ A comparative analysis is essential for understanding a legal challenge and provides ideas on how to solve it by borrowing from foreign legal systems.¹⁰⁹

The reason for choosing two states for the comparative study is that firstly, in Oklahoma, the catfishing legislation addresses catfishing in private law. This perspective is critical because this thesis aims to address catfishing in South African private law. Secondly, California deems online impersonation a criminal offence but, its penal code offers civil remedies. These two perspectives juxtaposed to one another will help analyse the sufficiency of each state's laws in combating catfishing. California is also a common law jurisdiction, and the private law

¹⁰⁸ According to Derzakarian 2017 *Loyola of Los Angeles Law Review* 741, there are at least nine states in the USA that have legislation against online impersonation. However, the state of Oklahoma was the first to enact legislation and codify the repercussions of catfishing and provide protection for victims in 2016.

¹⁰⁹ B Grossfeld (tr T Weir) *The Strengths and Weaknesses of Comparative Law* (1990) 8-9.

remedies stem from the common law right to privacy.¹¹⁰ Moreover, the comparative analysis is used to assess the adequacy of South African legal remedies for catfishing victims through the lens of private international law. These methods are useful since social media is available globally.

The US legal system is divided into a dual system of federal law and state law. The US Constitution establishes the federal government which is like the South Africa national government. Each of the 50 states have constitutions which empower state governments and assign certain powers to the federal government.¹¹¹ The legal areas and questions that are not dealt with in federal law are dealt with in state law. The catfishing issue is one of the legal questions that are not dealt with in federal law. Hence, this study focuses on the catfishing laws of two states. At national level, there is the Communications Decency Act (CDA)¹¹² which primarily regulates the distribution of indecent materials on the internet.¹¹³ The statute is also the source of protection for the companies that operate and provide social media services to the public through the internet.¹¹⁴

Where federal law and state law intersect, according to the supremacy clause,¹¹⁵ federal law takes preference over state law. The supremacy clause in the US Constitution gives rise to the doctrine of pre-emption.¹¹⁶ The doctrine provides that if state law conflicts with federal law, then state law must give way for the application of federal law.¹¹⁷ It follows that whilst federal law sets the standard, states can improve on the standards set by federal law by enacting more specific laws.¹¹⁸ The thesis considers state law because despite the CDA granting ISPs broad immunity, the CDA does not speak directly to how catfishing must be addressed. However, states have specific laws regulating such conduct online.

¹¹⁰ Derzakarian 2017 *Loyola of Los Angeles Law Review* 755; Santi 2019 *Southern Illinois University Law Journal* 90. The Californian right to privacy is divided into four torts. Two of those torts - misappropriation of name or likeness or false light- are avenues for victims of catfishing to claim damages. See Koch 2017 *University of Colorado Law Review* 263; Derzakarian 2017 *Loyola of Los Angeles Law Review* 757.

¹¹¹ Federal Judicial Center "The U.S. Legal System: A Short Description" https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U_S_Legal_System_English07.pdf (accessed 17 May 2021).

¹¹² 47 U.S.C § 230 (2012).

¹¹³ P Ehrlich "Communications Decency Act § 230" (2002) 17 *Berkley Technology Law Journal* 401 at 401. It must be noted that despite the provisions of the CDA, states are permitted to enact their own laws in addition to the CDA.

¹¹⁴ 47 U.S.C. §230(c); Ehrlich 2002 *Berkley Technology Law Journal* 402.

¹¹⁵ The U.S. Const. art VI.

¹¹⁶ *California Trucking Association v. Bonta*, 2021 WL 1656283 (C.A.9 (Cal.), 2021) 5.

¹¹⁷ *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (U.S.Ga., 1993) 663-664.

¹¹⁸ This can be compared to the Constitution of the Republic of South Africa, 1996 setting legal standards and empowering the executive and legislature to formulate and enact specific statute to enable the implementation of constitutional provisions.

No ethical considerations arise because all the information used in this thesis is publicly available.

1.7 Outline of the thesis

The thesis comprises of 6 chapters. Chapter one introduces the study and provides an outline of the thesis and the themes explored in the thesis. It sets out the study's limitations and methodology. Chapter two defines social media as there are many definitions and delineates which internet-based tools catfishing applies to. It also defines online catfishing by traversing through its brief history. Chapter three focuses on the right to identity in South African. It touches on the history of personality rights in South Africa and as well as the applicable remedies. This chapter investigates the adequacy of current common law rules in protecting individuals against catfishing online and whether the *actio iniuriarum* is a suitable remedy for victims of catfishing.

Chapter four is a comparative analysis of the methods of addressing catfishing used in California and Oklahoma. Having enacted laws dealing with online impersonation and catfishing, the chapter juxtaposes the common law torts the two states to the statutory remedies. Finally, it considers whether and how South African delict principles should be developed. Chapter five analyses the relevant principles of private international law that operate between South Africa and the USA. This chapter discusses which law would apply where catfishing victim is in South Africa and the perpetrator is in the US or vice versa. Finally, chapter six concludes the study by highlighting major arguments made in the thesis and recommends how our common law can be developed to adequately protect the right to identity against catfishing.

CHAPTER 2: CATFISHING ON SOCIAL MEDIA

2.1 Introduction

Life without social media is unimaginable because of the dominance of smartphones. Today, having a high social media presence and sharing every aspect of one's life on social media platforms is customary.¹ Online content has evolved beyond worded posts and now includes captioned picture and video posts, among other things.² The frequent and almost reflexive sharing of one's life online with strangers has some dangers.³ It is not unheard of for people to share the same identity online.⁴ One of them is a fake account and is impersonating the other. Impersonation accounts online are referred to as catfish.⁵

Catfishing describes the act of appropriating another person's images to create a non-existent persona online or using another person's online profiles to impersonate them. The purpose of impersonation or catfishing varies from seeking romantic partners, jest or wanting to cause harm to the impersonated person or an unaware third party.⁶

On the one hand, vast internet communication tools are beneficial for communication and interpersonal relations.⁷ However, on the other hand, these tools are accompanied by various legal challenges.⁸ One of those challenges relates to conduct that interferes with individual privacy and identity on social media.⁹ Therefore, this chapter analyses the context in which the research is located and introduces the existing frameworks aimed at regulating Internet communications.

¹ Adams 2014 *Journal of Law, Information and Science* 158; Smith Smith and Blazka 2017 *Journal of Legal Aspects of Sport* 33; P Nyoni and M Velempini "Privacy and User Awareness on Facebook" (2018) 114 *South African Journal of Science* 27 at 28; Loubser and Midgley *et al The Law of Delict* 402.

² V Estebeth "Intermediary Liability" in S Papadopoulos and S Snail *Cyberlaw@SA III the Law of the Internet in South Africa* (2012) 243. For instance, websites like Instagram only allow users to post picture and video content. In contrast to Facebook where users can share text posts, including captioned pictures and videos. Twitter allows its users to post miniature blog post of 240 characters in length as well as picture, video, and voice recordings. Tiktok, another popular website, allows users to post short video clip content.

³ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 222; L Rogal "Anonymity in Social Media" (2013) 7 *Arizona Summit Law Review* 61 at 61-62.

⁴ Heck 2017 *TYL* 411; Kambellarl 2017 *University of Illinois Timely Tech* 1.

⁵ *Ibid.*

⁶ K Claton "We Are Not Who We Pretend to Be: ODR Alternatives to Online Impersonation Statutes" (2014) 16 *Cardozo Journal of Conflict Resolution* 323 at 355.

⁷ CE Hart "Social Media Law: Significant Developments" (2016) 72 *Business Lawyer* 235 at 235.

⁸ N Pelletier "The Emoji that Cost \$20,000: Triggering Liability for Defamation on Social Media" (2016) 52 *Washington University Journal of Law & Policy* 227 at 229 - 230; TW Hartney "Likeness Used as Bait in Catfishing: How Can Hidden Victims of Catfishing Reel in Relief" (2018) 19 *Minnesota Journal of Law, Science & Technology* 277 at 278.

⁹ Clanton 2014 *Cardozo Journal of Conflict Resolution* 324.

2.2 A historical overview of the meaning of catfishing

2.2.1 The history of catfishing and the meaning of the term

Contrary to popular belief, catfishing is not a product of social media platforms.¹⁰ Catfishing or impersonation has been taking place both online and through other mediums offline.¹¹ For example, in the 1960s, people impersonated others or cloaked their real identity using fake names in newspaper adverts when looking for romantic partners. They would send their unknowing victims love letters to scam them out of money.¹² Intriguingly, Benjamin Franklin expressed controversial ideas and criticism against the state under false names or false identities to protect himself.¹³ The rise of social media changed this practice significantly by offering a different platform to impersonate or catfish.

Colloquially catfishing refers to using another person's images to create a fake social media profile. Formally, catfishing is known as the impersonation of another person through social media.¹⁴ The catfishing phenomenon gained popularity following the release of the MTV television series "Catfish".¹⁵ The series has a similar plot to "Catfish: the documentary", where Nev Schulman, whom a catfish misled, travelled to meet the person behind the account.¹⁶ He found out that the account was fake, and the images used to create the account belonged to a model who was not aware that someone used her pictures to catfish. His brother documented his journey to meet the person that ran the account and with whom he was in a nine-month relationship.¹⁷

Schulman found that a married woman had lured him into an online relationship. He coined the term "catfish" after the woman's husband was asked to comment on his wife's conduct. The husband said:

"They used to tank cod from Alaska all the way to China. They'd keep them in vats in the ship. By the time the codfish reached China, the flesh was mush and tasteless. So this guy came up with the idea that if you put these cods in these big vats, put some catfish in with them and the

¹⁰ Santi 2019 *Southern Illinois University Law Journal* 75.

¹¹ M Pearl "How Catfishing Worked Before the Internet" <https://www.vice.com/en/article/5gk78n/how-did-people-catfish-before-the-internet> (accessed 7 April 2021).

¹² *Ibid.*

¹³ JC Calaway "Benjamin Franklin's Female and Male Pseudonyms: Sex, Gender, Culture, and Name Suppression from Boston to Philadelphia and Beyond" (2003) *Honors Projects* 1 at 2 and 5.

¹⁴ Derzakarian 2017 *Loyola of Los Angeles Law Review* 748; Santi 2019 *Southern Illinois University Law Journal* 76.

¹⁵ Heck 2017 *TYL* 411; "Catfish: The TV Show" <https://www.mtv.com/shows/catfish-the-tv-show> (accessed 14 April 2021); Hartney 2018 *Minnesota Journal of Law, Science & Technology* 278.

¹⁶ Koch 2017 *University of Colorado Law Review* 237-238.

¹⁷ *Ibid.*

catfish will keep the cod agile. And there are those people who are catfish in life. And they keep you on your toes. They keep you guessing, they keep you thinking, they keep you fresh. And I thank god for the catfish because we would be droll, boring and dull if we didn't have somebody nipping at our fin.”¹⁸

The term originated from this analogy. The idea was that the fishermen put bigger predatory fish in the tank to keep the smaller fish alert and alive to improve the quality of the smaller fish. According to the woman's husband, online impersonation is similar.¹⁹ Impersonators keep regular people awake and aware of their interactions. It suggests that while caution is encouraged in online communications, catfish accounts are necessary keep regular users stimulated and alert.

Social media provides an accessible source for perpetrators to find their victims and third parties to lure. Moreover, the unimpeded account creation and ease of downloading other people's pictures contribute to the effectiveness of the conduct. Catfishing is much easier and effective on social media because of the level of trust people have online.²⁰

2.2.2 Social media's contribution to catfishing

The phrase “social media”²¹ refers to digital technologies that facilitate user-generated interaction through uploaded content.²² Social media comprises of technology for connecting people globally to share information. There are many definitions of social media because the phrase refers to different technologies for different people.²³ Today, social media is a collective term referring to internet-based platforms²⁴ and websites designed to facilitate communications through user-generated content, either in real-time or asynchronously with a chosen audience.²⁵

¹⁸ A Harris “Who Coined the Term “Catfish”?” <https://slate.com/culture/2013/01/catfish-meaning-and-definition-term-for-online-hoaxes-has-a-surprisingly-long-history.html> (accessed 7 April 2021).

¹⁹ *Ibid*; O Waring “What is Catfishing and How Can You Spot it?” <https://www.metro.co.uk/2018/03/18/catfishing-can-spot-7396549> (accessed 4 May 2021).

²⁰ Koch 2017 *University of Colorado Law Review* 24; Nyoni and Velempini 2018 *South African Journal of Science* 27.

²¹ Compared to the Merriam-Webster Dictionary “Social media” <https://www.merriam-webster.com/dictionary/social%20media> (accessed 8 April 2021), which defines social media as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages and other content (such as videos).”

²² CT Carr and RA Hayes “Social Media: Defining, Developing and Divining” (2015) 23 *Atlantic Journal of Communication* 46 at 47.

²³ Rogal 2013 *Arizona Summit Law Review* 62; Carr and Hayes 2015 *Atlantic Journal of Communication* 47- 48.

²⁴ A Rochefort “Regulating Social Media Platforms: A Comparative Policy Analysis” (2020) 25 *Communication Law and Policy* 225 at 227 defines platforms as digital infrastructures that give users tools to build their own products, services, and marketplaces. They are a place where consumers and businesses converge in one integrated environment online.

²⁵ TZ Zarsky and NN Gomes de Andrade “Regulating Electronic Identity Intermediaries: The Soft eID Conundrum” (2013) 74 *Ohio State Law Journal* 1335 at 1338; M Tsikerdekis and S Zeadally “Online Deception

The platforms and websites facilitate e-commerce, user-generated content creation and distribution.²⁶ There are different categories of social media, depending on their features and purposes.

The categories include social networking websites,²⁷ blogging and micro-blogging websites,²⁸ image and video sharing websites,²⁹ and social bookmarking websites.³⁰ Most of the identified classifications of social media overlap because each website fosters multiple functions.³¹ Often social media and social networking sites are used interchangeably. Technically the two terms refer to different concepts and should not be considered synonymous.³² Social networking sites are defined by three characteristic functions allowing individuals to (1) create profiles within a bounded system, (2) select and delineate users with whom they share a connection, and (3) explore other users' profiles and leave private messages or public comments on their content.³³

Social networking websites are technological applications built on what some refer to as the "Web 2.0" foundation.³⁴ Web 2.0 refers to applications and technologies found on the World Wide Web that enable end-user interaction and collaboration.³⁵ The term describes the technology's utility to users rather than the technology's features. This model indicates that the current Internet applications' model is more user-centric than before, and users direct the

in Social Media" (2014) 57 *Communications of the ACM* 72 at 75; Adams 2014 *Journal of Law, Information, and Science* 164; Carr and Hayes 2015 *Atlantic Journal of Communication* 50; Pelletier 2016 *Washington University Journal of Law & Policy* 227; Smith Smith and Blazka 2017 *Journal of Legal Aspects of Sport* 33; Santi 2019 *Southern Illinois University Law Journal* 75.

²⁶ Tapria and Kanwar *Understanding social media* 8; H Paquette "Social Media as a Marketing Tool: A literature Review" (2013) *Major Papers by Master of Science Students* 1 at 4; Mushwana and Bezuidenhout 2014 *Southern African Journal of Accountability and Auditing Research* 63.

²⁷ These include, Facebook, LinkedIn, Myspace, instant messengers such as WhatsApp, and Google +.

²⁸ Examples of blogging websites are Tumblr, WordPress and Twitter is an example of a microblogging websites because it limits users' post, called "tweets" to 240 characters. TikTok is also considered a microblogging website even though it mainly allows video sharing, the size of the videos is smaller than most video sharing websites.

²⁹ YouTube and Vimeo are types of video sharing websites, whilst Instagram, Pinterest and Snapchat are picture sharing websites.

³⁰ This category has websites such as Google, Pinterest.

³¹ For example, Twitter was initially a microblogging website, however, now it is classified as both a microblogging website and social network. According to I Himelboim *et al* "Classifying Twitter Topic-Networks Using Social Network Analysis" (2017) *Social Media + Society Journal* 1 at 2 Twitter can be classified as a social networking website because it permits users to form connections resulting in social network structures by mentioning, liking, and retweeting one another's content.

³² According to Carr and Hayes 2015 *Atlantic Journal of Communication* 49, social networking sites are social media tools. There is a prevalent and erroneous belief that the two are synonymous or refer to the same websites and tools. Roos and Slabbert 2014 *Potchefstroom Electronic Law Journal* 2848.

³³ DM Boyd and NB Ellison "Social Network Sites: Definition, History, and Scholarship" (2008) *Journal of Computer-Mediated Communication* 210 at 211; Roos 2012 *SALJ* 383-385; *Heroldt v Wills* para 11.

³⁴ AM Kaplan and M Haenlein "Users of the World, Unite! The Challenges and Opportunities of Social Media" (2010) 53 *Business Horizons* 59 at 60; Paquette 2013 *Major Papers by Master of Science Students* 2; R Clarke "Privacy and Social Media: An Analytical Framework" (2014) 23 *Journal of Law, Information and Science* 169 at 169.

³⁵ Kaplan and Haenlein 2010 *Business Horizons* 60-61.

functionality of the platforms.³⁶ Users direct functionality because the service providers update or improve the platforms based on the actions of users and how they utilise the platforms.

SixDegree.com was the first social networking site to be created in 1997.³⁷ It had the model three characteristic functions. This model was the prototype for most social networking websites that originated in the early 2000's such as Friendster, LinkedIn, MySpace and Facebook.³⁸ The primary function of these websites was to allow individuals to connect with people that they knew personally. Each user could navigate through their friends' list of connections and expand their network by connecting with those people. Based on the foundational concept of the website SixDegrees, everyone is connected but separated by a few steps. People connect based on the idea that each is "a friend of a friend", separated by a maximum of six steps.³⁹ The idea facilitates connections between individuals that may have not occurred offline.⁴⁰

The different websites refer to the connection lists using other terms.⁴¹ Users with profiles on the website form connections and extend their networks. A profile is a user's personality depicted on that social networking website. To construct a profile, a user must answer a questionnaire asking for personal information. Typically, a profile includes one's age, gender, a short biography, and interests.⁴² Most sites, if not all, encourage users to upload a picture for easy identification.⁴³ Users can further enhance their profiles by uploading more images.⁴⁴

³⁶ Kaplan and Haenlein 2010 *Business Horizons* 61; Paquette 2013 *Major Papers by Master of Science Students* 2; C Campbell LF Pitt M Parent and PR Berthon "Understanding Consumer Conversions Around Ads in a Web 2.0 World" (2011) 40 *Journal of Advertising* 87 at 87; Rochefort 2020 *Communication Law and Policy* 227.

³⁷ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 214; Roos 2012 *SALJ* 382.

³⁸ *Ibid.* A similar platform that was only available to South African users is "Mxit". It is no longer in operation. See "Mxit is officially dead" https://businesstech.co.za/news/mobile/139225/mxit-is-officially-dead/?_cf_chl captcha_tk__=pmd_Ku5YWeXLX6D4pYu3L3uvxuduv.ygyX3K1dXKpxB8GbI-1634563808-0-gqNtZGzNAXCjcnBszQeR (accessed 18 October 2021).

³⁹ <http://sixdegrees.com> (accessed 12 April 2021). Himelboim *et al* 2017 *Social Media + Society Journal* 2 state that social network structures are created when people or organisation form connections or links with one another. Social media platforms permit users to form links through befriending and sharing content.

⁴⁰ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 211. It must be noted that while websites like Facebook refer to connections as "friends" this is not an accurate description of all connections that occur on the site. Networks are created by firstly identifying users that one knows personally offline, then secondly by connecting with or befriending the connections on another user's network. Sometimes these are not friends in the true sense of the word as they may not have met offline.

⁴¹ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 213. For example, in *Isparta v Richter* 2013 (6) SA 529 (GP) para 4 the court identified that on Facebook people in one's network are called "Friends". Instagram and Twitter refer to connections as followers. *Heroldt v Wills* para 13.

⁴² *Isparta v Richter* 2013 (6) SA 529 (GP) para 4; Roos and Slabbert 2014 *Potchefstroom Electronic Law Journal* 2846; Nyoni and Velepini 2018 *South African Journal of Science* 27.

⁴³ Roos 2012 *SALJ* 384; Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 213.

⁴⁴ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 213, 214 the features on social networking websites vary but the most common features are communicating by commenting on other users' content and sending other users private or direct messages.

Since there is no authentication mechanism, users may provide false information and present themselves as whomever they want.⁴⁵

Apart from viewing the content posted by others, social networking sites now include content sharing features.⁴⁶ Consequently, it is easy to distribute another user's content to others who are not part of their immediate audience. Likewise, screen capturing and recording features on certain mobile devices means that users have less control over the destination of their content and the way people use it. Anyone with an account on a particular website can access the content posted on social media platforms depending on a user's privacy settings.⁴⁷

Social media is generally prevalent, but social networks are the most popular category. For example, in the second quarter of 2020, Facebook⁴⁸ was reported to have 2.7 billion active monthly users. Instagram,⁴⁹ a photo and video sharing platform with e-commerce features, was said to have 1.1 billion active users,⁵⁰ whilst Twitter⁵¹ had an average of 330 million users in 2019.⁵² Popularity is significant on social media platforms. The number of "friends" or "followers" and the level of engagement on one's content is a form of currency.⁵³

On social networking platforms, a user's profile and the content they post make the first impression.⁵⁴ The most attractive profiles are more likely to be popular. Impressions are essential on social media. The list of connections, the appearance of one's profile, and the

⁴⁵ Roos 2012 *SALJ* 385; Smith Smith and Blazka 2017 *Journal of Legal Aspects of Sports* 34; Kambellarl 2017 *University of Illinois Timely Tech* 1; Heck 2017 *TYL* 411; Santi 2019 *Southern Illinois University Law Journal* 75.

⁴⁶ For example, on Facebook one can share the posts of a friend to their own page, allowing their own list of friends to view it. Instagram allows users to send content posted by another user through direct messages without the author's knowledge. On Twitter there is a function called "Retweet" that allows users to repost other user's content on their own pages. Twitter users can also share other users' tweets through direct messages without the author's knowledge.

⁴⁷ It is noteworthy that some social networking websites allow non-users to view content posted by users with public accounts. However, this access is limited to some degree because the website prompts a non-user to create an account. For instance, Instagram allows non-users to scroll or navigate through a public user's profile and then interrupts scrolling with a prompt to log in or to create an account. Twitter does not have the same feature; this means that anyone can navigate through a user's profile and their tweets.

⁴⁸ <https://www.facebook.com>.

⁴⁹ <https://www.instagram.com>.

⁵⁰ "Most popular social networks worldwide as of October 2020 ranked by number of active users" <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (accessed 26 January 2021).

⁵¹ <https://www.twitter.com>.

⁵² "Number of monthly active Twitter Users worldwide from 1st quarter 2010 to 1st quarter 2019" <https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/> (accessed 26 January 2021).

⁵³ Engagement is the measure of activity and positive responses that one's profile generates from other users. It is built on the reactions collected such as likes, retweets, followers, and shares. Paquette 2013 *Major Papers by Master of Science Students* 12 defines social currency as the by-product of individuals sharing information about a brand or share a particular brand with their audience. This is closely linked to social capital which arises from relationships formed between individuals. The size of a network influences the social capital.

⁵⁴ Clanton 2014 *Cardozo Journal of Dispute Resolution* 326.

content they post create a particular image directed to a chosen audience.⁵⁵ Individuals might find it appealing to assume another person's identity because of the social dynamics on social media.

2.2.3 Catfishing on social networking sites

Initially, social media networks consisted of friends and family known in-person to a user.⁵⁶ However, this changed because users befriended and interacted with people they had never met before.⁵⁷ The popularity of a high social media presence has made people more vulnerable to conduct such as catfishing. One of the main attractions of social media is being able to connect with many people quickly.⁵⁸ Also, building networks and gaining notoriety is appealing to some. It is hard to separate fake accounts from real accounts when one is motivated by seeking notoriety. People share personal information such as their images with networks of people they do not wholly know.

The fake profile problem dates back as far as 2002 on the social networking website Friendster.⁵⁹ Fake profiles began because the website tacitly encouraged having many friends through its "most popular" feature.⁶⁰ The feature identified the most popular users. Unfortunately, the website removed the component due to the rise of "fakesters".⁶¹ The Friendster fake accounts included, but were not limited to, celebrities and other fictional characters. Some of these accounts were also fake because they had unrealistic display pictures.⁶² Fake accounts did not start and end on Friendster. Towards the end of 2020, Facebook reportedly took down 1.3 billion fake accounts.⁶³

There are many instances where social networking website users cloak their identities but not all amount to catfishing. Sometimes users will use a neutral image, such as an image of their

⁵⁵ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 219; Roos 2012 *SALJ* 385.

⁵⁶ Kaplan and Haenlein 2010 *Business Horizons* 63.

⁵⁷ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 211 and 213.

⁵⁸ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 216.

⁵⁹ www.Friendster.com is no longer operational.

⁶⁰ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 216.

⁶¹ *Ibid.* Fake social media accounts did not end on Friendster. A recent phenomenon is the rise of "Finsta" accounts on Instagram. "Finsta" is a shorthand for "Fake Instagram Account". Many younger users have Finsta accounts which are usually a private account through which they connect with close friends. Their open and public account is where they openly share content with a wider audience. See U.S Senate Committee on Commerce, Science and Transportation hearing for an explanation of "Finsta" accounts. <https://www.commerce.senate.gov/2021/9/protecting-kids-online-facebook-instagram-and-mental-health-harms> (accessed 18 October 2021).

⁶² Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 216.

⁶³ C Mehta "Facebook Disables 1.3-billion Fake Accounts in Oct-Dec Last Year" *Sunday Times Live* 22 March 2021 <https://www.timeslive.co.za/news/world/2021-03-22-facebook-disables-13-billion-fake-accounts-in-oct-dec-last-year/> (accessed 12 April 2021).

pet, accompanied by their real name to conceal their identity. In catfishing, the image used to depict the account belongs to an existing person attached to another name. Catfishing is different from impersonating a person online in the way parody or fan accounts would.

A catfish is hard to find because their profiles often tend to resemble the accounts of real people.⁶⁴ They have a profile picture, a background story and multiple videos and pictures attached. It is difficult to say that an account is a catfish with absolute certainty. Third parties might easily mistake a catfish for a real person, and victims might never be aware that they are victims of catfishing or impersonation.⁶⁵ Victims of catfishing usually become aware that their images are used for catfishing when the third party who the catfish misled brings it to the victim's attention.⁶⁶

People who catfish are zealous in their work and can create whole networks of people through catfishing.⁶⁷ Most social networking sites encourage users to create profiles that are accurate representations of their offline identity. Unfortunately, not all users follow this rule, and social networking sites do not have an incentive to authenticate every account created.⁶⁸ Catfish accounts are an example of inauthentic accounts on social media. One of the reasons that people impersonate others or catfish is to maintain online anonymity.⁶⁹

Anonymity is the ability to conceal a person's identity during communication.⁷⁰ It is usually motivated by the need to express opinions without fear of retaliation.⁷¹ Online anonymity encourages freedom of speech, and there are many ways to achieve anonymity online, such as using a pseudonym.⁷² A pseudonym is an alias or fictitious name used to conceal one's legal name and identity.⁷³ However, some choose to hide their identity by presenting themselves as someone else altogether by using another person's picture or name, or or a combination of both.

⁶⁴ Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 55.

⁶⁵ Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1343-1344; Heck 2017 *TYL* 411.

⁶⁶ E Flynn "Someone's Been Using my Facebook Photo's to 'Catfish' People for Nearly a Decade" <https://www.vice.com/en/article/mv5zbn/someones-been-using-my-identity-to-catfish-people-for-nearly-ten-years-930> (accessed 12 April 2021).

⁶⁷ Hartney 2018 *Minnesota Journal of Law, Science & Technology* 278.

⁶⁸ Boyd and Ellison 2008 *Journal of Computer -Mediated Communication* 219; Koch 2017 *University of Colorado Law Review* 251 -252.

⁶⁹ Kambellarl 2017 *University of Illinois Timely Tech* 1.

⁷⁰ Nel 2007 *Comparative and International Law Journal of Southern Africa* 193 and 196.

⁷¹ E Moyakine "Online Anonymity in the Modern Digital Age: Quest for a Legal Right" (2016) 1 *Journal of Information Rights, Policy and Practice* 1 at 1.

⁷² Nel 2007 *Comparative and International Law Journal of Southern Africa* 194; Rogal 2013 *Arizona Summit Law Review* 62.

⁷³ Rogal 2013 *Arizona Summit Law Review* 62; Moyakine 2016 *Journal of Information Rights, Policy and Practice* 1.

2.2.4 Defining catfishing legally

Catfishing is not yet regulated in South African law. There is no statutory definition, and the courts have not had the opportunity to define it. It follows that there is no formal legal definition for catfishing in South Africa as no law addresses this phenomenon yet. Similarly, the USA does not have a federal law that explicitly addresses and defines catfishing.⁷⁴ However, several states recognise catfishing as a legal problem and have codified laws to address catfishing.⁷⁵ Some courts have also had to adjudicate on matters concerning catfishing.⁷⁶ However, in the USA, the legal definitions of catfishing are linked to online impersonation.⁷⁷

The US states recognise online impersonation in one of two forms.⁷⁸ Impersonation can be (a) obtaining a person's personal information to log into their online profiles and pretend to be that person,⁷⁹ or (b) creating a fake or fictitious account using another person's identity and likeness.⁸⁰ Catfishing is usually the second type of online impersonation because a catfish constructs a fake identity profile on social networking sites by appropriating another person's images.⁸¹

There are a few US academic and judicial definitions of catfishing. Pelletier defines catfishing as when an internet user engages an unaware and vulnerable user into a fake online relationship.⁸² Hartney refers to it as the fabrication of individual online identities or multiple

⁷⁴ Santi 2019 *Southern Illinois University Law Journal* 85.

⁷⁵ Reznik 2013 *Touro Law Review* 457; Smith Smith and Blazka 2017 *Journal of Legal Aspects of Sport* 36-37; Derzakarian 2017 *Loyola of Los Angeles Law Review* 742; Santi 2019 *Southern Illinois University Law Journal* 86.

⁷⁶ *In re Rolando S.*, 197 Cal. App. 4th 936 was not dealt with as a catfishing case where an actual person had been impersonated. Rather, the matter related to the unauthorised use of personal identifying information of another person. Under Cal Penal Code § 30.5 using another person's identification information amounts to identity theft. *Calsoft Labs, Inc. v. Panchumathi*, 2020 WL 4032461 2 is a case where the court dealt with catfishing where the plaintiffs had impersonated the defendant by using his email account.

⁷⁷ Reznik 2013 *Touro Law Review* 457-458.

⁷⁸ According to Reznik 2013 *Touro Law Review* 457-458 and Derzakarian 2017 *Loyola of Los Angeles Law Review* 742 Oklahoma, California, New York, Texas, Louisiana, Hawaii, Mississippi, New Jersey, Washington, and Wyoming are the few states that refer to online impersonation in their laws.

⁷⁹ In *In re Rolando S.*, 945 fn 6, the court differentiates between two types of online impersonations that are legally recognised in the state of California. The first is Cal. Penal Code §528.5(a) which makes it an offence to credibly impersonate an actual person through or on an internet website or by other electronic means. The court stated that this provision could be violated by posting comments on a blog impersonating another person. The second is Cal. Penal Code §530.5(a) which makes it an offence to intentionally obtain a person's personal identifying information and use that information for an unlawful purpose. The court found the defendant guilty of contravening §530.5(a) by gaining access to the victim's Facebook profile and impersonating her.

⁸⁰ Heck 2017 *TYL* 411; Kambellarl 2017 *University of Illinois Timely Tech* 1; *Calsoft Labs, Inc. v. Panchumathi*, 2.

⁸¹ OK ST T. 12 §1450 Subsection B; Cal. Penal Code §528.5(a); Koch 2017 *University of Colorado Law Review* 237 and 239. *People v. Love*, 2019 WL 3000836 1 and 3, and *People v. Faber*, 15 Cal. App. 5th Supp. 41 51 are examples of cases where someone had been lured by a catfish account.

⁸² Pelletier 2016 *Washington University Journal of Law & Policy* 232.

online identities to mislead people into emotional/ romantic relationships over a long period.⁸³ In the case *Zimmerman v. Board of Trustees of Ball State University*,⁸⁴ the court confirmed this definition of catfishing.⁸⁵ On a popular television series dedicated to uncovering the true identities of catfish, catfishing is defined as “[pretending to be someone else] online by posting false information, such as someone else’s pictures, on social media sites usually with the intention of getting someone to fall in love with you.”⁸⁶

These definitions have some commonalities, such as creating fake identities with false information such as someone else’s pictures to mislead others. Most catfish accounts use the pictures of a person who exists offline accompanied by fabricated personal information, like a name, date of birth, location, and interests. The term catfishing is widely used and known among younger users of social networking platforms. Younger people watch the television series “Catfish”, which is the reason for the term’s popularity.⁸⁷

2.3 Social media policies on catfishing

A person who falls victim to a catfishing scheme and suffers harm as a result, should undoubtedly have recourse against someone for the damage they have suffered. Therefore, the study critically examines social media service providers’ policies on catfishing and impersonation establishes whether they can be held liable.⁸⁸ Social networking platforms offer different features and functions. It follows that the platforms have different policies on catfishing and impersonation.⁸⁹

For a long time, anonymity was generally acceptable. The United Nations Human Rights Council accepted that anonymity was a vital in exercising the right to freedom of expression and opinion.⁹⁰ Even with the development of Internet communications, International law tolerates anonymity online and regards it as an inherent aspect of the right to privacy and freedom of expression.⁹¹ According to this view, online confidentiality and anonymity preserve

⁸³ Hartney 2018 *Minnesota Journal of Law, Science & Technology* 281.

⁸⁴ *Zimmerman v. Board of Trustees of Ball State University*, 940 F. Supp. 2d 875 (S.D.Ind. 2013).

⁸⁵ *Zimmerman v. Board of Trustees of Ball State University*, 891.

⁸⁶ Hartney 2018 *Minnesota Journal of Law, Science & Technology* 281; *Zimmerman v. Board of Trustees of Ball State University*, 891.

⁸⁷ VH Williams *Catfishing and Online Identity Management* (PH. D, Alliant International University, 2020) 3

⁸⁸ Clanton 2014 *Cardozo Journal of Dispute Resolution* 326- 327.

⁸⁹ Koch 2017 *University of Colorado Law Review* 250.

⁹⁰ Article 19 of the Universal Declaration of Human Rights; F La Rue “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” (2011) *A/HRC/17/27* para 53; W Benedek and MC Kettemann *Freedom of Expression and the Internet* (2013) 37.

⁹¹ D Kaye “Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression” (2015) *A/HRC/29/32* paras 12 and 16. See also Association for Progressive Communications “The Right to Freedom of Expression and The Use of Encryption and Anonymity in Digital Communications”

privacy in online communications.⁹² Therefore, anonymity contributes to the safety of socially and politically marginalised groups when they express their views online. Nevertheless, recently there has been a shift in favour of unconcealed identity online.⁹³ The main characteristic of this shift is that social media users, and particularly users of social networks, use their legal names.⁹⁴ An example of a social networking site that strongly encourages real-name usage is Facebook.

2.3.1 Facebook

2.3.1.1 Nature and purpose

Facebook is a free internet-based social networking service.⁹⁵ People join Facebook to socialise with others and to network.⁹⁶ Initially, Facebook was only available at US universities.⁹⁷ Facebook users must create a profile containing their name, location, interests, relationship status, birth information and contact details to interact with other users online and share content.⁹⁸ Facebook has evolved in its functions. Today, users can do more than just like, share, and befriend one another. The platform also offers e-commerce features enabling users to advertise, buy and sell goods to one another.⁹⁹

2.3.1.2 Impersonation policy

According to the platform's community standards, the company is committed to free expression, however, it is aware of the new abuses that arise from the Internet. Hence, it limits free expression with the aim of giving effect to certain values, one of which is authenticity.¹⁰⁰ The authenticity value relates to the content that users see on the platform and the way users

Submissions to the United Nations Special Rapporteur on Right to Freedom of Opinion and Expression 3 and 4 <https://www.ohchr.org/Documents/Issues/Opinion/Communications/AssociationForProgressiveCommunication.pdf> (accessed 12 April 2021).

⁹² Association for Progressive Communications "The Right to Freedom of Expression and The Use of Encryption and Anonymity in Digital Communications" 5.

⁹³ R Bodle "The Ethics of Online Anonymity or Zuckerberg vs. 'Moot'" (2013) 43 *Computers and Society* 22 at 23; Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1351; SC Haan "Bad Actors: Authenticity, Inauthenticity, Speech and Capitalism" (2020) 22 *University of Pennsylvania Journal of Constitutional Law* 619 at 629.

⁹⁴ Bodle 2013 *Computers and Society* 23. The movement towards unconcealed identity in online communications comes as no surprise given that online communications has become the primary mode of communication globally.

⁹⁵ *Dutch Reformed Church Vergesig Johannesburg Congregation v Rayan Sooknunan t/a Glory Divine World Ministries* para 42; Roos 2012 *SALJ* 383.

⁹⁶ Adams 2014 *Journal of Law, Information and Science* 164; Roos and Slabbert 2014 *Potchefstroom Electronic Law Journal* 2846.

⁹⁷ Roos and Slabbert 2014 *Potchefstroom Electronic Law Journal* 2846.

⁹⁸ *Ibid*; *Isparta v Richter and Another* para 4.

⁹⁹ Roos 2012 *SALJ* 383.

¹⁰⁰ Facebook Transparency Center <https://transparency.fb.com/en-gb/policies/community-standards/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2F> (accessed 18 October 2021). Other values include privacy, safety, and dignity.

represent themselves and their conduct.¹⁰¹ Facebook's community standards include a list of conduct that it deems offensive and may result in account termination.¹⁰² Impersonating others by using their pictures with the explicit intent to deceive others, creating an account to pretend to be or speak for another person or entity without consent is strictly prohibited.¹⁰³ Such conduct will lead to the user's account being disabled.

Applying the principle of proportionality to misconduct, the policy provides that account termination is a harsh response. Therefore, the company aims to give users opportunities to rectify their behaviour and familiarise themselves with the platform policies.¹⁰⁴ In 2021, Facebook further updated its policies and added that they would investigate accounts misrepresenting their identity by using a name that does not accord to its "name policies",¹⁰⁵ and maintaining multiple accounts,¹⁰⁶ among other things.¹⁰⁷

Facebook's "name policy" expresses that users should use a name that matches their offline name or nickname.¹⁰⁸ The name should also be the same name that appears on the users' legal identification documents.¹⁰⁹ According to the community standards, the rationale of the policy is to enhance authenticity to create a community of accountability. In addition, the policy operates to prevent misrepresentation and impersonation.¹¹⁰ Consequently, the platform strongly discourages pseudonyms or creating accounts under other people's names.¹¹¹ The website creator Mark Zuckerberg expressed the rationale for the real name policy by saying

¹⁰¹ *Ibid.*

¹⁰² Facebook "Account Integrity and Authentic Identity" <https://transparency.fb.com/en-gb/policies/community-standards/account-integrity-and-authentic-identity/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2Fmisrepresentation%2F> (accessed 18 October 2021).

¹⁰³ Facebook Community Standards "Account Integrity and Authentic Identity".

¹⁰⁴ *Ibid.*

¹⁰⁵ Facebook "Name Policies" <https://www.facebook.com/help/112146705538576?ref=ccs> (accessed 12 April 2021).2

¹⁰⁶ Facebook Community Standards "Account Integrity and Authentic Identity".

¹⁰⁷ The sanctions that result from this conduct are temporary restriction or accounts being permanently disabled.

¹⁰⁸ Facebook Community Standards "Account Integrity and Authentic Identity". Google's policy deems it a violation of its usage terms to create a false identity to trick people. However, this does not apply on all Google services, and it does not apply to using a false identity account to make a fan email account for a celebrity. Google also disables an account for impersonation and misrepresentation of one's identity, although the service provider allows users to create parody, satirical accounts and to use pen names and pseudonyms. See <https://support.google.com/accounts/answer/40695?hl=en-GB#zippy=%2Ccreating-a-false-identity-to-deceive-people> (accessed 12 April 2021).

¹⁰⁹ Facebook "Name Policies".

¹¹⁰ Facebook Community Standards "Account Integrity and Authentic Identity"; S Chen "What's in a Name? - Facebook's Real Name Policy and User Privacy" (2018) 28 *Kansas Journal of Law and Public Policy* 146 at 153.

¹¹¹ *Ibid.*

that people should only have one identity and that having more than one identity was a lack of integrity.¹¹²

Moreover, the community standards state that Facebook will remove harmful accounts to maintain a safe environment and empower free expression. There is a combination of automatic and manual systems dedicated to blocking and removing accounts that infringe community standards.¹¹³ Despite having such stringent policies on identity and names, Facebook remains the most prominent site for catfish accounts.¹¹⁴ Facebook reserves the right to implement the name policy when there has been a report of a community standard breach. Therefore, Facebook can choose whether to remove an account after receiving a notice for misrepresentation or impersonation.¹¹⁵

The service provider also only seeks identity authentication once there has been a report. The automated systems do not automatically pick up on the duplicate accounts or seek authentication at account creation. The lack of automatic authentication illustrates that preventing impersonation or misrepresentation on the website is not a top priority. Hence, the court in *Heroldt v Wills*¹¹⁶ encouraged focusing on the users' if one wants to stop the wrongdoing than direct energy to the service providers.¹¹⁷

2.3.2 Tinder

2.3.2.1 Nature and purpose

Tinder is a free internet-based dating website and application. It enables users to meet potential romantic partners through a matching-making system.¹¹⁸ The system connects users with potentials based on location, gender, orientation, and distance.¹¹⁹ A match arises when two

¹¹² Bodle 2013 *Computers and Society* 23; Chen 2018 *Kansas Journal of Law and Public Policy* 152.

¹¹³ Facebook "Detecting Violations" <https://transparency.fb.com/en-gb/enforcement/detecting-violations/technology-detects-violations/> (accessed 18 October 2021) shows that the service provider uses artificial intelligence technology to detect violations of certain community standards. The manual mechanisms are content moderators who are employed with the sole responsibility of reviewing reported materials to decide whether the content infringes community standards. See H Messenger and K Simmons "Facebook Content Moderators Say They Receive Little Support, Despite Company Promises" (2021) *NBC News* <https://www.nbcnews.com/business/business-news/facebook-content-moderators-say-they-receive-little-support-despite-company-n1266891> (accessed 2 October 2021).

¹¹⁴ E Fletcher "Scams Staring on Social Media Proliferate in Early 2020" (2020) *Consumer Protection Data Spotlight* <https://www.ftc.gov/news-events/blogs/data-spotlight/2020/10/scams-starting-social-media-proliferate-early-2020#end5> (accessed 7 May 2021).

¹¹⁵ *Heroldt v Wills* para 38.

¹¹⁶ [2014] JOL 31479 (GSJ).

¹¹⁷ *Heroldt v Wills* para 38.

¹¹⁸ Tinder "Frequently Asked Questions" <https://tinder.com/en-GB/faq> (accessed 7 May 2021); ID Manta "Tinder Lies" (2019) 54 *Wake Forest Law Review* 207 at 209.

¹¹⁹ Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 2.

users swipe right on one another's profiles.¹²⁰ Swiping left means that a user does not have an interest in the profile.¹²¹ Once there is a match, the platform sends reminders to encourage users to communicate with one another through the website's private messaging feature.¹²²

Catfishing is known to be ubiquitous on dating websites and services. On these websites, users want their profiles to appear more appealing to others. Thus, they modify their profiles in whatever manner they wish to make them more attractive to potential matches and give a better impression to other users.¹²³ Although it is common for users of dating sites to enhance their profiles,¹²⁴ it is arguably most common on Tinder because it only allows users to upload six pictures. Their biography is limited to 500 characters.¹²⁵ A user could be tempted to use another person's photos to make their profile more appealing because physical appearance is significant.¹²⁶ Tinder, however, has a strict policy against impersonation. It is also likely much harder to catfish on Tinder because the purpose of interacting on the site is to meet one another in person eventually.¹²⁷

2.3.2.2 Impersonation Policy

Like most social networking platforms, Tinder users can add pictures to their profiles. Tinder has a photo verification feature that confirms that users are the people who appear on the images uploaded, to ensure that profiles are authentic. Verified profiles are signified by a blue tick.¹²⁸ Tinder's "Community Guidelines" set out the service's policies to which users must adhere. One of the policies prohibits impersonation. The provision instructs users to be themselves and not pretend to be someone else: "Do not impersonate or otherwise misrepresent affiliation, connection or association with, any person or entity. This includes parody accounts..."¹²⁹

The guidelines also stipulate that each user is only allowed to have one account and that account sharing is prohibited. Another term in the guidelines is that any real-life illegal conduct is

¹²⁰ *Ibid.*

¹²¹ Tinder "Frequently Asked Questions"; Manta 2014 *Wake Forest Law Review* 210; Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 2.

¹²² Manta 2014 *Wake Forest Law Review* 210.

¹²³ Williams *Catfishing and Online Identity Management* 5.

¹²⁴ Manta 2014 *Wake Forest Law Review* 210.

¹²⁵ Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 3.

¹²⁶ Koch 2017 *University of Colorado Law Review* 249; Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 3.

¹²⁷ Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 3.

¹²⁸ *Ibid.*

¹²⁹ Tinder "Community Guidelines" <https://www.gotinder.com/community-guidelines?lang=en-GB> (accessed 7 May 2021).

deemed unlawful on the website too.¹³⁰ To address and implement its policies and guidelines, the service provider uses automated and manual moderation and review tools. The purpose of these tools is too prevent, monitor and remove inappropriate behaviour. Inappropriate behaviour includes impersonation and harassment, among other conduct. The tools scan profiles automatically for ‘red-flag language and images’, reviewing suspicious profiles and user-generated reports manually.¹³¹

It is noteworthy that Tinder, like Facebook, uses automated and manual tools to monitor, prevent and implement compliance with the terms of use. However, it is not uncommon to find users on Tinder who misrepresent their identity or impersonate others. It appears that platforms like Tinder leave more room for the users to monitor impersonation because users interact with the sole intention to meet in person.¹³² As such, users must present themselves in their true form. It follows that whilst users may modify attributes like height, weight, or age, using another person’s images would defeat the platform’s purpose.¹³³

Moreover, a study found that users are concerned about catfishing and fellow user authenticity.¹³⁴ Therefore, Tinder introduced the verification process that is linked to photo authentication. The photo authentication ensures that users are who they present themselves as on and offline. However, it is different from Facebook because there is no identity verification system. Another way that users authenticate their identity to assure that they are who their profiles depict is linking their Tinder account to other social networking accounts.¹³⁵ For example, Tinder allows users to connect their Facebook and Instagram pages and will enable others to use these links to gain more information about a user.

Although there is value in using one’s real name online, platforms and websites strongly encourage users to use a name other than their legal name. Rogal suggests that when social networking sites ask users to choose a ‘username’ or ‘handle’, they implicitly encourage users to identify themselves as something other than their real identity.¹³⁶ Moreover, social networking sites inspire users to construct idealised online identities that do not match their

¹³⁰ *Ibid.*

¹³¹ Tinder “Safety and Policy” <https://policies.tinder.com/safety-and-policy/intl/en> (accessed 7 May 2021).

¹³² Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 25.

¹³³ Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 10.

¹³⁴ Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 25-26.

¹³⁵ Tinder “Privacy” <https://policies.tinder.com/privacy/intl/en> (accessed 7 May 2021); Dunlop *App-ily Ever After – Self-Presentation and Perception of Others on the Dating App Tinder* 58.

¹³⁶ Rogal 2013 *Phoenix Law Review* 62. According to Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1357, ‘handles’ are a type of stable pseudonym that users can use as an indicator of their online identity. A stable pseudonym is a fictitious name that is linked to one specific user.

offline identity. It bolsters the notion that it is acceptable for users to be whomever they want online as an extension of freedom of expression. This flexibility presents users with the opportunity to create catfish accounts. Examples of websites that value free expression manifested by assuming different identities are Instagram and Twitter.

2.3.3 Instagram

2.3.3.1 Nature and purpose

It is not rare for users to catfish on Instagram. Instagram is a global internet-based photo, video and e-commerce website. It connects its users to people and businesses.¹³⁷ Instagram is a service forming part of the Facebook products provided by Facebook.¹³⁸ It follows that when one creates an account and agrees to the terms of use, they enter a contract with Facebook. The service is free for users, and it is funded through targeted advertising in the same way as Facebook.¹³⁹

Once a user creates an account, the website prompts them to add a profile picture to their profile and connect with other users by “following” them. On the homepage, called a “feed”, a user will find the content uploaded by the people they follow on the platform.¹⁴⁰ Content is in the form of pictures or videos. Users can interact with the content by liking, sharing, or commenting on the posts. Users can also communicate with each other privately through direct messages. Instagram is a platform where users can express themselves and their identities.¹⁴¹

A person’s profile on Instagram is by default visible to all who have an account on the platform.¹⁴² The default public setting means that when other users visit their page, they can see all their content. Users can change this setting and set their profiles on “private”, which

¹³⁷ Instagram “The Instagram Service” [https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Policies%20and%20Reporting](https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Policies%20and%20Reporting) (accessed 7 May 2021).

¹³⁸ Facebook “What are Facebook Products” <https://www.facebook.com/help/1561485474074139/?ref=share> (accessed 7 May 2021).

¹³⁹ Instagram “How Our Service is Funded” [https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Policies%20and%20Reporting](https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Policies%20and%20Reporting) (accessed 7 May 2021).

¹⁴⁰ AL Tang and J Armstrong “Communication and Collaboration Through Web 2.0 Affordances on Virtual Online Communities for Expression of Identity: Performance of Identity on Instagram” (2020) <http://networkconference.netstudies.org/2020Curtin/wp-content/uploads/2020/05/Communication-and-Collaboration-through-Web-2.0-Affordances-on-Virtual-Online-Communities-for-Expression-of-Identity-Performance-of-Identity-on-Instagram-pdf-converted-1.pdf> (accessed 9 May 2021) 3 - 4.

¹⁴¹ Tang and Armstrong “Communication and Collaboration Through Web 2.0 Affordances on Virtual Online Communities for Expression of Identity: Performance of Identity on Instagram” 3.

¹⁴² Tang and Armstrong “Communication and Collaboration Through Web 2.0 Affordances on Virtual Online Communities for Expression of Identity: Performance of Identity on Instagram” 4.

means that only their chosen followers can see the content on their profile.¹⁴³ Instagram also allows users to run multiple accounts. Therefore, it is usual for one person to have a public account and a second private account.¹⁴⁴ This feature creates an opportunity for users to create and operate catfish accounts. Social networks provide people with the freedom to develop identities that do not necessarily match their offline identities.¹⁴⁵ Nonetheless, like Facebook, Instagram has a policy against impersonation.

2.3.3.2 Impersonation Policy

Under a policy titled “How You Can’t Use Instagram”, the service provider prohibits users from impersonating others or providing “inaccurate information”.¹⁴⁶ The policy stipulates that while users are not required to disclose their identity on the platform, they must provide accurate information. The information provided may include personal data. The service provider expressly prohibits impersonating another person or something a user is not. This suggests that users cannot create accounts for other people unless they have express consent.¹⁴⁷

Instagram recently updated its tools to protect users against hate speech and abuse.¹⁴⁸ The feature allows users to toggle an automatic filter for offensive words, phrases and emojis from direct messages. Another new feature prohibits users who offend the harassment policy from creating a new account. Once Instagram becomes aware that the offender has created another account, they will remove it. This feature is valuable in the context of catfishing because catfish usually make multiple accounts. Depending on the purpose of catfishing, numerous people might have their images used to further this purpose.

¹⁴³ *Ibid.*

¹⁴⁴ Tang and Armstrong “Communication and Collaboration Through Web 2.0 Affordances on Virtual Online Communities for Expression of Identity: Performance of Identity on Instagram” 5. Instagram users with two profiles, one being public and another being private, refer to their private profile as “Finsta”. See C Waever and D Issawi “ ‘Finsta’ Explained (2021) *The New York Times* <https://www.nytimes.com/2021/09/30/style/finsta-instagram-accounts-senate.html> (accessed 2 October 2021).

¹⁴⁵ Tang and Armstrong “Communication and Collaboration Through Web 2.0 Affordances on Virtual Online Communities for Expression of Identity: Performance of Identity on Instagram” 5.

¹⁴⁶ Instagram “How You Can’t Use Instagram” [https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Policies%20and%20Reporting](https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Policies%20and%20Reporting) (accessed 9 May 2021).

¹⁴⁷ *Ibid.*

¹⁴⁸ Instagram “Introducing New Tools to Protect Our Community From Abuse” (2021) <https://about.instagram.com/blog/announcements/introducing-new-tools-to-protect-our-community-from-abuse> (Accessed 15 May 2021).

Instagram allows users to create a maximum of five accounts under a single email address.¹⁴⁹ This tool is beneficial for people with businesses that operate on Instagram. However, the disadvantage is that there is room for abuse and catfishing.

2.3.4 Twitter

2.3.4.1 Nature and purpose

Twitter describes itself as “an information network made up of short messages (including photos, videos, and links) from all over the world”.¹⁵⁰ The service’s founding ideal is to provide a space where diverse people can share their perspectives, ideas, and information. The company says that its purpose is to serve the public conversation. As such, they provide a free and safe space to speak.¹⁵¹ Twitter prioritises freedom of speech and has rules to enhance and implement freedom of speech on the website. The rules include expressing oneself in whatever manner they please, provided that they do not violate the terms of use or spread false information.¹⁵²

Once a user has created an account, they can choose a username preceded by the “@” symbol called a handle. They can then add a profile picture and a short biography to their profile. The website prompts them to subscribe to other users’ profiles by “following” them to see what they tweet. Posts made by users are called “tweets”, which are 280 characters in length. The “timeline”, a real-time stream of all posts shared made by the people one follows, displays all tweets.¹⁵³ Twitter expressly prohibits impersonation intended to deceive but allows parody accounts. Twitter permanently suspends impersonation accounts because they violate rules.

2.3.4.2 Impersonation Policy

Twitter defines impersonation as an account that poses as another person, brand or misleadingly portrays another entity or person.¹⁵⁴ According to the service provider’s impersonation policy, accounts with similar usernames or accounts similar in appearance do not automatically violate the policy.¹⁵⁵ The policy reiterates that “... users are allowed to create

¹⁴⁹ Instagram <https://help.instagram.com/1642053262784201> (accessed 15 May 2021).

¹⁵⁰ Twitter “Twitter” <https://help.twitter.com/en/glossary> (accessed 10 May 2021).

¹⁵¹ Twitter “Our Company and Our Purpose” <https://about.twitter.com/en/who-we-are/our-company> (accessed 10 May 2021).

¹⁵² Twitter “Healthy Conversations” <https://about.twitter.com/en/our-priorities/healthy-conversations> (accessed 10 May 2021).

¹⁵³ See Twitter’s glossary for the definition of “Tweet(n)” and “Timeline” <https://help.twitter.com/en/glossary> (accessed 10 May 2021).

¹⁵⁴ Twitter “Impersonation Policy” <https://help.twitter.com/en/rules-and-policies/twitter-impersonation-policy> (accessed 11 May 2021).

¹⁵⁵ Profiles that share a name but no other commonalities and those that clearly state their non-affiliation with certain similar named individuals and brands will not be suspended. See Twitter “What Is Not an Impersonation

parody, newsfeed, commentary [and] fan accounts”.¹⁵⁶ It appears that Twitter is more transparent than Facebook and Tinder regarding the implementation of their impersonation policy. However, Twitter expresses that they do not actively monitor accounts.¹⁵⁷

Although their monitoring of impersonation accounts is lenient, according to the 15th Transparency Report,¹⁵⁸ the service provider has invested in technology to gradually reduce the need for users to report Twitter Rules violations. Due to these efforts, Twitter increased account suspension for the infringement of rules by 105%. This figure included several policy violations, including impersonation.¹⁵⁹ Twitter’s report states that Twitter requested a phone number or email address to combat spam accounts at the time of account creation.

Like Instagram and Facebook, Twitter uses the Blue Check icon next to verify a user’s name. The Blue Check confirms that the user is who they genuinely claim to be on the platform. The issue with this mechanism is that people who are popular on the website and people who are well-known in society are the most likely to be assigned a Blue Check icon.¹⁶⁰ This tool is helpful for celebrities and people of high stature in society. However, some users with this mark have earned it from popularity on the website even under a pseudonym. Therefore, this verification procedure is not adequate for certifying identity.¹⁶¹

2.4 The effectiveness of anti- impersonation policies

2.4.1 Contractual interpretation

The above policies are terms in the agreement between a user and the social network service provider. Therefore, principles of contractual interpretation should be used to give meaning to the intentions of the parties or the purpose of the agreement.¹⁶² In law, these types of

Policy Violation?” <https://help.twitter.com/en/rules-and-policies/twitter-impersonation-policy> (access 11 May 2021).

¹⁵⁶ The website permits users to create accounts under inauthentic identities and can use their accounts to share any information in exercise of freedom of expression. However, users are responsible for the content they publish on the website. Twitter provides requirements for use of parody and other accounts. See Twitter <https://help.twitter.com/en/rules-and-policies/parody-account-policy> (accessed 11 May 2021) for the requirements.

¹⁵⁷ See Twitter “When does Twitter Review Accounts Under This Policy” <https://help.twitter.com/en/rules-and-policies/twitter-impersonation-policy> (accessed 11 May 2021).

¹⁵⁸ Twitter “15th Transparency Report: Increase in Proactive Enforcement on Accounts” (2019) https://blog.twitter.com/en_us/topics/company/2019/twitter-transparency-report-2019.html (accessed 11 May 2021).

¹⁵⁹ *Ibid.*

¹⁶⁰ “Verification FAQ” <https://help.twitter.com/en/managing-your-account/twitter-verified-accounts> (accessed 11 May 2021); S Shorman and M Allaymoun “Authentication and Verification of Social Networking Account Using Blockchain Technology” (2019) 11 *International Journal of Computer Science & Information Technology* 1 at 2.

¹⁶¹ Shorman and Allaymoun 2019 *International Journal of Computer Science & Information Technology* 2.

¹⁶² D Hutchison and C Pretorius *et al The Law of Contract in South Africa* (2018) 3ed 267.

agreements are known as “click-wrap” or “web-wrap” agreements.¹⁶³ The agreement is such that for an individual to become a member of the service, they have to assent to the service’s terms of use. The most common method of concluding a contract in these instances is by having a list of terms displayed on the screen and at the bottom of the terms the user must click on a button or link to assent to the terms.¹⁶⁴ This usually occurs when the user creates an account on a particular website. Following the acceptance of the terms, a user is then able to create a profile on the website.

It is noteworthy that these types of agreements are commonly used where a term of use must be accepted.¹⁶⁵ Given that the policies form part of the terms of the agreement, users bear the duty to acquaint themselves with the terms of that contract.¹⁶⁶ In the event of a dispute, the service provider can rely on the acceptance of the terms as knowledge of the terms of the agreement.¹⁶⁷ Kroonhof suggests that click-wrap agreements are popular in the realm of social media. However, they are criticised for being one-sided and creating duties that only the service provider is aware of.¹⁶⁸ The contracts tend to favour the service provider more as a result of unequal bargaining powers between the parties.¹⁶⁹

2.4.1.1 Principles of Interpretation

The rules of interpretation were summarised by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹⁷⁰ Two years later the same court confirmed the rules in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*.¹⁷¹ The court reiterated that the general purpose of interpreting documents was to ascertain the meaning of the words used, be it a contract, or a statute. In the process of interpretation one must have regard for the context provided by reading the provisions of that document.¹⁷² The context referred to by the court was the internal context of the whole document and the external context, meaning the circumstances surrounding the conclusion of the contract.¹⁷³

¹⁶³ PGJ Kroonhof “The Enforceability of Incorporated Terms in Electronic Agreements” (2012) 2 *Speculum Juris* 41 at 42.

¹⁶⁴ Kroonhof 2012 *Speculum Juris* 44.

¹⁶⁵ Kroonhof 2012 *Speculum Juris* 44 and JM Johnson “The Legal Consequences of Internet Contracts” *Transactions for The Centre of Business* 37 (2005) 51 (Published LLM Thesis, UFS).

¹⁶⁶ Kroonhof 2012 *Speculum Juris* 45; *Heroldt v Wills* para 15.

¹⁶⁷ *Ibid.*

¹⁶⁸ Kroonhof 2012 *Speculum Juris* 42.

¹⁶⁹ *Ibid.*

¹⁷⁰ 2012 (4) SA 593 (SCA).

¹⁷¹ 2014 (2) SA 494 (SCA).

¹⁷² *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* para 10 citing *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

¹⁷³ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* para 12.

One should also consider the language of the document in light of the ordinary rules of grammar and the apparent purpose of the provisions. Moreover, the court emphasised that interpretation was a unitary exercise and did not occur in stages.¹⁷⁴

2.4.1.2 How effective are the policies?

Before liability attaches to individual users, it is crucial to assess the power of service providers in curbing catfishing or contributing to the problem. Most social networking service providers only authenticate user accounts through email.¹⁷⁵ Unfortunately, the issue with this method is that no factual identity certification occurs because it is easy to create an email address under a pseudonym or false identity. Email service providers also do not authenticate the identities of users.¹⁷⁶ For example, on Instagram users are permitted to have up to five accounts under the same email account. This measure may be beneficial for businesses that have multiple accounts for various business related reasons. However, it creates room for abuse by a person who operates multiple catfish accounts.

An effective measure in preventing impersonation is triggering identity authentication at account creation. Multiple catfish or impersonation accounts exist and operate on social networks because of service provider inaction, and the service providers are unaware until a victim lodges a complaint.¹⁷⁷ The service providers do not have preventative measures in place.¹⁷⁸ Upon a careful analysis of the policies of the four platforms, it appears that the service providers place a lot of trust in the honesty of users.

For instance, Facebook and Tinder's policies create a rebuttable assumption that a user is who they claim to be. The presumption is rebutted when the platforms are presented with contradictory information stemming from a report of impersonation and further investigation. The assumption is such that because users have assented to the terms of use, they are aware that they must present themselves authentically on the platforms. The difference between the

¹⁷⁴ *Ibid*; Hutchison and Pretorius *et al Contract* 268.

¹⁷⁵ Koch 2017 *University of Colorado Law Review* 250.

¹⁷⁶ Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1352 describe this as anonymous and pseudonymous identification. The idea is that, in theory one's email address should have their real and legal name and should be capable of providing positive identification of who they claim to be on social networking sites. However, the contrary is true. There is no real account verification process because even email accounts can be created under fictitious names.

¹⁷⁷ According to Koch 2017 *University of Colorado Law Review* 250, social networking website reports work as follows: a user must report to the service provide using the website's reporting function. The function gives options regarding the nature of the report or complaint. The service provider investigates the issue and addresses it accordingly. If the complaint has to do with a violation of terms of use, usually some form of formal identification is required from the complainant to prove they are who they say they are. At all times, the service provider reserves the right to act on the matter.

¹⁷⁸ Clanton 2014 *Cardozo Journal of Dispute Resolution* 328.

two platforms is that Facebook does not purport to monitor any user compliance with the terms of agreement. Whilst Tinder explicitly agree that they will monitor user compliance. Moreover, Tinder incentivises users to verify their identities by having a photo verification mechanism with the effect that if the user is truly who they are in their pictures they get a blue check mark next to their picture.

Facebook enforces its policies in various ways. Recently the service provider introduced a “strike system” whereby the number of strikes determines the extent and proportion of action taken against an account that go against the community standards for Instagram and Facebook.¹⁷⁹ The more strikes a user accumulates against their name, the harsher the action taken against them by the service provider. Eventually the final action is that a user account may be disabled.¹⁸⁰

Tinder also places a lot of trust in users by permitting them to connect their accounts to other platforms such as Facebook as further authentication of identity. This is not effective because, again, it is based on an assumption that their Facebook account is a true depiction of who they are. This is the same as using email accounts to authenticate identity because, as noted above, people who catfish are zealous and can create multiple fake accounts across platforms. It follows that these measures are a not preventative and are rather reactionary and ineffective in curbing catfishing or impersonation.

It is noteworthy that Tinder’s policies state that the service deems conduct that is unlawful offline, unlawful on its platform. One wonders whether the same principle applies to catfishing and impersonation since some US states, such as California, criminalise such conduct.

It does not help that even after a catfish account has been reported and removed a perpetrator can still create another catfish account that will not raise any flags for the service provider. Additionally, social networking sites have fewer incentives to act on existing catfish accounts.¹⁸¹ From a financial perspective, social networking companies’ income is dependent on having many users view advertisements on their sites.¹⁸² Whether the users are authentic is

¹⁷⁹ Facebook “Restricting Accounts” <https://transparency.fb.com/en-gb/enforcement/taking-action/restricting-accounts/> (accessed 18 October 2021).

¹⁸⁰ Facebook “Restricting Accounts”.

¹⁸¹ Koch 2017 *University of Colorado Law Review* 251. There appears to be a race for the number one social networking platform spot among social networking companies. Having the highest number of users is important. See Shorman and Allaymoun 2019 *International Journal of Computer Science & Information Technology* 3.

¹⁸² Haan 2020 *University of Pennsylvania Journal of Constitutional Law* 632.

not relevant.¹⁸³ Despite the policies prohibiting impersonation and catfishing and mechanisms to curb these issues, catfishing is still a problem.

The service providers do not assume the responsibility to monitor impersonation. For example, Twitter's terms of use make it clear that the service provider will not monitor user accounts. Therefore, the responsibility is on users to report any inauthentic accounts through the report feature on the website. Instagram also has a similar position. Interestingly, Instagram prohibits users from using "inaccurate information" despite not being required to disclose their identity. The service provider does not explain what accurate information and it also does not provide a standard by which it tests accuracy. It is assumed that providing a valid identity document would suffice.

However, one wonders how this works if Instagram and Twitter both allow for the use of pseudonyms. How does the service provider authenticate that a person who uses another person's images under a pseudonym is truly the person in the images? It seems that the policies discussed are illustrations of what Kroonhof considers one-sided contracts concluded with imbalanced bargaining power.¹⁸⁴ These terms are wide enough to permit the service providers to deflect or limit their liability.

It appears from the policies that the service providers provide a space for people to interact, and how they use the space is mainly in their control. The service providers only address the issues specified in their policies which illustrates that the service providers are not involved in the conduct of the users.¹⁸⁵ That being said, our courts also do not have strong assurance that service providers will comply with a request to remove an infringing account. In *Heroldt v Wills*¹⁸⁶ the court expressed that it was not certain that the social networking website Facebook would necessarily comply with a request to remove certain content or a report of abuse.¹⁸⁷

The matter concerned a defamatory post made by the respondent about the applicant. The applicant sought to interdict the respondent from posting further information pertaining to the applicant on Facebook and other social media websites.¹⁸⁸ The respondent contended that applicant could have approached Facebook to remove the defamatory content, however the

¹⁸³ Koch 2017 *University of Colorado Law Review* 252.

¹⁸⁴ Kroonhof 2012 *Speculum Juris* 42.

¹⁸⁵ Instagram "Who Is Responsible if Something Happens" <https://help.instagram.com/581066165581870> (accessed 21 May 2021).

¹⁸⁶ 2013 (2) SA 530 (GSJ).

¹⁸⁷ *Heroldt v Wills* para 38.

¹⁸⁸ *Heroldt v Wills* para 1.

court could not accept this contention. It does not come as a surprise that the court then urged users to seek recourse against other users instead of the service providers.

Instagram has gone as far as explicitly stating in their terms that they are not responsible for users' conduct on the service. According to their terms, their liability is limited to the extent that the law stipulates.¹⁸⁹ It is worth noting that Instagram has tried to combat inauthentic accounts.¹⁹⁰ The efforts are directed at ensuring that real people make content posted on the website. The measure introduced prompts people behind accounts displaying inauthentic behaviour to confirm their identity. If an account does not verify its identity, the content it shares may suffer reduced distribution, or it may be removed.

The measures taken by social networking service providers do leave room for improvement however, it is clear that they absolve themselves of responsibility for the conduct of users. So, no liability is imputed on them for inaction against the infringing conduct of users of the service. Moreover, without a legal duty to act, the service providers cannot be held liable. They also have broad immunity against claims arising from the conduct of users.

2.5 Service provider immunity

Regrettably, holding service providers accountable for their inaction is a challenge because there is no legal duty on them to act.¹⁹¹ The obligation might be a moral one, which is beyond the scope of this research. Furthermore, in South Africa the Electronic Communications and Transactions Act (ECT Act)¹⁹² provides immunity to service providers.¹⁹³ The companies that operate social media are implicitly Internet Service Providers (ISP) in terms of the ECT Act because they provide information system services.¹⁹⁴ The ECT Act does not expressly include social media or social networking companies in their definition of a service provider.¹⁹⁵ However, the definition is wide enough to incorporate social networking companies.

¹⁸⁹ *Ibid.*

¹⁹⁰ Instagram “Introducing New Authenticity Measures to Instagram” <https://about.instagram.com/blog/announcements/introducing-new-authenticity-measures-on-instagram> (accessed 17 May 2021).

¹⁹¹ Estebeth *Cyberlaw@SA* 243.

¹⁹² Act 25 of 2002.

¹⁹³ The provisions under chapter 11 of Act 25 of 2002 provide for the limitation of liability of service providers.

¹⁹⁴ S 70 read with s 1 of Act 25 of 2002.

¹⁹⁵ Section 70 defines a service provider as “any person who provides services in information systems”.

The ECT Act defines an information system as “... a system [used] for generating, sending receiving, storing, displaying, or otherwise processing data messages...”.¹⁹⁶ The ECT Act further defines information system services as

“the provision of connections, the operation of facilities for information systems, the provision of access to information systems, transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service”.¹⁹⁷

The provision above is an accurate depiction of the role played by social networking companies. They provide a variety of services to users. Depending on the services they offer and the type of platform, the service providers may have complete or limited control over the content posted by users and their actions.¹⁹⁸ If the ISP is an author or publisher of infringing or unlawful content, they attract liability for the harm that results. Conversely, where the users of the services provided by the ISP are authors and publishers, then the ISP cannot attract liability because, according to the ECT Act, they are “mere conduits”.¹⁹⁹

As ISPs, the ECT Act grants social networking companies the power to self-regulate through an established representative industry body.²⁰⁰ The immunity provision in chapter XI of the ECT Act supports this stance. Section 72 sets out two conditions that must be satisfied before an ISP can gain immunity.²⁰¹ First, the ISP must be a member of the representative industry body established in section 71(1); second, it must adopt and implement the official code of conduct of the representative body.²⁰² Section 73(1) provides that ISPs are not liable for providing information systems services if they do not initiate the transmission, do not select the addressee, perform the functions automatically and technically without selecting the data, and do not modify the data in the transmission.²⁰³

¹⁹⁶ S 1 of Act 25 of 2002.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Nel Information and Communications Technology Law* 511.

¹⁹⁹ *Ibid.*; S 73 (1) and (2) of Act 25 of 2002.

²⁰⁰ *Ketler Investments CC t/a Ketler Presentations v Internet Service Providers' Association* 2014 (2) SA 569 (GJ) paras 73- 76. S 71(1) compels the Minister of Communications to establish an industry representative body for service providers. S 71 (2) sets out the conditions to be satisfied for the Minister to recognise the representative body.

²⁰¹ *Estebeth Cyberlaw@SA* 240.

²⁰² *Estebeth Cyberlaw@SA* 241.

²⁰³ *Nel Information and Communications Technology Law* 524.

The ECT Act suggests that ISPs do not have any obligation to act to prevent or monitor any conduct that may infringe the law in South Africa by holding ISPs as “mere conduits”.²⁰⁴ In essence, under the ECT Act, ISPs are not responsible for the conduct of users because they only facilitate and provide a platform for users to participate in a variety of behaviours online.²⁰⁵ Conversely, ISPs that only act as publishers of information are not provided for in the ECT Act and cannot seek immunity from the ECT Act.²⁰⁶ A key case in the discussion of the role of ISPs is *Ketler Investments v Internet Service Providers’ Association*, where the court affirmed the position of ISPs as mere conduits.

2.5.1 Ketler Investments CC t/a Ketler Presentations v Internet Service Providers’ Association 2014 (2) SA 569 (GJ)

In *Ketler Investments v Internet Service Providers’ Association*, the court emphasised the role of internet service providers. The court highlighted that an internet service provider was central to using the internet. According to the court, the service provider was the consumer’s primary means of accessing the internet.²⁰⁷ The applicant was a user who used the internet to send bulk emails to its recipients. The respondent was a South African association of internet service providers, established in statute. The respondent, through its website, displayed the applicant’s name on its “Hall of Shame” list of “spammers”.²⁰⁸ The applicant brought an application to have its name removed from the list on the respondent’s website and prevent the respondent from listing the applicant on the website again.²⁰⁹

The applicant argued that having their name placed on the “spammer” list amounted to defamation. In dismissing the application, the court dealt with the meaning of internet service provider and the obligations of such persons.²¹⁰ The court explained that the Internet was a global computer network connected through lines, cables, and satellites.²¹¹ It adopted a single language of transmission that allowed for a worldwide network of enabled devices to communicate with one another. The communication occurred by transferring packages of digital data between enabled devices.²¹² The data transmitted came in different forms, including

²⁰⁴ S 78 of Act 25 of 2005; Estebeth *Cyberlaw@SA* 243; Nel *Information and Communications Technology Law* 511.

²⁰⁵ T Pistorius “Copyright Law and IT” in DP Van Der Merwe *et al Information and Communications Technology Law* (2017) 331; Nel *Information and Communications Technology Law* 524.

²⁰⁶ Nel *Information and Communications Technology Law* 523.

²⁰⁷ *Ketler Investments v Internet Service Providers’ Association* para 21.

²⁰⁸ *Ketler Investments v Internet Service Providers’ Association* para 1.

²⁰⁹ *Ketler Investments v Internet Service Providers’ Association* para 2.

²¹⁰ *Ketler Investments v Internet Service Providers’ Association* paras 19- 30.

²¹¹ *Ketler Investments v Internet Service Providers’ Association* para 22.

²¹² *Ketler Investments v Internet Service Providers’ Association* para 23.

web pages or websites and email messages. The court added that there was a vast volume of transmissions generated on the Internet through various mediums such as downloading files or communicating through SKYPE and social media networks.²¹³

Social media platforms amount to service providers under the provisions of the ECT Act; they are not members of the Internet Service Providers' Association.²¹⁴ At the beginning of the year 2021, Kemp reported that approximately 41% of the total South African population are active social media users.²¹⁵ 99, 5% of that portion of the population use or visit a social network or messaging service.²¹⁶ Yet, according to the Internet Service Providers' Association, international social media platforms are not established in South Africa.²¹⁷

The platforms are not local, suggesting that they are not members of the industry representative body and that users can only resort to international mechanisms to solve any issues.²¹⁸ Non-membership to the representative body implies that the immunity provision does not apply to social media providers.²¹⁹ The Internet Service Providers' Association suggests that users should seek remedies from the terms of service of each social networking platform.²²⁰ The representative body can only offer a take-down procedure to help South African users. The take-down procedures are in section 77 of the ECT Act.

It is noteworthy that the immunity provisions of the ECT Act do not override court decisions and obligations arising out of contracts. The contracts applicable in this instance are the terms users accede to when creating accounts on the various social networking platforms. It follows that to avoid delictual liability, the ISP must comply with the ECT Act.²²¹

ISPs do not have immunity in South Africa unless they comply with the provisions of the ECT Act. The lack of immunity means that users can institute action against ISPs in our courts if reasonable. Since no claims against social networking websites have come before our courts, there is no certainty about the prospects of success in such an endeavour. There is more certainty in seeking liability against the users who are direct actors in the infringing conduct.

²¹³ *Ibid.*

²¹⁴ <https://ispa.org.za/membership/list-of-members/> (accessed 22 April 2021).

²¹⁵ S Kemp "Digital 2021: South Africa" (2021) <https://www.slideshare.net/DataReportal/digital-2021-south-africa-january-2021-v01> (accessed 23 April 2021).

²¹⁶ Kemp "Digital 2021: South Africa".

²¹⁷ Internet Service Providers' Association https://ispa.org.za/press_releases/international-social-platforms-mean-international-hate-remedies/ (accessed 23 April 2021).

²¹⁸ *Ibid.*

²¹⁹ Roos and Slabbert 2014 *Potchefstroom Electronic Law Journal* 2861.

²²⁰ *Ibid.*

²²¹ Estebeth *Cyberlaw@SA* 246; Roos and Slabbert 2014 *Potchefstroom Electronic Law Journal* 2858.

There is an argument that a victim can institute action against ISP and the perpetrator equally because the platforms are aware of the prevalent catfishing problem.

2.5.2 Communications Decency Act

Similarly, social networking service providers have blanket immunity under the USA's Communications Decency Act (CDA).²²² Section 230 of the CDA provides that service providers of an interactive computer service shall not be treated as the publisher or speaker of any information provided by another information content provider.²²³ Interactive computer service is

“any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”²²⁴

The definition above describes social networking services, among other services offered on the internet. That means section 230's immunity covers social networking service providers.²²⁵ According to the provision, only content providers can be held liable for their content on interactive computer services. The rationale for protecting ISPs in the US is that the legislature wanted to avoid stifling the development of communication technology.²²⁶

2.5.2.1 *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003)

Carafano v. Metrosplash.com, Inc. is an example of a case where section 230 of the CDA was applied. The Appellate Court Judge Thomas described the matter as one involving cruel and sadistic identity theft. The appellant, an actress, instituted an action in a Californian court against an Internet service provider and other related parties for the invasion of her privacy and misappropriation of the right of publicity.²²⁷ The court had to consider the extent to which a service provider could be held liable for a fake profile created by someone else. The cause of action is that a third party started a false profile of the appellant on the defendant's website.²²⁸

²²² Communications Decency Act of 1996, 47 U.S.C §230 (2012).

²²³ H.R. REP. 115-572(I) 73 at 74.

²²⁴ H.R. REP. 115-572(I) 74-75.

²²⁵ Derzakarian 2017 *Loyola of Los Angeles Law Review* 746.

²²⁶ Derzakarian 2017 *Loyola of Los Angeles Law Review* 747; §230. Protection for private blocking and screening of offensive material, 47 USCA §230.

²²⁷ *Carafano v. Metrosplash.com, Inc.*, 1120.

²²⁸ *Carafano v. Metrosplash.com, Inc.*, 1121.

A computer in Berlin was used to create the account, and the appellant had no knowledge or consent for its creation. As a result of the profile, the appellant was subject to some harassment and threats.²²⁹ The court found that the defendant was not malicious and had immunity under section 230 of the CDA. The court reasoned that even if it assumed that the defendant had provided the content information in terms of the statute, the appellant's claim would not succeed unless the defendant has created or developed the impinged information.²³⁰

2.5.2.2 *Perkins v. LinkedIn Corporation*, 53 F.Supp.3d 1222 (N.D.Cal., 2014)

Perkins v. LinkedIn Corporation, is an example of a case where the service provider was not protected by the immunity under the CDA. The plaintiffs brought a putative class action against the defendant, the operator of a website. The plaintiffs alleged that their usernames and likeness were misappropriated in emails reminding users to connect to the website. The court explained that LinkedIn was a social networking website tailored to professional networking.²³¹ Users of the platform maintained "resume-like" profiles and used the website to view one another's profiles and communicate.²³²

The defendant claimed immunity under section 230 of the CDA, contending that it was not an information content provider but rather an interactive computer service. Additionally, users are responsible for the substantive content of the reminder emails and not the service provider.²³³ The court found in favour of the plaintiff that the defendant was not entitled to enjoy immunity because although they were an information content provider, they were responsible for creating or developing the reminder emails.²³⁴ The court denied the defendant's motion to dismiss.

An aggrieved parties may not always be successful in trying to seek recourse against social networking sites where their pictures are used for catfishing. In the USA, ISP's have immunity from liability arising from the conduct of service users. In South Africa, immunity can only accrue when the ISP complies with the ECT Act. ISP's only provide a platform for users and give rules to govern conduct. The users of the platforms breach the rules by creating false profiles and impersonating others. Although ISP's cannot always be held liable for catfishing, users can still be held accountable for their behaviour.

²²⁹ *Carafano v. Metrosplash.com, Inc.*, 1122.

²³⁰ *Carafano v. Metrosplash.com, Inc.*, 1125.

²³¹ *Perkins v. LinkedIn Corporation*, 1225.

²³² *Perkins v. LinkedIn Corporation*, 1226.

²³³ *Perkins v. LinkedIn Corporation*, 1247.

²³⁴ *Ibid.*

2.5.3 Private international law

Cross-border nature of social networking relations is another important aspect in the discussion of user liability. The Internet and social networks enable individuals from different locations across the world to interact and give them access to one another's content. It is not inconceivable that a user from the USA might catfish a user from South Africa, or vice versa.²³⁵ Such an issue would fall in the province of private international law.

Private international law deals with private law in a foreign context.²³⁶ Before a victim can bring an action against an individual who is not in South Africa, they need to establish the appropriate court to bring the action. Private international law establishes the jurisdiction and determines the application of the appropriate legal system, as well as the application of foreign precedents.²³⁷ The principles of private international law will be dealt with in detail in chapter five of this thesis.

2.6 Conclusion

In conclusion, impersonating others online by using their images without consent to create fictitious accounts is catfishing. Although impersonation does not originate online, catfishing occurs predominantly on social networking websites. Despite some websites allowing pseudonymous and parody accounts, catfishing is prohibited on Facebook, Instagram, Tinder and Twitter. It may be hard to hold social networking service providers accountable for catfishing because they do not have a legal or contractual obligation to address catfishing and they have immunity protecting them from liability arising from user conduct. A victim of catfishing may be able to hold the person who impersonated them accountable through delict since catfishing affects aspects of personality that are protected in delict.

²³⁵ See for example, P Saal "Falling in love Online? Beware the Catfish" mentioned in chapter 1.

²³⁶ CF Forsyth *Private International Law The Modern Roman-Dutch Law Including The Jurisdiction of the High Courts* 5ed (2012) 5. Additionally, M Dendy "Conflict of Laws" *LAWSA* Vol 7(1) para 306 defines private international law as the area of law in each country that is applied when the facts of a matter intimately involve the laws of another country.

²³⁷ Forsyth *Private International Law* 6.

CHAPTER 3: REGULATING CATFISHING THROUGH THE RIGHT TO IDENTITY

3.1 Introduction

Despite the high number of catfish accounts, there are still features on platforms that contribute to the easy downloadability of users' content. For example, Facebook has a feature that allows users to download media content posted by others.¹ The ability to download and share users' content is a standard condition of Internet tools. Users tend to think that catfishing is harmless and does not yield any repercussions. Based on the plot of the television series "Catfish", the only consequence of catfishing is that the third party becomes aware that the account is not real.² The lack of severe repercussions for creating fake accounts using others' pictures enables catfishing. This thinking stems from the fact that users do not read the terms of social networking websites they assent to when they sign up.³

Users are aware of their right to freedom of expression and exercise it by creating fake profiles,⁴ such as parody accounts, but do not understand the extent of that freedom online.⁵ As a result, they use other users' content however they please because no consequences have arisen from their conduct. That is why catfishing is prevalent. However, Loubser and Midgley suggest that the advent of the Internet and communications technology revolution presented new mediums to commit delicts against others.⁶ The technological revolution provided new platforms for committing delicts and heightened the possibility of people abusing their freedoms, causing delicts.⁷

¹ <https://www.facebook.com/help/community/question/?id=1739362893059289> (accessed 3 June 2021) this is an example of how the download feature on Facebook works. Here, a user seeks help for having downloaded someone's picture and they want to know whether the person will be notified, a Facebook employee replies and states that no one knows when their picture is downloaded or saved by other users. Facebook is not the only social network with a web application that enables users to download any picture uploaded to the platform, even another user's profile picture.

² Derzakarian 2017 *Loyola of Los Angeles Law Review* 755.

³ Kroonhof 2012 *Speculum Juris* 41 at 42.

⁴ Freedom of expression is a right protected in s 16 of the Constitution of the Republic of South Africa, 1996 and is a cornerstone in our democracy. Fake profiles online are a manifestation of freedom of expression to some degree. However, freedom of expression is not an unlimited right and has to be balanced against other rights when there is conflict.

⁵ D Iyer "An Analytical Look into the Concept of Online Defamation in South Africa" (2018) 32 *Speculum Juris* 124 at 125.

⁶ Loubser and Midgley *et al The Law of Delict* 16; *Tsichlas and Another v Touchline Media (Pty) Ltd* 2004 (2) SA 112 (W) 123F-G.

⁷ For example, freedom of speech and expression online has been abused giving rise to multiple actions for defamation and hate speech. See *Heroldt v Wills* 2013 (2) SA 530 (GSJ) a case concerning defamation on Facebook; *ANC V Sparrow* [2019] JOL 44908 (EqC) a case concerning hate speech online heard by the Equality Court; and *Manual v Economic Freedom Fighters and Others* 2019 (5) SA 210 (GJ) a case between politicians involving defamatory statements made on social media.

As one of the manifestations of fake accounts on social networks, catfishing appears harmless.⁸ However, catfishing attracts legal action because it interferes with protected personality rights, namely privacy and identity. The law of delict protects these rights, and victims of infringement can claim damages. In law, image is one of the indicators of identity,⁹ and identity is a protected interest. A catfish impairs this interest in two ways (1) by downloading another person's pictures to use them without permission, or (2) by using another person's image in a manner contrary to their authentic self.

Milo, Stein and McQuoid-Mason argue that an image is a personal fact and using another person's picture without consent is an invasion of privacy.¹⁰ Whether catfishing is a privacy or identity issue will be investigated in this chapter. However, it is indisputable that using another person's images affects their personality rights.¹¹

3.1.1 Delictual damages

A delict is unlawful, intentional conduct resulting in harm suffered by another person.¹² The purpose of the law of delict is to compensate the injured party.¹³ It is a fundamental principle of law that damage rests where the harm falls.¹⁴ Suggesting that a person must bear the costs of the damage or injury they have suffered.¹⁵ However, the law of delict creates an exception to the general rule. The exception is that if someone suffers harm from the conduct of another person, the person who is at fault bears the cost of the damage or injury.¹⁶ The exception effectively shifts the burden of the damage from the victim to the person who caused the harm.¹⁷ Essentially, the law of delict is concerned with determining the circumstances in which a person should be responsible for the damage.

A person who suffers harm caused by the conduct of another person has a claim against the wrongdoer. There are three actions for claiming damages from a wrongdoer under the law of

⁸ R Kareem and WS Bhaya "Fake Profile Types of Online Social Networks: A Survey" (2018) 7 *International Journal of Engineering and Technology* 919 at 919.

⁹ For example, in *Grütter v Lombard* 2007 (4) SA 89 (SCA), *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) and *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) the courts highlight which aspects of personality are make up the right to identity. Neethling Potgieter and Visser *Delict* 373.

¹⁰ D Milo and P Stein "A Practical Guide to Media Law" (2013) *Technology, Media and Telecommunications* para 9.3; *Grütter v Lombard* para 8; D McQuoid-Mason "Invasion of Privacy: Common Law v Constitutional Delict – Does it Make a Difference?" (2000) *Acta Juridica* 227.

¹¹ Milo and Stein *Technology, Media and Telecommunications* para 9.3.

¹² Neethling, Potgieter and Visser *Delict* 4.

¹³ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2006 (1) SA 461 (SCA) para 12.

¹⁴ Neethling, Potgieter and Visser *Delict* 3.

¹⁵ *Telematrix (Pty) Ltd v Advertising Standards Authority of SA* para 12.

¹⁶ *Cape Town Municipality v Paine* 1923 AD 207.

¹⁷ *Telematrix (Pty) Ltd v Advertising Standards Authority of SA* para 12; Neethling, Potgieter and Visser *Delict* 3.

delict. The first is the Aquilian action, which is limited to patrimonial loss and the damage to corporeal things.¹⁸ The second is the *actio iniuriarum*, which is limited to personality injury. The third is the action for pain and suffering, also known as the Germanic action.¹⁹ The present study is concerned with personality rights and only deals with the *actio iniuriarum*.

Delictual liability relies on the fulfilment of five elements. There must be wrongful conduct resulting in harm, caused either intentionally or negligently. The formulation of the elements depends on the action and the type of harm suffered.²⁰ For a person to be held liable for damage under the *actio iniuriarum*, they must have unlawfully and intentionally infringed or injured another person's personality right.²¹ Historically, the *actio iniuriarum* applied to interferences with *corpus*, *fama* and *dignitas*.²²

Corpus dealt with the physical and bodily personality interests, and *fama* dealt with reputational personality interests. *Dignitas* dealt with all other personality interests that *corpus* or *fama* did not encompass.²³ The infringement of a person's *corpus*, *fama* or *dignitas* is known as an *iniuria*.²⁴ The elements of an *iniuria* are that there must be conduct that is wrongful and intentional, resulting in an injury of a person's personality rights.²⁵ These elements are similar to the general elements of a delict, distinguished by the specific injury to personality rights.

Delictual liability only arises where there is harm stemming from conduct.²⁶ Conduct under the *actio iniuriarum* consists of a statement or the performance of an action.²⁷ The conduct element requires a person to show that the harm they suffered and the wrongdoer's actions are linked. The conduct complained of should be voluntary, meaning that the wrongdoer must have

¹⁸ Neethling, Potgieter and Visser *Delict* 5.

¹⁹ *Ibid.*

²⁰ Loubser and Midgley *et al The Law of Delict* 25.

²¹ *Grütter v Lombard* para 10; Neethling, Potgieter and Visser *Delict* 5; Loubser and Midgley *et al The Law of Delict* 25.

²² These were the Roman law classifications of personality interests. Neethling, Potgieter and Visser *Delict* 13; Loubser and Midgley *et al The Law of Delict* 86. In *O'Keeffe v Argus Printing and Publishing Co* 1954 (3) SA 244 (C) 247C-E the court noted that the *actio iniuriarum* was the action for the wrongful infringement of another person's personality rights.

²³ Under Roman law, *dignitas* referred to any other personality interest that was not explicitly recognised and did not connote dignity or a person's honour. Neethling, Potgieter and Visser *Delict* 13; Loubser and Midgley *et al The Law of Delict* 86.

²⁴ *R v Umfaan* 1908 TS 62 66; Neethling, Potgieter and Visser *Delict* 14.

²⁵ *Grütter v Lombard* para 10.

²⁶ The Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) para 21 and in *H v Fetal Assessment Centre* 2015 (2) BCLR 127 (CC) para 53-55 reiterated the notion that delictual liability relied on the presence of conduct resulting in harm. Where there was no harm suffered, the conduct was not wrongful, and liability does not arise. It is a matter of public policy that a person should not be held liable for conduct without fault and wrongfulness.

²⁷ Loubser and Midgley *et al The Law of Delict* 31.

directed or controlled their behaviour towards performing the harmful act.²⁸ The wrongdoer must also not justify their conduct by raising any defences excluding voluntariness.

Conduct alone does not establish liability. First, the conduct must be characterised by unlawfulness or wrongfulness.²⁹ The wrongful character of conduct depends on legal principles and the public policy considerations underscored by normative constitutional values.³⁰ Second, the conduct complained of must result in harm. The victim of a delict must experience actual or potential harm. The purpose of delictual claims is to compensate a person for a loss, damage, or harm they have suffered due to someone else's wrongdoing.³¹ In the context of the *actio iniuriarum*, harm is the injury of a personality interest. Injury to personality is non-patrimonial harm because it cannot be measured financially.³² The mere infringement of the personality right is a sufficient cause of action.³³

Third, to establish liability, a person must find a causal link between wrongful conduct and the harm they suffered. Causation is an essential part of delictual liability, and the satisfaction of a two-prong test founds it.³⁴ The first leg of the test is factual causation, which necessitates a factual connection between the wrongdoer's conduct and the resultant harm. This component depends on the "but-for" test, which investigates whether the harm would have materialised or occurred in the absence of the wrongdoer's conduct.³⁵ If the answer is negative, the next leg of the test is triggered. The second leg of the test is legal causation,³⁶ which assesses whether there is a sufficiently close link between the conduct and the harm suffered. Legal causation has the effect that liability cannot attach where the harm is too remote.³⁷

Lastly, for a wrongdoer to be held delictually liable, they must be at fault. Fault examines a wrongdoer's legal blameworthiness. Fault is either in the form of negligence (*culpa*) or intention (*dolus*). Negligence arises when a person acts outside the standards of what the law

²⁸ Loubser and Midgley *et al The Law of Delict* 96.

²⁹ *Country Cloud Trading CC v MEC* para 20 - 21.

³⁰ *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amicus Curiae)* 2011 (3) SA 274 (CC) para 122; *Country Cloud Trading CC v MEC* para 20-21; *Loureiro and others v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 53.

³¹ *Esselen v Argus Printing and Publishing Co Ltd and Others* 1992 (3) SA 764 (T) 771H; Loubser and Midgley *et al The Law of Delict* 75.

³² *Matthews v Young* 1922 AD 492 503; Loubser and Midgley *et al The Law of Delict* 83.

³³ Loubser and Midgley *et al The Law of Delict* 86.

³⁴ *International Shipping Co (Pty) Ltd v Bentley* 1990 (SA) 680 (A).

³⁵ The "but-for" test is also known as the *sine qua non* test. *Lee v Minister for Correctional Services (Treatment Action Campaign and others as amici curiae)* 2013 (2) SA 144 (CC) para 40.

³⁶ *International Shipping Co (Pty) Ltd v Bentley* 700H-I; *Lee v Minister for Correctional Services* para 38.

³⁷ *International Shipping Co (Pty) Ltd v Bentley* 700E-I. This is an example of an instance where the wrongdoer's conduct was a factual cause of the harm, but not the legal cause because the conduct and the loss suffered were too remote.

would deem reasonable.³⁸ As such, the test for negligence enquires what a reasonable person in the wrongdoer's position would do.³⁹ Intention refers to a state of mind governed by the will to cause harm.⁴⁰ The idea here is that the wrongdoer was aware of the consequence of their wrongful conduct, and they wilfully acted to cause that result. The *actio iniuriarum* attaches liability only where there is an intention to injure a personality right.

The scope of the present study is limited to the broad concept of *dignitas*. In modern South African law, *dignitas* does not exclusively connote dignity, but it refers to all the rights related to a person's dignity.⁴¹ It is an all-embracing concept including all aspects of personality not covered by *corpus* and *fama*.⁴² The *locus classicus* for this view is *O'Keeffe v Argus Printing and Publishing Co Ltd*.⁴³

3.1.1.1 *O'Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C)*

The court decided whether the unauthorised publication of a person's picture and name for advertisement constituted aggression on the victim's *dignitas*. The plaintiff, an employee of the South African Broadcasting Corporation, claimed damages from the defendants.⁴⁴ The cause of action was that the first defendant, the newspaper owner, wrongfully and intentionally printed and published a photograph of the plaintiff in an advertisement. The second defendant caused the first defendant to make the publication. The plaintiff admitted that she consented to the first defendants using her picture for an illustration alongside a newspaper article. However, she did not permit the second defendant to use her image and name in an advertisement.⁴⁵

The plaintiff contended that the advertisement was an intentional infringement of her right to personal privacy and an unjustified infringement of her dignity.⁴⁶ The court noted that the plaintiff brought her claim under the *actio iniuriarum*, an action for wrongful and intentional conduct resulting in a violation of another person's personality rights.⁴⁷ The court accepted the definition of *dignitas* as being a valuable condition in life that a person could violate by

³⁸ *S v Ngubane* 1985 (3) SA 677 (A) 686.

³⁹ *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-F; *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) para 21.

⁴⁰ Loubser and Midgley *et al The Law of Delict* 139.

⁴¹ *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) 247F.

⁴² *O'Keeffe v Argus Printing and Publishing Co* 48A.

⁴³ 1954 (3) SA 244 (C).

⁴⁴ *O'Keeffe v Argus Printing and Publishing Co* 246C-D.

⁴⁵ *O'Keeffe v Argus Printing and Publishing Co* 247A-C.

⁴⁶ *O'Keeffe v Argus Printing and Publishing Co* 246F.

⁴⁷ *O'Keeffe v Argus Printing and Publishing Co* 247C-E.

subjecting another person to degrading treatment.⁴⁸ The concept of *dignitas* was construed widely to include all those rights that protect a person against humiliation and degradation, against the impairment of their character and being exposed to ill-will and disesteem.⁴⁹

According to the court, injuries against dignity were all those injuries that were not aggressions on the person or reputation.⁵⁰ However, Watermeyer AJ noted that Roman-Dutch law did not pre-empt the issue before the court. Thus, the court could not rely heavily on Roman-Dutch law to conclude the matter.⁵¹ Considering the modern conditions, the court decided that the plaintiff had suffered offensive, degrading, and humiliating treatment.⁵² In the court's opinion using a person's photograph and name without their consent for advertising would reasonably constitute offensive conduct on the user's part.⁵³

In reaching its conclusion, the court also noted the legal position in the USA, where the unauthorised publication of another person's picture for advertising was actionable.⁵⁴ In conclusion, the court held that the unauthorised publication of a person's photo and name for an advertisement constituted an aggression on the victim's *dignitas*.⁵⁵

Another critical case that echoed the idea that *dignitas* was a broad concept is *Khumalo v Holomisa*.⁵⁶ This case is essential because it arose after the advent of our constitutional dispensation, and the Constitutional Court differentiates the common law *dignitas* from the constitutional right to human dignity.

3.1.1.2 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC)

This matter was an application for leave to appeal against the dismissal of an exception by the High Court. The respondent was a well-known politician and leader of a political party claiming damages against the applicants for publishing a defamatory article in a newspaper.⁵⁷ The article stated that the respondent was involved in a gang of bank robbers and was under police investigation. The applicant excepted the claim by contending that the article's contents

⁴⁸ *O'Keeffe v Argus Printing and Publishing Co* 247G-H the court quoted J Voet and M De Villiers *The Roman and Roman-Dutch Law of Injuries: A Translation of Voet's Commentary on the Pandects (With annotations by Melius De Villiers)* (1899) 24 and 25.

⁴⁹ *O'Keeffe v Argus Printing and Publishing Co* 247H-248A.

⁵⁰ *O'Keeffe v Argus Printing and Publishing Co* 247G-248.

⁵¹ *O'Keeffe v Argus Printing and Publishing Co* 248D-E.

⁵² *O'Keeffe v Argus Printing and Publishing Co* 249A.

⁵³ *Ibid.*

⁵⁴ *O'Keeffe v Argus Printing and Publishing Co* 249B-C.

⁵⁵ *O'Keeffe v Argus Printing and Publishing Co* 249D.

⁵⁶ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

⁵⁷ *Khumalo v Holomisa* para 1.

were matters of public interest. The respondent failed to show in his particulars of claim that the statement was false.⁵⁸

The question before the court was whether the common law of defamation was inconsistent with the Constitution.⁵⁹ The applicants contended that the elements of defamation should require the defamatory statement to be false. The court dealt with the common law of defamation based on the *actio iniuriarum*.⁶⁰ The flexible remedy enabled plaintiffs to claim damages against a person who unlawfully and intentionally impaired their personality rights. The court noted that the law of defamation protected the right to reputation or *fama*.⁶¹

The court then dealt with the constitutional value of human dignity. It acknowledged that the law of defamation intersected with freedom of speech and the protection of reputation.⁶² The court held that the current constitutional order recognised and protected human dignity as a foundational constitutional value. In the context of the *actio iniuriarum*, the common law separated claims for injury to *fama* and *dignitas*.⁶³ The court said *dignitas* pertained to subjective self-worth but included various other personal rights such as privacy. The constitutional value of human dignity was not limited to individual self-worth. Instead, it affirmed the worth of all human beings in society.⁶⁴

O'Regan J added that human dignity included the intrinsic worth of human beings that all people shared and the reputation of each person. Therefore, the value of human dignity covered both the personal self-worth and the public's perception of the worth of an individual.⁶⁵ In conclusion, the court dismissed the appeal because the applicant had not shown that the common law was inconsistent with the Constitution. Although this case concerned defamation law, the principles it highlighted about *dignitas* and the constitutional value of human dignity are essential.

Khumalo v Holomisa was also an example of the court balancing freedom of expression with personality rights. O'Regan J demonstrated that although freedom of expression was important in our legal system, it did not override the value of dignity in connection with individual

⁵⁸ *Khumalo v Holomisa* para 2.

⁵⁹ The Constitution of the Republic of South Africa, 1996.

⁶⁰ *Khumalo v Holomisa* para 17.

⁶¹ *Ibid.*

⁶² *Khumalo v Holomisa* para 26.

⁶³ *Khumalo v Holomisa* para 27.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

reputation. As a foundational constitutional value, dignity does not succumb to freedom of expression.⁶⁶

The right to freedom of expression entrenched in section 16(1) of the Constitution is extensive and protects all expressions except those explicitly excluded by section 16(2).⁶⁷ Freedom of expression encompasses action because any conduct aimed at communicating an idea, information or message is an expression.⁶⁸ Catfishing is a form of expressive conduct or activity.⁶⁹ By pretending to be another person, a catfish communicates to other users that the person depicted in the profile picture is using the account. This representation is a false narrative.

Drawing from *Khumalo v Holomisa*, if the common law recognises that truth is at the centre of balancing dignity and freedom of expression,⁷⁰ it follows that prohibiting the use of a person's image in a manner that places them in a false light justifiably limits freedom of expression. Hence, the reasonable publication defence affirmed by the court exists. It allows for media defendants to escape liability for publishing false information. However, this defence would not avail in catfishing because catfishing is concerned with falsity and driven by self-interest, not truth and public interest.⁷¹

The effect of the above two judgments is that interference with a person's identity amounts to an infringement of the common law *dignitas*.⁷² A person's right to identity is indirectly entrenched as a human right through the right to human dignity,⁷³ which is a concept that embraces a person's sense of self-worth and the worth of all human beings in society.⁷⁴ The common law *dignitas* gives effect to the constitutional value of human dignity.⁷⁵ It follows that

⁶⁶ *Khumalo v Holomisa* para 25.

⁶⁷ S 16(1) and (2) of the Constitution of the Republic of South Africa, 1996; DW Freedman and ES Pugsley "Constitutional Law: Bill of Rights" *LAWSA* Vol 5 (2012) para 107; Currie and De Waal *The Bill of Rights Handbook* 338-339.

⁶⁸ RE Trager and DL Dickerson *Freedom of Expression in the 21st Century* (1999) 17-18; Currie and De Waal *The Bill of Rights Handbook* 342.

⁶⁹ Nel 2007 *Comparative and International Law Journal of Southern Africa* 208-209.

⁷⁰ *Khumalo v Holomisa* paras 36 and 37.

⁷¹ In *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA) para 22 the court as *obiter* said that the publication of untruths could never be in the interest of the public. Neethling, Potgieter and Visser *Delict* 361 explain that the reasonable publication defence is applied cautiously, considering societal legal convictions. One of the factors considered in the application of this defence is public interest in the subject matter and not merely public inquisitiveness. The only member of society who might benefit from catfishing is the catfish, catfishing is of no greater utility to society.

⁷² *O'Keeffe v Argus Printing and Publishing Co* 249D.

⁷³ S 10 of the Constitution of the Republic of South Africa, 1996; Neethling Potgieter and Visser *Delict* 19; Grütter *v Lombard* para 12.

⁷⁴ *Khumalo v Holomisa* para 27.

⁷⁵ Neethling *LAWSA* Vol 20(1) para 400 even suggests that the conception of *dignitas* found in *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) forms the basis for the recognition of more personality rights.

interfering with a person's identity interferes with human dignity because the two concepts are not entirely distinguishable.⁷⁶

3.1.2 Personality rights in general

Personality rights are highly private personal rights because they are innately linked to the right holder and cease to exist upon death.⁷⁷ Many countries protect these rights because of their personal nature.⁷⁸ The personality rights currently recognised are dignity, bodily and mental integrity, reputation or good name, identity, privacy and feelings.⁷⁹ The list of personality rights is not exhaustive, and there is room for more personality rights to be developed and legally recognised.⁸⁰ However, it is worth mentioning that development in this area of law has been gradual.⁸¹

In South Africa, the common law protects personality rights under personality law. The object of the right is a personality interest. Unlawfully and intentionally infringing on personality interests is called *iniuria*.⁸² Personality rights are non-patrimonial, although patrimonial damage may accompany an *iniuria*.⁸³ A victim of personality injury can use the *actio iniuriarum* to claim satisfaction.⁸⁴ The landmark case regarding the *actio iniuriarum* is *Matthews v Young*⁸⁵ discussed later in this chapter.

3.1.2.1 Personality Rights and the Constitution

The common law *dignitas* includes but is not limited to the right to privacy, feelings, dignity, and identity.⁸⁶ Personality rights are essential facets of a human that have also found legal

⁷⁶ *Khumalo v Holomisa* para 27; *Grütter v Lombard* para 12.

⁷⁷ Neethling 2005 *The Comparative and International Law Journal of Southern Africa* 211; Neethling Potgieter and Visser *Law of Personality* 10.

⁷⁸ According to Neethling 2005 *The Comparative and International Law Journal of Southern Africa* 211, South Africa is not the only country that provides comprehensive protection for personality rights. In fact, in the USA and in Germany for example, personality rights are protected and entrenched as human rights.

⁷⁹ Neethling 2005 *The Comparative and International Law Journal of Southern Africa* 213.

⁸⁰ Neethling *LAWSA* Vol 20(1) para 395.

⁸¹ Neethling *LAWSA* Vol 20(1) para 395.

⁸² *Delange v Costa* 1989 (2) SA 857 (A) 860I- 861A; *Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W) para 27; Neethling *LAWSA* Vol 20(1) para 395; Neethling Potgieter and Roos *Personality Rights* 72.

⁸³ Neethling 2005 *The Comparative and International Law Journal of Southern Africa* 211; Loubser and Midgley *et al The Law of Delict* 31.

⁸⁴ *Matthews and Other v Young* 1922 AD 492; Neethling Potgieter and Roos *Personality Rights* 92.

⁸⁵ 1922 AD 492.

⁸⁶ Neethling Potgieter and Roos *Personality Rights* 269.

protection as human rights.⁸⁷ For example, the Bill of Rights equivalent of the common law *corpus* is the right to bodily and psychological integrity.⁸⁸ The Bill of Rights equivalent of the rights encompassed by *dignitas* are the respective rights to human dignity and privacy.⁸⁹ The Constitution entrenches these rights, which increases their protection.⁹⁰

It is essential to touch on the Constitution's impact on personality rights because catfishing requires balancing rights directly and indirectly protected by the Constitution. Specifically, the rights to freedom of expression, privacy and human dignity are triggered. All law and conduct are subject to the Constitution, and any statute or behaviour contrary to the Constitution is invalid.⁹¹ In *Khumalo v Holomisa* the Constitutional Court explained how the Bill of Rights' provisions operated within our legal system.⁹² Section 8(1) is the direct application of the Bill of Rights, and it is unqualified.⁹³ It is a direct vertical application because it binds state organs to refrain from infringing on the rights of private individuals.⁹⁴ Section 8(2) is the direct horizontal application of the Bill of Rights, but it is qualified and operates between private and juristic persons.⁹⁵

Khumalo v Holomisa is the only case of direct horizontal application. The reason for this is the practical principle of constitutional subsidiarity.⁹⁶ In practice, the principle applies to give effect to the rights protected in the Constitution. When litigating, individuals should first rely on legislation to give effect to the infringed right.⁹⁷ In the alternative, a litigant can challenge the constitutional validity of a right before invoking constitutional rights.⁹⁸ There is also an indirect application of the Bill of Rights, which relies on the principle of avoidance.⁹⁹ It

⁸⁷ Neethling 2005 *The Comparative and International Law Journal of Southern Africa* 211; Neethling Potgieter and Roos *Personality Rights* 9.

⁸⁸ S 12(2) of the Constitution of the Republic of South Africa, 1996.

⁸⁹ S 10 and 14 of the Constitution of the Republic of South Africa, 1996.

⁹⁰ The Constitution of the Republic of South Africa, 1996; Neethling *LAWSA* Vol 20(1) para 396; Neethling Potgieter and Roos *Personality Rights* 19.

⁹¹ S 2 of the Constitution of the Republic of South Africa, 1996.

⁹² S Woolman "Application" in S Woolman and M Bishop *Constitutional Law of South Africa* 2ed (2013) 31-6.

⁹³ Woolman *Constitutional Law* 31-45, being unqualified means that all law and all conduct of the state is subject to the direct application of the Bill of Rights without any exceptions. According to Woolman *Constitutional Law* 31-32, the rationale is that the state creates and enforces the law. Therefore, to prevent an abuse of power constitutional standards must limit state power.

⁹⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 44.

⁹⁵ The idea in this provision is that all natural persons are entitled to the rights entrenched in the Bill of Rights. However, some of the rights do not apply directly due to their nature.

⁹⁶ This principle was explained by the minority judgment of Cameron J in *My Vote Counts v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) paras 44- 66.

⁹⁷ *My Vote Counts v Speaker of the National Assembly* para 46.

⁹⁸ *My Vote Counts v Speaker of the National Assembly* para 49. See also *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73.

⁹⁹ KG Young "The Avoidance of Substance in Constitutional Rights" (2013) 5 *Constitutional Court Review* 233 at 236.

supposes that it is preferable to develop the common law or interpret legislation to bring it in line with the Constitution than to rely directly on a provision of the Constitution.¹⁰⁰

Neethling suggests that personality rights and the common law are compliant with the Bill of Rights unless the contrary is proven.¹⁰¹ The courts have not heard a case challenging the consistency of the right to identity with the Bill of Rights' spirit, objects, and purport. However, delictual principles may need development to address the legal challenges presented by social media. More specifically, the right to identity may require some development to address catfishing.¹⁰²

The common law does not contain rules that address the technological revolution, which points to a deficiency. The lack of legislation addressing catfishing adds to the paucity. Under the current constitutional dispensation, personality rights are an extension of the right to human dignity. The infringement of a personality right is an *iniuria* under the common law and an indirect violation of the constitutional value of human dignity. It follows that if catfishing interferes with an individual's right to identity, it interferes with the common law *dignitas* and indirectly with the constitutionally protected right to human dignity.

There is a need for legal development to balance the conflicting right to free expression and identity, protecting a person's interest in not having their identity appropriated or portrayed in a false light. Therefore, it is vital to traverse through the theory of subjective rights to demonstrate the importance of having legal protection against catfishing.

3.2 Identity and privacy as subjective interests affected by catfishing

3.2.1 The theory of subjective rights

¹⁰⁰ S 39(2) read with s 173 of the Constitution of the Republic of South Africa, 1996. GE Devenish DW Freedman RM Robinson and ES Pugsley "The Procedural Stage" *LAWSA* Vol 5(4) (2012) para 10. According to the Constitutional Court in *Carmichele v Minister of Safety and Security* para 39, this provision places a general obligation on the judiciary to develop the common law in accordance with the Constitution if it is inconsistent. There is also a responsibility on the judiciary to develop the common law if it is not inconsistent, but it is necessary to develop it in line with the Bill of Rights. See Woolman *Constitutional Law* 31 – 78; *Carmichele v Minister of Safety and Security* para 56; *Thebus and Another v S* 2003 (6) SA 505 (CC) para 28 and *Economic Freedom Fighters and others v Manual (Media Monitoring Africa Trust as amicus curiae)* [2021] 1 All SA 623 (SCA) para 60.

¹⁰¹ Neethling *LAWSA* Vol 20(1) para 396.

¹⁰² The rationale for this suggestion stems from the *Du Plessis and others v De Klerk and Another* 1996 (3) SA 850 (CC) para 61. The court held that judges should adapt the common law to fit the country's changing social, moral, and economic circumstances. The court further added that courts should not perpetuate rules based on social conditions that had changed or no longer existed. The responsibility to develop the common law was only necessary to keep it abreast with the evolving society.

As an introduction to subjective interests, it is essential to touch on basic concepts. In private law, a legal subject bears subjective rights.¹⁰³ Legal subjects have specific capacities that allow them to participate in legal activities.¹⁰⁴ Subjective rights are one of the by-products of legal subjectivity.¹⁰⁵ Private law protects a legal subject's interest in an object or thing through a subjective right. There are five categories of subjective rights, and personality rights are one category.¹⁰⁶ The law does not create personality rights.¹⁰⁷ People have a fundamental interest in facets of their personality, and these interests exist independently of their legal recognition. Therefore, personality rights stem from the legal recognition and protection of a person's independent interests.¹⁰⁸

3.2.1.1 Personality rights as subjective rights

Personality interests are slightly different from other interests that give rise to subjective rights. Neethling expressed that the rights protected as personality rights depend on the individual interests accepted as objects of personality.¹⁰⁹ The main characteristic of personality interests is that they cannot be separated from the person because they are closely connected to their personality. Moreover, the highly personal nature of these interests means that they are non-patrimonial.¹¹⁰ This nature indicates that they are somewhat *sui generis* interests because they are not valuable in the sense of monetary value and cannot exist independently. Hence, Joubert defines personality interests as non-patrimonial legal objects that are bound to the personality of the holder of the right.¹¹¹

¹⁰³ According to D Kleyn and F Viljoen *et al Beginners Guide for Law Students* (2019) 5ed 208- 209, a legal subject is a natural or juristic person. See Neethling Potgieter and Roos *Personality Rights* 14.

¹⁰⁴ Kleyn and Viljoen *et al Beginners Guide* 210. There are four capacities a subject can have. They are legal capacity allowing a subject to bear rights and duties; capacity to act which refers to the ability to perform juristic or lawful acts; *locus standi in iudicio* which is the capacity to stand in court proceedings; and accountability which is the capacity to be held accountable for unlawful conduct.

¹⁰⁵ G Muller and JM Pienaar *Silberberg and Schoeman's: The Law of Property* 6ed para 2.4 explains that legal objects are things. Things are defined by their corporeality, tangibility, capability of independent existence and usefulness to legal subjects. The concept of a thing originated in Roman law and was one of three categories of law.

¹⁰⁶ Kleyn and Viljoen *et al Beginners Guide* 214. There is a difference between personal rights and personality rights. The latter relates to aspects of personality whilst the former relates to performances.

¹⁰⁷ Neethling, Potgieter and Visser *Law of Personality* 12; Neethling Potgieter and Roos *Personality Rights* 14.

¹⁰⁸ Neethling Potgieter and Roos *Personality Rights* 14.

¹⁰⁹ Neethling Potgieter and Roos *Personality Rights* 16.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

The legal traits of personality rights exist from birth, are not transferable, and terminate at the holder's death. Unlike personal rights and personal immaterial property, personality rights are not inheritable and cannot be relinquished or attached.¹¹²

3.2.1.2 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T)*

The leading case in the discussion on subjective rights and their infringement is *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*. The respondent created a film based on a coloured person who masqueraded as a white person studying at the University of Pretoria.¹¹³ The film illustrated the man as a rugby hero at the university who aspired to become a national rugby team member of the Springboks.¹¹⁴ There were scenes with the university's rugby team in the film, making references to the university. The University of Pretoria contended that the film infringed its privacy, good name, and property rights in its application for an interdict restraining the film's airing.¹¹⁵

Mostert J held that the right to privacy is one of the personality rights protected in our law. He considered whether its application was limited to human beings or extendable to juristic persons. He concluded that the invasion of privacy was an infringement of a right associated with human beings and did not apply to an institution such as the university.¹¹⁶ The university did not have a personality right, and it followed that the *actio iniuriarum* was not available to the university because of its impersonality.¹¹⁷ Instead, the court found that a university had a right to goodwill, which caused students and donors to support it. The right of goodwill amounted to an asset that held economic value and was entitled to legal protection.¹¹⁸

The court said an infringement on the institution's goodwill was equivalent to a person's reputation protected under the Aquilian action.¹¹⁹ The court concluded that there was no defamation and that showing the film was not unlawful.¹²⁰ The reasons proffered were that universities were part of the spiritual property of a community, and they held a sentimental value to members of the community. Hence, universities frequently appeared in stories.¹²¹ To

¹¹² Neethling Potgieter and Roos *Personality Rights* 17.

¹¹³ *Universiteit van Pretoria v Tommie Meyer* 379C-D.

¹¹⁴ *Ibid.*

¹¹⁵ *Universiteit van Pretoria v Tommie Meyer* 379G-H.

¹¹⁶ *Universiteit van Pretoria v Tommie Meyer* 384G-385B.

¹¹⁷ JM Burchell "Law of Delict" (1977) *Annual Survey of South African Law* 207.

¹¹⁸ *Universiteit van Pretoria v Tommie Meyer* 384C-G; Burchell 1977 *Annual Survey* 207.

¹¹⁹ *Universiteit van Pretoria v Tommie Meyer* 385B-H; Burchell 1977 *Annual Survey* 207.

¹²⁰ *Universiteit van Pretoria v Tommie Meyer* 388E.

¹²¹ *Universiteit van Pretoria v Tommie Meyer* 386E-F; Burchell 1977 *Annual Survey* 208.

require that an artist seek permission before using the spiritual property of the community was contrary to the public's viewpoint.¹²²

This case is significant for its explanation and application of the doctrine of subjective rights.¹²³ The court illustrated that personality rights are subjective rights, and injuring an aspect of personality was wrongful.¹²⁴ Midgley explains that subjective rights consist of a twofold relationship. In the first instance, a vertical relationship exists between the holder of the right and the legal object.¹²⁵ The subject-object relationship allows the holder to use and enjoy the legal object. In the second instance, a horizontal relationship exists between the holder of the right and the people against whom it applies.¹²⁶ The subject-subject relationship places a duty on others to not infringe on the holder's relationship to the object.¹²⁷

The wrongful and unjustified interference with any personality rights gives the right to a claim for compensation through the *actio iniuriarum*.¹²⁸ Whether the infringing conduct is justifiable depends on the objective standard of reasonableness informed by the legal convictions of the community.¹²⁹ The rapid development of information and communications technologies has altered the community's convictions.¹³⁰ By implication, what society deems reasonable conduct regarding online conduct has changed.

In chapter two, this thesis established that catfishing involves appropriating a facet of identity. It follows that catfishing interferes with individuals' use and enjoyment of their privacy and identity on social networking platforms. The freedoms afforded by technology should not enable a person to interfere with another person's personality rights. Social network users should post their content without the fear of having others download their pictures to create

¹²² *Universiteit van Pretoria v Tommie Meyer* 388C-D; Burchell 1977 Annual Survey 208.

¹²³ *Universiteit van Pretoria v Tommie Meyer* 381F-G.

¹²⁴ Midgley *LAWSA* Vol 15 para 80.

¹²⁵ Neethling Potgieter and Roos *Personality Rights* 15 say that this relationship gives rise to some powers and duties for the bearer.

¹²⁶ Kleyn and Viljoen *et al Beginners Guide* 212. In Neethling Potgieter and Roos *Personality Rights* 15 the authors suggest that private law allows the bearer to enforce their rights where there has been an interference with their personality rights.

¹²⁷ Midgley *LAWSA* Vol 15 para 80. Moreover, Midgley suggests that an infringement is any interference, impairment, or disturbance of the subject-object relationship.

¹²⁸ Midgley *LAWSA* Vol 15 para 80; *DE v RH* 2015 (5) SA 83 (CC) para 3 fn 5; Neethling Potgieter and Roos *Personality Rights* 60.

¹²⁹ *Grütter v Lombard* para 13; *Universiteit van Pretoria v Tommie Meyer* 387C-D.

¹³⁰ *Amod v Multilateral Moto Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) para 23. This suggestion is supported by the view that society's legal convictions change depending on need. The advent of the internet tools discussed in this thesis have created a need for society's legal convictions to change. See also, *Heroldt v Wills* para 8 and *Delshery Trust v ABSA Bank Limited* 2014 JOL 32417 (WCC) para 18.

fake accounts. Some might argue that this is a privacy issue.¹³¹ Therefore, it is essential to briefly consider the impact of catfishing on privacy to illustrate why this thesis focuses on catfishing as an infringement of identity.

3.2.2 Privacy

The right to privacy is the condition of life typified by seclusion from the public.¹³² Privacy encompasses the personal information or facts that the bearer of the right has chosen to not reveal to others and intends to keep private.¹³³ In other words, legally, privacy is the right to be left alone without interference.¹³⁴ In *O’Keeffe v Argus Printing and Publishing Co Ltd*, the court recognised privacy as one of the rights protected under the common law *dignitas*.¹³⁵ Neethling suggested that in that matter, the court’s failure to define the right to privacy was the reason that subsequent courts conflated privacy and identity.¹³⁶

McQuoid-Mason argues that the appropriation of facets of identity infringes the right to privacy because a person’s image is a personal fact, and control over a person’s image and likeness is central to individual autonomy or privacy.¹³⁷ Furthermore, the right to privacy includes the ability to choose the destination of their personal information. In terms of this theory, it follows that when a person uses another person’s image without consent for catfishing, they violate the right to privacy.¹³⁸ Whilst this is respectfully a valid argument, the courts have not settled the academic debate.

McQuoid-Mason’s view may be valuable in the context of users’ conduct on social networks. Social networks have privacy settings that allow users to protect themselves and their online identities. These settings enable users to set their accounts to “private”, allowing them to limit their audiences on platforms instead of having their profile and content exposed to the general public.¹³⁹ Therefore, there is something to be said about catfishing being a privacy concern

¹³¹ McQuoid-Mason 2000 *Acta Juridica* 231; Hartney 2018 *Minnesota Journal of Science and Technology* 278.

¹³² Neethling *LAWSA* Vol 20(1) para 431.

¹³³ *Ibid.*

¹³⁴ McQuoid-Mason 2000 *Acta Juridica* 227; Loubser and Midgley *et al The Law of Delict* 403.

¹³⁵ 1954 (3) SA 244 (E) 246.

¹³⁶ Neethling Potgieter and Roos *Personality Rights* 307 fn 9.

¹³⁷ McQuoid-Mason 2000 *Acta Juridica* 231.

¹³⁸ McQuoid-Mason 2000 *Acta Juridica* 230 -231.

¹³⁹ Neethling Potgieter and Roos *Personality Rights* 323 fn 115.

because controlling the visibility of a user's profile and content is categorised as a privacy issue online.¹⁴⁰

A person who discloses private facts without consent infringes privacy.¹⁴¹ The reason that McQuoid-Mason advocates so strongly that appropriation and falsification fall within the scope of privacy has to do with publication. He suggests that these are variations of publishing private facts.¹⁴² The unlawfulness of a publication of private facts depends on the *boni mores* of society.¹⁴³ Nevertheless, our courts have held that privacy and identity are closely related.¹⁴⁴ Whether falsification and appropriation are infringements of privacy or identity is an essential aspect of this thesis.

3.2.3 Identity

The prevalence of Internet tools that change in tune with the way users behave on the platforms is striking and calls for more attention to potential human rights violations. The right to identity is one of the rights frequently affected by conduct online. Identity is different from privacy because it concerns individuality, which separates people.¹⁴⁵ The right to identity is concerned with defining and protecting those unique personal traits because individuals are interested in protecting their identity. It is infringed by falsification or by appropriation for a commercial purpose.¹⁴⁶

Identity is a separate personality right despite being similar to privacy and previously conflated with privacy.¹⁴⁷ Although the two rights can be infringed simultaneously, identity deserves equal recognition and protection as an independent personality right.¹⁴⁸ Identity's

¹⁴⁰ *Heroldt v Wills* para 18-21. Many social networking companies are based in the USA. In US law, impersonation and matters relating to identity are dealt with under privacy laws. Therefore, it is suggested that the reason social media deal with these issues under privacy is because US law categorises it as such.

¹⁴¹ McQuoid-Mason 2000 *Acta Juridica* 229; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) 462E-F.

¹⁴² McQuoid-Mason 2000 *Acta Juridica* 231. Neethling Potgieter and Roos *Personality Rights* 313 expound on this notion. The notion is premised on the idea that confidentiality is central to private facts because they are not known by many. Publication of private facts is principally wrong because it is contrary to the will and determination of the right -holder and the legal convictions of the community deem it wrong to publicise such information. Regarding catfishing, it is an example of mass publication of private facts because the victim's image is taken from one platform and exposed on another platform to an undetermined number of people usually without their consent. Following Neethling's views in Neethling Potgieter and Roos *Personality Rights* 323, publications made online are contrary to the legal convictions of the community.

¹⁴³ *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 462F-G.

¹⁴⁴ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 65.

¹⁴⁵ Neethling Potgieter and Visser *Delict* 373.

¹⁴⁶ Neethling Potgieter and Visser *Delict* 374.

¹⁴⁷ Neethling *LAWSA* Vol 20(1) para 436.

¹⁴⁸ *Kumalo v Cycle Lab* para 18.

distinguishing characteristic is its protection of those aspects of personality that are beyond the domain of privacy and are central to a person's individuality.¹⁴⁹

3.3 The scope of the right to identity

The courts have established the general scope of identity, although the right to identity has received little attention. The right to identity manifests as indicators or facets: image, name, likeness, history, character, voice, and handwriting.¹⁵⁰ Identity is infringed when one of its facets are used to contradict a person's unique personality.¹⁵¹ Our law recognises two violations of identity based on US tort law.¹⁵² Firstly, identity is violated when it is misrepresented or falsified. Secondly, identity is violated when one or more *indicia* are appropriated for commercial purposes.¹⁵³

3.3.1 The infringement of identity

Falsification occurs when someone interferes with the facets of another person's identity by using them to create a false impression of that person. Falsification implies that the characteristics of a person's identity, such as their image, name, or likeness, are used to contradict the person's true identity. Infringement by falsification has two requirements. First, a person must falsify another person's identity, and second, the resultant false impression must be linked to a specific person.¹⁵⁴ Appropriation of identity for commercial gain is when a person's facets of identity are used for advertising or to sell a product. In this instance, a person's identity is used without permission for economic purposes.¹⁵⁵

There are four cases where the courts dealt with identity explicitly and gave content to the right.¹⁵⁶ More cases should have been dealt with as identity matters; however, identity was only formally identified as a separate personality right recently.¹⁵⁷ Additionally, it is also noteworthy

¹⁴⁹ Loubser and Midgley *et al The Law of Delict* 405.

¹⁵⁰ Neethling *LAWSA* Vol 20(1) para 436.

¹⁵¹ Neethling *LAWSA* Vol 20(1) para 436.

¹⁵² In *O'Keeffe v Argus Printing and Publishing Co Ltd* 249B-C; *Universiteit van Pretoria v Tommie Meyer Films* 386H and *Grütter v Lombard* para 7 the courts mention the US tort law infringements of identity.

¹⁵³ Neethling Potgieter and Roos *Personality Rights* 352. See also Loubser and Midgley *et al The Law of Delict* 404.

¹⁵⁴ *Grütter v Lombard* 2007 (4) SA 89 (SCA); *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) and Neethling Potgieter and Roos *Personality Rights* 353.

¹⁵⁵ *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ); *Cele v Avusa* [2013] 2 All SA 412 (GSJ); *W v Atoll Media* [2010] 4 All SA 548 (WCC) and Neethling Potgieter and Roos *Personality Rights* 357.

¹⁵⁶ *Grütter v Lombard* 2007 (4) SA 89 (SCA); *W v Atoll Media* [2010] 4 All SA 548 (WCC); *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) and *Cele v Avusa* [2013] 2 All SA 412 (GSJ).

¹⁵⁷ Neethling Potgieter and Roos *Personality Rights* 351; *Grütter v Lombard* 2007 (4) SA 89 (SCA).

that identity can both be falsified and appropriated at the same time.¹⁵⁸ This duality makes it challenging to single out the type of infringement present in a single case. Therefore, the cases below are considered without particular reference to the specific category of the violation they fall under. This analysis method is helpful because the courts discuss the two infringements without categorising the infringement in the particular case.

3.3.2 The infringement of identity through the cases

3.3.2.1 *O’Keeffe v Argus Printing and Publishing Co Ltd and Another 1954 (3) SA 244 (C)*

This case is discussed above as the *locus classicus* for the position that the common law *dignitas* is an all-embracing concept that encompasses all aspects of personality excluded by *corpus* and *fama*. However, this case is also valuable in the discussion of the infringement of identity. It involved the unauthorised publication of a person’s name and picture in an advertisement. The court found this conduct to be an unjustified aggression on the plaintiff’s *dignitas*.¹⁵⁹ The plaintiff brought a damages claim because the defendants had infringed her dignity and privacy by publishing her name and image in an advertisement.¹⁶⁰

The court decided this matter before our law recognised the right to identity as a separate personality right. The court’s finding that the unauthorised use of a person’s picture and name for an advertisement was an infringement of dignity was correct. This case is essential to the present discussion because although the court did not expressly categorise this as an infringement of identity, the court mentioned a similar US position.¹⁶¹ It follows that by inference, the court recognised a similarity between this plaintiff’s claim and the tort of appropriation for commercial use. It realised that identity was an interest worth protecting without saying so explicitly.

This case was an excellent example of the infringement of identity by appropriation for commercial gain.¹⁶² Features of the plaintiff’s identity were used without her consent in an

¹⁵⁸ Neethling Potgieter and Roos *Personality Rights* 357.

¹⁵⁹ *O’Keeffe v Argus Printing and Publishing Co Ltd* 249D.

¹⁶⁰ *O’Keeffe v Argus Printing and Publishing Co Ltd* 246F- 247C.

¹⁶¹ *O’Keeffe v Argus Printing and Publishing Co Ltd* 249B-C.

¹⁶² Neethling *LAWSA* Vol 20(1) para 436.

advertisement with the hopes of getting the public to use the second defendant's facilities and buy products they stocked.¹⁶³

O'Keeffe v Argus Printing and Publishing Co Ltd illustrates the difference between catfishing and identity appropriation for commercial gain. Catfishing will not always involve monetary gain. The catfish appropriates a victim's image to mask their own identity while navigating through social networks.¹⁶⁴ Considering the court's broad conception of *dignitas*, one can conclude that catfishing interferes with *dignitas* and identity because it subjects the victim to degrading treatment, ill-will and disdain.¹⁶⁵ However, the court cautioned that not all unauthorised publications would amount to an aggression on *dignitas*. Whether there has been an infringement will depend on the type of image, the plaintiff's personality and position in society, and their previous habits regarding publicity.¹⁶⁶

3.3.2.2 *Kidson and Others v SA Associated Newspapers Ltd 1957 (3) SA 461 (W)*

*Kidson v SA Associated Newspapers Ltd*¹⁶⁷ is another case that came before the courts before the recognition of the right to identity. The plaintiffs instituted an action for damages arising from defamation and *iniuria* following a publication of their image in the Sunday newspaper along with a misleading caption. The plaintiffs were two engaged nurses and the husband of another nurse. The picture depicted three nurses and was captioned, "Off duty: lonely and nowhere to go." One nurse was writing a letter, the other was reading a letter, and the third was doing needlework.¹⁶⁸ The three nurses only consented to have their picture taken to raise funds for a recreational hall.¹⁶⁹ The defendants did not have consent to publish the picture of the nurses with an article that gave the impression that the married and engaged nurses were single. The court interpreted the article and gave it a primary meaning. It held that the article was not defamatory, and the action for damages on the ground of *iniuria* could not succeed.¹⁷⁰ However, the court applied *iniuria* for special circumstances and differentiated the case of the

¹⁶³ *O'Keeffe v Argus Printing and Publishing Co Ltd* 247.

¹⁶⁴ *Kumalo v Cycle Lab* [2011] JOL 27372 (GSJ) reverberates the same notion. Despite the court having found an element of falsification, this case primarily concerned appropriation for commercial gain. The plaintiff's image was taken and used for advertising. This is different from catfishing which is driven by the desire to deceive others and cloak one's identity using another person's identity.

¹⁶⁵ In *Kumalo v Cycle Lab* para 24, the court resonates the idea that a reasonable person in the plaintiff's position would feel insulted by this conduct and would find the publication of their photograph offensive.

¹⁶⁶ *O'Keeffe v Argus Printing and Publishing Co Ltd* 249.

¹⁶⁷ *Kidson and Others v SA Associated Newspapers Ltd 1957 (3) SA 461 (W)*.

¹⁶⁸ *Kidson and Others v SA Associated Newspapers Ltd* 462D-E.

¹⁶⁹ *Kidson and Others v SA Associated Newspapers Ltd* 463B-464B.

¹⁷⁰ *Kidson and Others v SA Associated Newspapers Ltd* 467F-G.

one nurse from the other two plaintiffs.¹⁷¹ In this regard, the court held that the fact that she was married before the publication had to be considered when determining whether the article was an infringement of her privacy. In respect of the married nurse, the court concluded that the invitation created by the article was an insult.¹⁷² The court absolved the defendant from the instance regarding the other plaintiffs as they were not of the same standing as the married nurse.¹⁷³

As Neethling suggested,¹⁷⁴ this case was an identity matter and it fell under the falsification infringement of identity. The rationale was that the publication of the image and the caption accompanying the photo was misleading and created a false impression of the nurses to the public.¹⁷⁵ This suggestion is acceptable because the image coupled with the caption gave the impression that they were single and looking for companions. The caption also had their names; the three women could be linked to the false narrative.

Kidson v SA Associated Newspapers Ltd illustrates the fundamental issue with catfishing. Catfishing involves falsifying the identity by using identity features to portray the victim as someone they are not, similar to what the nurses in this case experienced.¹⁷⁶ How a catfish account behaves perpetuates the false narrative about the victim and attaches these false attributes to the victim. Neethling says that the mere publication of this false impression about the victim to many people is unacceptable.¹⁷⁷ One can link this idea to *Kumalo v Cycle Lab* where the court said that what mattered legally was that the defendant used the plaintiff's image without authority and in a misleading way.¹⁷⁸

3.3.2.3 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T)*

Universiteit van Pretoria v Tommie Meyer Films is significant for first identifying and recognising the right to identity as a personality right.¹⁷⁹ The court, in this case, acknowledged identity as separate from privacy and noted that there were two ways of impairing identity.¹⁸⁰ A detailed outline of the facts is available above. The action arose following a film by the

¹⁷¹ *Ibid.*

¹⁷² *Kidson and Others v SA Associated Newspapers Ltd* 467G – 468A.

¹⁷³ *Kidson and Others v SA Associated Newspapers Ltd* 469.

¹⁷⁴ Neethling *LAWSA* Vol 20(1) para 436.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Kidson and Others v SA Associated Newspapers Ltd* 464H and 467G-H.

¹⁷⁷ Neethling Potgieter and Roos *Personality Rights* 355.

¹⁷⁸ *Kumalo v Cycle Lab* para 30.

¹⁷⁹ *Universiteit van Pretoria v Tommie Meyer* 386G-H; Neethling Potgieter and Roos *Personality Rights* 59.

¹⁸⁰ *Universiteit van Pretoria v Tommie Meyer* 386H.

respondent, the storyline of which implicated the appellant. The university claimed that the respondent infringed on its privacy, good name, and property rights in the film.¹⁸¹

Although this case concerned a juristic person,¹⁸² the principles echoed by the court are valuable. The *indicia* of a person's identity set them apart from others. Using those indicators without consent and placing a person in a false light publicly interferes with their identity.¹⁸³ A person should not be subjected to an injury of their personality by having their identity unjustifiably falsified in public. The court held that whether it dealt with the university's goodwill or identity, the question remained whether the film's screening violated a subjective right.¹⁸⁴

The court acknowledged that the university was included in a film, although it did not consent. However, the court said the respondent did not depict the university in a false light in the storyline, nor was the university part of the theme. Instead, the respondent used the university as a background.¹⁸⁵ It further held that viewers would not get the impression that the university was involved in making the film or consented to be used in the film.¹⁸⁶ One can infer from this position that the court essentially concluded that there was no violation of the university's identity.

Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk emphasised that identity infringement had to do with publishing falsehoods or false facts that could not be reconciled with the person's true image. Catfishing is the publication of falsehood online. It infringes on a person's identity because the victim's image is falsified by being attached to a fake account. Hence, catfishing is an identity issue more than a privacy issue. It goes beyond interfering with the private facts a person tries to keep away from the public domain. It is concerned with how others use a person's identity in public and whether that impression is accurate of the victim.¹⁸⁷

3.3.2.4 *Grütter v Lombard and Another 2007 (4) SA 89 (SCA)*

Grütter v Lombard is the landmark case regarding the right to identity because it was the first case where the Supreme Court of Appeal (SCA) recognised the right to identity as a separate

¹⁸¹ *Universiteit van Pretoria v Tommie Meyer* 379G-H.

¹⁸² *Ibid.*

¹⁸³ *Universiteit van Pretoria v Tommie Meyer* 386H; Neethling Potgieter and Roos *Personality Rights* 110.

¹⁸⁴ *Universiteit van Pretoria v Tommie Meyer* 387A.

¹⁸⁵ *Universiteit van Pretoria v Tommie Meyer* 387D-E.

¹⁸⁶ *Universiteit van Pretoria v Tommie Meyer* 388A.

¹⁸⁷ Neethling Potgieter and Roos *Personality Rights* 353 and 359.

personality right.¹⁸⁸ The appellant sought an order prohibiting the respondent from using his name to contradict his true identity.¹⁸⁹ The appellant and respondent had agreed to share premises to run separate legal practices under a joint name.¹⁹⁰ However, after they terminated their agreement, the respondent used the collective name bearing the appellant's name.¹⁹¹

The court found that this was a violation of the appellant's right to identity. The respondent's conduct amounted to falsification of identity because he was using the appellant's name. By using the appellant's name, the respondent portrayed a false message to the public because it represented that the appellant was still professionally linked to the practice with the respondent. Moreover, it meant that the appellant had consented to the respondent using his name in that manner. The court concluded that holistically this was a misrepresentation of the "true state of affairs" for which there was no legal justification.¹⁹²

The court also commented that there were no public policy justifications for the respondent's unauthorised use of the appellant's name for their commercial advantage.¹⁹³ By continuing to use the appellant's name in practice after he had withdrawn his consent, the respondent was effectively appropriating the appellant's name for his commercial advantage. In the court's view, it followed that this was an *iniuria*.¹⁹⁴ This conclusion was a unique perspective from the court because it highlighted that both types of identity infringements were present.

This case was a detailed illustration of falsification because it satisfied the two conditions required to violate identity by falsification. First, the appellant's identity was falsified because the respondent continued to use his name in practice after he withdrew his consent. Second, the false impression was linked to the appellant because he was the person known as Grütter in the practice description.¹⁹⁵ It was also an illustration of appropriation for commercial use because the respondent used the appellant's name without authority to gain clients that would have been the appellant's clients.

¹⁸⁸ In *Grütter v Lombard* para 9- 11, the SCA confirmed and expounded on the views expressed by the court in *Universiteit van Pretoria v Tommie Meyer Films* 1977 (4) SA 376 (T) and *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) regarding the right to identity. The court held that a person's identity was capable of delictual protection through the *actio iniuriarum*. The unauthorised publication of one's name or likeness in an advertisement was an *iniuria*.

¹⁸⁹ *Grütter v Lombard* para 3.

¹⁹⁰ *Grütter v Lombard* para 2.

¹⁹¹ *Ibid.*

¹⁹² *Grütter v Lombard* para 13.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Grütter v Lombard* para 3.

Grütter v Lombard also highlights the difference between catfishing and using a person's image for commercial gain. The respondent's commercial advantage came from the continued use of the appellant's name. One would infer from the facts that clients who approached the practice looking for the appellant would find the respondent instead, and he would offer them his services.¹⁹⁶ While catfishing is not always driven by commercial gain, where the purpose is commercial, the catfish has an advantage that stems from being mistaken as the victim. This is a mistake that the victim is entitled to ensure does not occur.¹⁹⁷

3.3.2.5 *W (Wells) v Atoll Media [2010] 4 All SA 548 (WCC)*

W v Atoll Media is a case that concerned the appropriation of identity for commercial gain. The plaintiff approached the court for damages on behalf of her minor child whose picture had been used in a surfing magazine accompanied by the caption "filth".¹⁹⁸ The image also appeared on the television program "Super Sport".¹⁹⁹ The publication of the picture led to the minor being called names among her community.²⁰⁰ The defendant did not obtain consent from the minor or her mother to publish the photograph.

The court held that the publication of a provocative image of a child without her or her mother's consent did not meet the standard of a reasonable publisher—especially where the purpose of the publication was to drive commercial sales.²⁰¹ The court noticed that the defendant conceded that he would not have published the picture if he had known that the image was of a 12-year-old.²⁰² In its *obiter* remarks concerning identity, the court held that appropriating a person's image or likeness for a commercial benefit called for legal intervention. However, it stated that legal intervention might not be needed where an image or television scene depicts a crowd of people. However, an image used for magazines sold to profit was an unjustifiable invasion of an individual's personal rights.²⁰³

An interesting point to note from this judgment is how the court categorised the infringement of identity. The unauthorised use of the minor's image was wrongful because it was used in a

¹⁹⁶ *Grütter v Lombard* para 13.

¹⁹⁷ This idea stems from and is supported by the fact that in *Grütter v Lombard* para 13 the court said that the appellant was entitled to assert that there should not be room for error to begin with. Catfishing perpetuates the idea that the victim is the person controlling the account. This is the impression that other users get and this amounts to using a person's image in a manner that is irreconcilable with their true character.

¹⁹⁸ *W v Atoll Media* para 1-5.

¹⁹⁹ *W v Atoll Media* para 4.

²⁰⁰ *W v Atoll Media* para 9.

²⁰¹ *W v Atoll Media* para 45 and 47.

²⁰² *W v Atoll Media* para 43.

²⁰³ *W v Atoll Media* para 49.

magazine sold for profit. The court did not find the use of the image to be wrongful because the defendant used it to advertise the magazine.²⁰⁴ This case is distinguishable from *O'Keeffe v Argus Printing and Publishing Ltd* discussed above. The defendants used facets of the plaintiff's identity without her permission to entice the public to use the defendant's shooting range and purchase weapons from them.²⁰⁵ In *W v Atoll Media* the court gave a broader construction to using a person's identity for commercial gain.

This identity infringement is distinguishable from catfishing because catfishing does not always involve appropriation for a commercial purpose. A victim's identity, or facets thereof, is appropriated for some deceitful purpose, resulting in a patrimonial gain. Following the court's wide construction of commercial gain, using a person's image for a catfish account that swindles people of their money may fall in the scope of this type of infringement.

3.3.2.6 Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC)

The Constitutional Court heard an appeal against the decision of the SCA affirming the finding by the High Court that the applicants defamed the respondent. The applicants were learners at the school where the respondent was deputy principal. The learners had photoshopped the face of the respondent and the school principal to an image of two naked men sitting in a sexually provocative manner.²⁰⁶ As a result, the respondent instituted an action for damages against the learners on the grounds of defamation. The majority of the court upheld the finding of the SCA.²⁰⁷

The court had to deal with a matter concerning the image of a respondent attached to another person's body using a computer.²⁰⁸ Pictures of this nature are commonplace on the Internet. However, in this case, the court found the particular photo defamatory because of its message about the respondent.²⁰⁹ The court opined that a reasonable person looking at the picture would

²⁰⁴ Neethling Potgieter and Roos *Personality Rights* 357 also advance the idea that a commercial purpose is not limited to advertising but includes using facets of a person's identity on items that are sold for a profit.

²⁰⁵ *O'Keeffe v Argus Printing and Publishing Co Ltd* 247.

²⁰⁶ *Le Roux v Dey* para 1.

²⁰⁷ *Le Roux v Dey* para 5-6.

²⁰⁸ *Le Roux v Dey* para 98 the court explained what the picture looked like and said that it was a frontal image of two naked men sitting beside one another with their legs wide open. Their hands were in the genital area indicating some form of sexual activity covered by the school crest. The heads of the respondent and the principal were electronically cut out and attached to the bodies in the picture. Brand AJ took the view that that manner of manipulating the image was rude and obvious and that a reasonable person would know that the bodies were not of the respondent and the principal.

²⁰⁹ *Le Roux v Dey* paras 109 and 149.

infer a connection between the people in the image and the activity displayed by the photo.²¹⁰ Brand AJ highlighted that that was the similarity between that picture and caricatures or cartoons. The idea was that in those illustrations, the person identified was not the actual person in the illustration, but some link could be made between the person and the image.²¹¹

As such, the court rejected the contention that caricatures could never be defamatory. It held that our law accepts that cartoons, caricatures, and sketches can be defamatory. They were not excluded just because they were not an accurate depiction of the people concerned.²¹²

The principles echoed by the court in *Le Roux v Dey* are helpful in the present discussion. Firstly, catfishing is similar to cartoons, caricatures, and edited photos in that they show a false depiction of the person concerned. The difference is that in catfishing, the person behind the fake profile pretends to be the person in the image. Consequently, it is hard for an unaware third party to reasonably infer that the account is fake. Secondly, catfishing is different from caricatures or cartoons and edited pictures because it is a false reflection of the person. Catfishing is unacceptable because it places the victim in a false light since people are interested in having their true character published over a false one.

Although the respondent succeeded on the defamation claim, he would likely have succeeded on a claim for identity infringement. The applicants falsified the respondent's identity by editing his image onto another picture, essentially depicting him in a sexually suggestive manner. They were saying that he is the person who is participating in the sexual conduct displayed by the picture. Moreover, the respondent was identifiable from the photograph because the image had the school's badge over the genital area.

3.3.2.7 *Kumalo v Cycle Lab (Pty) Ltd [2011] JOL 27372 (GSJ)*

In this case, the plaintiff visited a cycling supplies store owned by the defendant where an employee took the plaintiff's picture.²¹³ The defendant used the photo in an advertisement without the plaintiff's consent.²¹⁴ As such, the plaintiff approached the court seeking damages because the publication of her image by the defendant constituted *iniuria*.²¹⁵ The court correctly

²¹⁰ *Le Roux v Dey* para 103.

²¹¹ *Ibid.*

²¹² *Le Roux v Dey* para 104.

²¹³ *Kumalo v Cycle Lab* para 3.

²¹⁴ *Kumalo v Cycle Lab* para 4.

²¹⁵ *Kumalo v Cycle Lab* para 1 and 9.

defined identity as a person's uniqueness, personalising and differentiating them from others. It manifested as a variety of facets of personality, such as physical appearance or image.²¹⁶

As an individual personality right, the court said that identity deserved legal protection.²¹⁷ It held that identity was infringed by the falsification of a person's true identity. Falsification occurred when a person's image was used or appropriated without their consent for advertising. Thus, creating the false impression that the person has consented to the conduct or supports the advertised business or service.²¹⁸ The court highlighted that identity and privacy might be infringed in the same instance because the two concepts are closely related.²¹⁹ This relationship was the reason for the academic debate on whether privacy or identity was violated when a person's image was used without consent.²²⁰

The court only dealt with the falsification of identity and did not mention the other manner of infringing identity. The court's choice of words in setting out how identity was infringed is worth discussing. The court held that falsification occurred when a person's image was used or appropriated without permission for advertising purposes. Respectfully, this was a conflation of the two ways in which identity is infringed. Falsification is when a facet of identity is used without permission and creates a false or contrary impression of a person. By implication, the way a person's identity indicators are used in a manner that depicts a person in a different light than their true identity.²²¹

Conversely, appropriation is when someone uses the indicators of identity without permission for commercial purposes such as advertising a product, service, or business.²²² Respectfully, this matter should have been dealt with under the second type of infringement of identity. The defendant had taken the plaintiff's picture and used it without permission to advertise their products. The court held that the plaintiff's image had been used misleadingly, conveying to the public that the plaintiff endorsed the products sold by the defendant.²²³ Whilst this was true, the plaintiff's main contention was that the defendant had used her image to advertise his products without her permission.²²⁴

²¹⁶ *Kumalo v Cycle Lab* para 15.

²¹⁷ *Kumalo v Cycle Lab* para 16 the court here emphasised the view previously held by our courts regarding the right to identity and also cited *Grütter v Lombard* 2007 (4) SA 89 (SCA), among others.

²¹⁸ *Kumalo v Cycle Lab* para 17.

²¹⁹ *Kumalo v Cycle Lab* para 18.

²²⁰ *Kumalo v Cycle Lab* para 19.

²²¹ Neethling Potgieter and Roos *Personality Rights* 353.

²²² Neethling Potgieter and Roos *Personality Rights* 352.

²²³ *Kumalo v Cycle Lab* para 22.

²²⁴ *Kumalo v Cycle Lab* para 5.

The suggestion does not deny that appropriation and falsification can be present simultaneously. However, based on an analysis of the plaintiff's averments and the judgment, the real issue was that the defendant had no authority to use her image in an advertisement.²²⁵ Also, this case does not satisfy the two requirements for an infringement of identity by falsification. Nonetheless, that is not to say that the defendant did not infringe the plaintiff's identity.

3.3.2.8 *Cele v Avusa* [2013] 2 All SA 412 (GSJ)

Another case that goes to the heart of appropriation for a commercial purpose is *Cele v Avusa*. This case stems from the publication of an altered image of the plaintiff by the defendant.²²⁶ The defendant published a digitally altered picture of the plaintiff along with two articles. The plaintiff sought damages for defamation and, in the alternative, infringement of his dignity. The articles reported on the plaintiff's utterances, a Member of the Executive Council in KwaZulu-Natal, regarding the rampant crime problem in the province. The images depicted him as a sheriff from the Wild West.²²⁷

The plaintiff also averred that the images and articles falsified his identity because they portrayed his likeness in a false light.²²⁸ The court expressed that the altered image was a parody or caricature of the plaintiff and contained satirical elements. As such, it considered the idea that the Constitution protected artistic expression depicted as caricatures.²²⁹ Thus, the court held that publishing a person's image without consent violated their dignity, and the victim could find protection under the *actio iniuriarum*.²³⁰ However, publishing a politician's image or likeness without permission to comment on their public statements on a matter of public interest, the conduct was not wrongful.²³¹

The rationale for this finding was that the reason behind the publication of the image or likeness was not for commercial gain.²³² The court differentiated this case from *W v Atoll Media*. The court highlighted that there was a commercial interest being fulfilled by appropriating the image in that matter.²³³ In conclusion, the court dismissed the claim because the image and

²²⁵ *Kumalo v Cycle Lab* paras 5 and 23-28.

²²⁶ *Cele v Avusa* para 1.

²²⁷ *Cele v Avusa* para 25.

²²⁸ *Cele v Avusa* para 39.

²²⁹ *Cele v Avusa* para 47.

²³⁰ *Cele v Avusa* para 50.

²³¹ *Cele v Avusa* para 51.

²³² *Ibid.*

²³³ *Cele v Avusa* para 52-53.

articles did not violate the plaintiff's dignity, nor were they defamatory. Besides, the defendant published the picture in connection with articles were reporting on a matter of public interest.

Cele v Avusa is somewhat similar to the Constitutional Court case *Le Roux v Dey*.²³⁴ The facts are almost comparable because both cases deal with digitally altered images. Although *Le Roux v Dey* was a defamation matter, it is valuable to consider it in light of the court's views in *Cele v Avusa*.²³⁵ Following the court's comments, *Le Roux v Dey* may have claimed identity infringement by falsification. This suggestion is supported by the fact that the court limited the acceptability of the digitally altered caricatures to making comments of public interest. The effect of this decision is that using an individual's image in any other context than to comment on matters of public interest would be considered unacceptable.

The plaintiff's claim in *Cele v Avusa* failed because, objectively, the court did not find that a reasonable person in his position would be insulted by the photo. As such, there was no infringement of *dignitas*. Concerning the appropriation of his identity, the court held that using the image was not wrongful because the defendant used it to comment on the plaintiff's public statements. The press did not use the image for commercial purposes. Moreover, the press used public interest as a justification because they used the picture in connection with a public interest report.²³⁶ This case illustrates that identity is not absolute, and infringing identity can be justified.²³⁷

3.3.3 Applying the infringement of identity to catfishing

In catfishing, falsification occurs when someone uses another person's images and attaches them to a fake account. This conduct is falsification because the catfish uses the victim's physical appearance as their own. It creates a false impression to the public. It misrepresents that the victim is associated with the fake account, and they control the account, regardless of how the account behaves online.²³⁸ This misrepresentation creates the impression that the victim consented to using their image for the profile. Catfishing may be an instance where falsification and appropriation occur concurrently.²³⁹

²³⁴ *Le Roux v Dey* 2011 (3) SA 274 (CC).

²³⁵ *Cele v Avusa* para 50-51.

²³⁶ *Cele v Avusa* para 51.

²³⁷ Cornelius 2011 *Potchefstroom Electronic Law Journal* 198.

²³⁸ Koch 2017 *University of Colorado Law Review* 242.

²³⁹ Neethling Potgieter and Roos *Personality Rights* 357.

Concerning appropriation for a commercial purpose, whether the facets of a person's identity were appropriated for a commercial purpose will depend on how the fake account is used and how it interacts with other accounts.²⁴⁰ For example, the catfish may use a famous person's images to lure unknowing third parties to make financial contributions towards a cause. However, each catfishing case has to be dealt with on its own merits because no two cases are exactly alike.²⁴¹ After all, the underlying purpose of the appropriation is unique. As shown in chapter two, catfishing is a method of deceiving unaware third parties.²⁴²

In *O'Keeffe v Argus Printing and Publishing Co Ltd*, the court mentioned that the plaintiff's previous publicity habits formed part of the factors influencing the infringement of *dignitas*. Concerning catfishing, this is an essential consideration because it begs the question of whether a 'public' profile would affect a victim's claim for the infringement of *dignitas* on the grounds of having their identity violated. The question of privacy settings should not matter because users are free to use their profiles as they wish without the risk of someone using their identity precariously. Whether the victim has a "private" or "public" profile from which their images are appropriated for catfishing should be irrelevant.

The *Kumalo v Cycle Lab* decision supports this suggestion because the plaintiff in that matter was a celebrity, a person who profited off her identity.²⁴³ She did not live a life shrouded in anonymity. Nevertheless, the court still found it unacceptable that another person had taken her image and used it for advertising without consent. Additionally, the court took the view that a reasonable person would find the defendant's conduct offensive.²⁴⁴

Catfish accounts should not be confused with parodies or caricatures and cartoons, which are allowed by social networking websites and form part of protected speech.²⁴⁵ Catfishing is problematic because the message it conveys to the public about the victim is false.²⁴⁶ The Constitutional Court's decision in *Le Roux v Dey* supports this idea, where the overall

²⁴⁰ For example see E Brady and R George "Manti Te'o's 'Catfish' Story is a Common One" *USA Today* <https://www.usatoday.com/story/sports/ncaaf/2013/01/17/manti-teos-catfish-story-common/1566438/> (accessed 26 July 2021). Derzkarian 2017 *Loyola of Los Angeles Law Review* 741-742 summarizes this incident of catfishing.

²⁴¹ For instance, Santi 2019 *Southern Illinois University Law Review* 81- 82 shows the different reason that people appropriate another person's image for catfishing.

²⁴² Chapter 2 para 2.2.4.

²⁴³ *Kumalo v Cycle Lab* para 30 -32.

²⁴⁴ *Kumalo v Cycle Lab* para 24.

²⁴⁵ S Nel "Freedom of Expression" in DP van der Merwe *et al Information and Communications Technology Law* 2ed (2017) 506.

²⁴⁶ Midgley *LAWSA* Vol 15 para 103.

impression created by the superimposed image was wrongful irrespective of the truth.²⁴⁷ The association that an observer makes between the account and the victim through the picture is the issue. Also, self-interest underlines catfishing and thus, cannot be justified by public interest.²⁴⁸

The cases above also demonstrated why this thesis deals with falsification and appropriation as infringements of identity. Catfishing affects a part of an individual's personality that goes beyond an interest to remain secluded. It involves an integral part of individuality, and because identity has not received enough attention in our law, there is an unsettled academic debate about whether falsification and appropriation are infringements of identity or privacy.²⁴⁹ The courts have not resolved the ongoing academic debate, which has led to confusion regarding the right to identity in South African law. It perpetuates legal uncertainty as it is difficult to differentiate between the right to identity and privacy. Furthermore, the lack of legal certainty in this area stifles the development of the common law to keep it abreast with rapid technological developments and the changing needs of society.

In essence, catfishing interferes with an individual's identity because a facet of their identity, namely image or physical appearance, is used misleadingly, publicly placing them in a false light. It also interferes with identity because the individual's image is appropriated and used without consent. In *Kumalo v Cycle Lab* the court flirts with the idea that merely appropriating a person's identity or using their image without consent is enough interference to amount to *iniuria*, warranting a claim for sentimental damages.²⁵⁰ Interfering with a person's right to identity is an infringement of their dignity in a subjective sense, as per *dignitas* under the common law. It is also an infringement of their dignity in an objective sense, as per human dignity protected by the Constitution.

In delict, the infringement of any personality right is an *iniuria* and is remedied through the *actio iniuriarum*. As established above,²⁵¹ liability will depend on whether the defendant can justify the wrongfulness of their conduct or the existence of an intention to injure the plaintiff's personality.

²⁴⁷ *Le Roux v Dey* para 103-105.

²⁴⁸ J Neethling "Vonnisbespreking: Openbare Figuur – Laster, Belediging en Identiteitskending" (2014) 11 *LitNet Akademies* 116 at 123.

²⁴⁹ See *Kumalo v Cycle Lab* para 19; *Grütter v Lombard* para 8 and Roos 2008 *THRHR* 517-518.

²⁵⁰ *Kumalo v Cycle Lab* para 39.

²⁵¹ Para 3.2.1.

3.4 The remedies for an infringement of identity

There are a few remedies available to victims of catfishing. Some are remedies offered by the law, and others are remedies found within the terms of use of the social networking platforms. This thesis will consider both legal remedies and the remedies available online. As a point of departure, this thesis must deal with the common law remedy, *actio iniuriarum*, because it is the legal remedy for an infringement of identity. The leading case on this delictual remedy is *Matthews v Young*.

3.4.1 *Actio iniuriarum*

3.4.1.1 *Matthews v Young 1922 AD 492*

This matter was an appeal against the judgment of the court *a quo*. The defendants were the South African Council of an English trade union,²⁵² which the plaintiff was a member of whilst under the employ of the Johannesburg Municipal Council. The union rules stipulated that the council could expel a member for acting contrary to the interests of the union. However, the council had to give the member notice of intention to initiate proceedings against him.²⁵³ The cause of expulsion was the plaintiff's acceptance of an increase in salary against the order of the union.²⁵⁴

Being expelled from the union affected his employment negatively as it was a condition of his employment with the Municipal Council that he should be a Union member.²⁵⁵ The plaintiff made an application to the High Court for an order that the union reinstate his membership. The court granted the order, but it had no effect on his employment with the municipality. He then sought damages against the defendants for the loss he suffered from being expelled from the union and losing his job.²⁵⁶ The court ordered the defendants to pay such damages, an order which they brought on appeal.

The defendants brought an appeal under the *actio iniuriarum*. The Appellate Division held that damages claimed under this action were also known as sentimental damages. Sentimental damages were different from patrimonial damages claimed under the Aquilian action because there was an element of insult and *iniuria*.²⁵⁷ The harm under this action did not rely on monetary loss. The court highlighted that the wilful invasion of another person's rights

²⁵² 1922 AD 492 498-499.

²⁵³ *Matthews v Young* 499 and 501.

²⁵⁴ *Matthews v Young* 500.

²⁵⁵ *Matthews v Young* 502.

²⁵⁶ *Ibid.*

²⁵⁷ *Matthews v Young* 503.

regarding his person, dignity, and reputation violated their personality, constituting an *iniuria*.²⁵⁸ The court also noted that the *actio iniuriarum* extended to include all cases where a defendant could allege to have intentionally violated another person's right, with the intent to injure that person's personality.²⁵⁹

The court discussed the applicability of the Aquilian action for patrimonial loss resulting from injury to the personality. In that regard, the court stated that the Aquilian action was extended to cases of intentional harm to personality resulting in financial loss.²⁶⁰ In conclusion, the court found that the defendants were acting *per* the rules of the union. They were not liable to any damages since they acted *bona fide* and honestly discharged their duties.²⁶¹ As such, the appeal was upheld.²⁶²

This case emphasised that the *actio iniuriarum* was the action used for injuries to personality. To succeed in claiming damages under this action, the plaintiff had to prove that the wrongdoer intentionally directed conduct to infringe an aspect of their personality.²⁶³ In essence, *iniuria* is the intentional and wrongful infringement of a personality interest.

3.4.1.2 Requirements for delictual action

This thesis establishes that the infringement of aspects of personality is called *iniuria*.²⁶⁴ To attract liability, a wrongdoer must have the intention to infringe another person's personality.²⁶⁵ The requirements for *iniuria* are that there must be wrongful and intentional conduct, violating one of the personality rights.²⁶⁶ When it comes to the infringement of identity, the wrongdoer must intentionally appropriate facets of the victim's identity for a commercial purpose or use facets of the victim's identity to place them in a false light.²⁶⁷

The question that arises is whether catfishing amounts to wrongful conduct to violate the right to identity. Catfishing involves using a feature of a person's identity without their consent. The objective is to mask the user's true identity by pretending to be the person in the picture while conducting themselves in a reprehensible manner online. It has harmful results for the victim

²⁵⁸ *Ibid.*

²⁵⁹ *Matthews v Young* 503-504.

²⁶⁰ *Matthews v Young* 504 and 505.

²⁶¹ *Matthews v Young* 510.

²⁶² *Matthews v Young* 511.

²⁶³ *Alves v LOM Business Solutions (Pty) Ltd and Another* [2011] 4 All SA 490 (GSJ) para 34.

²⁶⁴ Para 3.1.2.

²⁶⁵ Neethling *LAWSA* Vol 20(1) para 399.

²⁶⁶ *R v Umfaan* 1908 TS 62 66; *Delange v Costa* 1989 (2) SA 857 (A) 860I-861B.

²⁶⁷ Loubser and Midgley *et al The Law of Delict* 406.

by the mere fact that their image is used without their permission deceitfully.²⁶⁸ Moreover, people are interested in their identity not being used falsely and without their consent.

The right to identity is a subjective right, and interference with subjective rights is *prima facie* wrongful.²⁶⁹ In the absence of a legal justification that permits using individuals' identities without consent, such conduct is unlawful. On this basis, catfishing is contrary to the legal convictions of society.²⁷⁰ The normative values found in the Constitution inform the legal convictions of society.²⁷¹ Determining the legal convictions of the community in respect of social networks is difficult because there is an offline community and an online community. The offline community in the present context is the South African population, and the online community comprises people from multiple geographic locations.²⁷² Therefore, the question is, whose standards do we use to measure wrongfulness?

The standards of the South African population should take preference.²⁷³ The rationale is that the standards of the online community in respect of what is wrong might differ vastly depending on the offline context from which those users come. Moreover, standards online are different from standards offline because of the overly lenient, or lack of, regulation of conduct online. As a result, much behaviour has gone unchecked or without any real offline consequence. The global desire for technological development is the reason for the legal leniency.²⁷⁴ In South Africa, human dignity is a constitutionally protected foundational value.²⁷⁵ Conduct interfering with dignity is unlawful. Therefore, catfishing is wrongful because it interferes with identity, a subjective right, and indirectly human dignity.

3.4.1.3 Defences against wrongfulness or intention

In litigation, wrongfulness is a rebuttable presumption, which means that the plaintiff does not need to prove that the conduct was wrongful. Instead, the respondent must show that their conduct was justifiable to avoid liability.²⁷⁶ In *Grütter v Lombard* the SCA said that the lawfulness of an intrusion on a personality right depends on a legal justification for the

²⁶⁸ Neethling Potgieter and Visser *Delict* 33.

²⁶⁹ Neethling Potgieter and Visser *Delict* 54; Midgley *LAWSA* Vol 15 para 80.

²⁷⁰ Midgley *LAWSA* Vol 15 para 80 fn 11.

²⁷¹ Neethling Potgieter and Visser *Delict* 55; Loubser and Midgley *et al The Law of Delict* 402.

²⁷² Loubser and Midgley *et al The Law of Delict* 402.

²⁷³ The conflict of laws is dealt with in detail later on in this thesis.

²⁷⁴ JP Barlow "A Declaration of the Independence of Cyberspace" (1996) <https://www EFF.org/cyberspace-independence> (accessed 12 July 2021); Rogal 2013 *Arizona Summit Law Review* 68.

²⁷⁵ S10 of the Constitution of the Republic of South Africa, 1996.

²⁷⁶ *Country Cloud Trading CC v MEC* para 22; Loubser and Midgley *et al The Law of Delict* 406.

infringing conduct.²⁷⁷ This leads the court to inquire whether the violation was legally acceptable or not, based on public policy considerations.²⁷⁸ There are few defences that a respondent may rely on to justify the infringement of identity through catfishing.

In *Le Roux v Dey* the court cautioned that giving way to dignity by limiting freedom of expression would be an unjust limitation if this was the response for every slight injury of feelings.²⁷⁹ Since catfishing is a type of expression, a person could raise freedom of expression as an argument against the unlawfulness of catfishing. They may advance the contention that the fake profile allows them to navigate social networks anonymously.²⁸⁰ Freedom of expression is a fundamental right in the South African constitutional dispensation, but it is not absolute.²⁸¹ As a qualified right, it does not trump the right to human dignity. Human dignity indirectly extends constitutional protection to the common law right to identity. Dignity plays a fundamental role in the South African legal system and society. If the exercise of other rights violates dignity, the court may justifiably limit those rights because of this unique role.²⁸²

Freedom of expression has to be balanced with the right to dignity to justify the unlawfulness of catfishing. The Constitutional Court in *Khumalo v Holomisa* dealt with the weighing up of human dignity and freedom of expression in the context of defamation involving the media. In defamation, similar to other *iniuria*, there is a rebuttable presumption that the publication of a defamatory statement was intentional and wrongful.²⁸³ There are grounds of justification available to dispute the wrongfulness of the publication or the intention to injure. The common defences are truth, fair comment, and privilege.²⁸⁴ Public interest is not a defence on its own but an element of each of the identified defences.²⁸⁵

Another defence available to media defendants is the reasonable publication developed by the court in *National Media Ltd v Bogoshi*.²⁸⁶ The effect of this defence is that where a media

²⁷⁷ *Grütter v Lombard* para 13.

²⁷⁸ *Ibid*; *Loureiro v iMvula Quality Protection (Pty) Ltd* para 53; *Country Cloud Trading CC v MEC* para 21.

²⁷⁹ *Le Roux v Dey* para 72-73.

²⁸⁰ Nel *Information and Communications Technology Law* 506 talks about the prevalence of fake profiles on social media. She mentions that parody and satire are forms of protected speech in South African law. However, these accounts are different from impersonation accounts which she suggests may have a defamatory effect on the victim. See S Nel "Online Defamation: The Problem of Unmasking Anonymous Online Critics" (2007) 40 *Comparative and International Law Journal of Southern Africa* 193 at 196- 198 for a discussion on anonymity online.

²⁸¹ S 16 of the Constitution of the Republic of South Africa, 1996; *Laugh It Off Promotions CC v SAB International (Finance) BV* para 47.

²⁸² *Le Roux v Dey* para 72.

²⁸³ *Khumalo v Holomisa* para 18.

²⁸⁴ *Ibid*; *EFF v Manual* para 20.

²⁸⁵ *EFF v Manual* para 20.

²⁸⁶ 1998 (4) SA 1196 (SCA); *Khumalo v Holomisa* para 18.

defendant publishes a defamatory statement but cannot rebut the presumption of unlawfulness because they cannot establish the truth of the statement, they will not be held liable for the publication on the basis that the publication was reasonable.²⁸⁷ Reasonableness will be contingent on the context and circumstances of the publication. The Constitutional Court affirmed the recognition of this defence.²⁸⁸ This defence is primarily available to media defendants because they are members of society responsible for imparting information to the public and upholding the democratic value of free speech.²⁸⁹

The court in this case also touched on the rebuttal of intention. Rebuttal of intention was one of the questions dealt with by the court in *National Media Ltd v Bogoshi*. In *iniuria*, fault presents itself in the form of intent to injure a person's personality. That means that a person must subjectively intend to harm the other person and be cognizant of their conduct's wrongful nature.²⁹⁰ The court concluded that a person relying on lack of knowledge of unlawfulness to justify their conduct would have to prove that they were also not negligent.²⁹¹ This defence applied to media defendants, and whether other defendants could rely on this defence was left open by the court in *Khumalo v Holomisa* and *National Media Ltd v Bogoshi*.²⁹²

Another defence that may be available to justify catfishing may be consent. In law, the maxim *volenti non fit iniuria* means that a willing person is not wronged. In other words, a person who consents cannot be injured.²⁹³ The effect of this principle is that a defendant cannot be liable for harm because the plaintiff had consented to injury or the risk thereof. Despite catfishing being prevalent on social networks, this defence should not hold because a victim has no way of anticipating that such harm might befall them. The fact that consent to the risk of injury requires a victim to be aware of the risks associated with the infringing conduct supports this suggestion.²⁹⁴ It is not sufficient that users are aware that other users misuse other people's identities to catfish. Moreover, signing up to online social networks does not constitute consent to this risk.

A person facing action for catfishing may also raise jest as a defence against the intention to injure.²⁹⁵ For a person to succeed on this defence, the court will objectively assess the harmful

²⁸⁷ *Khumalo v Holomisa* para 19; *EFF v Manual* para 40.

²⁸⁸ *Khumalo v Holomisa* para 39 and 43.

²⁸⁹ *Khumalo v Holomisa* para 24; *EFF v Manual* para 54.

²⁹⁰ *Khumalo v Holomisa* para 20.

²⁹¹ *Ibid.*

²⁹² *EFF v Manual* para 48.

²⁹³ Neethling Potgieter and Visser *Delict* 108.

²⁹⁴ Neethling Potgieter and Visser *Delict* 112.

²⁹⁵ *Le Roux and Others v Dey* 2010 (4) SA 220 (SCA) para 9.

conduct. In *Le Roux v Dey*,²⁹⁶ the SCA discussed the jest defence in the context of defamation. However, the principles apply to the present context. The court held that conduct is not harmful if a reasonable person would understand it as a jest. It distinguished between legitimate and illegitimate jest. The difference is that jest is illegitimate if the conduct is performed in self-interest to amuse oneself, and the other person would view it as insulting, offensive or degrading.²⁹⁷ According to Harms DP, making a joke at someone else's expense and the subject of which will not find funny is likely to be defamatory.²⁹⁸

The Constitutional Court confirmed this view and added that a funny statement is defamatory when there is an element of insult to the subject of the joke.²⁹⁹ Additionally, the court said that whether the joke was unsavoury was irrelevant. It was essential to assess whether the joke belittled the plaintiff or exposed them to ridicule and disdain. The court reasoned that often jokes were intended to destroy a person's image, and a joke that achieved that purpose was defamatory.³⁰⁰

In the context of catfishing, a person who claims to have used the victim's image as a joke has to show that they subjectively believed that their conduct was a joke and even in circumstances where society would not objectively view their conduct as a joke.³⁰¹ They must show that by using the victim's identity to catfish, they did not intend to destroy their image or expose them to ridicule and disdain. Moreover, a person of ordinary intelligence would objectively not consider the conduct offensive. Another defence related to jest is parody. A person claiming to have catfished in jest might argue that the account was a parody.

Parody forms part of protected speech in South African law.³⁰² For a fake account to amount to a parody, it would have to be clear that the purpose of appropriation was to imitate the victim.³⁰³ It must contain an element of creativity.³⁰⁴ As indicated in chapter two, some platforms, such as Twitter, permit users to create parody accounts. However, the profile must clearly indicate that it is a parody. The reason for this is that parody accounts can easily be mistaken for impersonation accounts which are prohibited. Catfishing is different from

²⁹⁶ 2010 (4) SA 220 (SCA).

²⁹⁷ *Le Roux and Others v Dey* (SCA) para 9.

²⁹⁸ *Le Roux and Others v Dey* (SCA) para 10.

²⁹⁹ *Le Roux v Dey* para 111-113.

³⁰⁰ *Le Roux v Dey* para 114.

³⁰¹ Midgley *LAWSA* Vol 15 para 134.

³⁰² Nel *Information and Communications Technology Law* 506.

³⁰³ *Laugh It Off Promotions CC v SAB International (Finance) BV* para 78.

³⁰⁴ *Laugh It Off Promotions CC v SAB International (Finance) BV* para 77.

parodies because the perpetrator intends to deceive by pretending to be the victim for their benefit.

3.4.2 Other legal remedies

Another legal remedy available to victims of catfishing is the interdict. An interdict is a court order prohibiting infringing conduct or mandates some conduct to stop a harmful act that is already pending.³⁰⁵ The purpose of an interdict is to prevent wrongful conduct. A prohibitory interdict directs a wrongdoer to cease the unlawful conduct, whilst a mandatory interdict requires the wrongdoer to act positively to stop continuous unlawful conduct.³⁰⁶ There are three requisites for an interdict.³⁰⁷ There must be a clear right, an actual or threatened infringement of a right, and there must not be another suitable remedy.³⁰⁸

Applying the requirements for an interdict to catfishing, the plaintiff's right to identity is their clear right. The respondent infringes the plaintiff's right to identity by falsification or appropriation for a commercial purpose or both. There is no other remedy available to the plaintiff.³⁰⁹ *Heroldt v Wills*³¹⁰ must be considered regarding the absence of a satisfactory remedy.

In *Heroldt v Wills* the applicant sought an interdict against the respondent, restraining her from posting any information about him on Facebook and other social media.³¹¹ The respondent posted content on Facebook about the applicant.³¹² The court discussed the nature of social media and the legal position on privacy and freedom of expression in our law.³¹³ Regarding interdicts, the court in *Heroldt v Wills* commented that when the Appellate Division laid down the principles in *Setlogelo v Setlogelo*, it did not imagine electronic media would exist.³¹⁴

The respondent suggested that another remedy available to the applicant was reporting the abuse to Facebook and having it taken down. In response to this suggestion, the court held there was no proof that Facebook would comply with such a request.³¹⁵ Moreover, by granting

³⁰⁵ Neethling Potgieter and Visser *Delict* 269; Loubser and Midgley *et al The Law of Delict* 525.

³⁰⁶ Loubser and Midgley *et al The Law of Delict* 525.

³⁰⁷ *Setlogelo v Setlogelo* 1914 AD 221 227.

³⁰⁸ Neethling Potgieter and Visser *Delict* 269; Loubser and Midgley *et al The Law of Delict* 525.

³⁰⁹ Loubser and Midgley *et al The Law of Delict* 526 note that when seeking an interdict fault is not necessarily a requirement because an interdict serves to prevent harm from resulting. It does not compensate the victim for any harm.

³¹⁰ 2013 (2) SA 530 (GSJ).

³¹¹ *Heroldt v Wills* para 1.

³¹² *Heroldt v Wills* para 6.

³¹³ *Heroldt v Wills* para 7- 23.

³¹⁴ *Heroldt v Wills* para 31.

³¹⁵ *Heroldt v Wills* para 38.

the interdict to have the respondent remove the infringing content, the court would be providing a remedy where there was no alternative remedy.³¹⁶ In essence, by issuing the mandatory interdict against the respondent, the court acknowledged that an interdict was not a remedy of last resort in cases of defamation on social media.

3.4.3 Social media remedies

Takedown notices are a remedy that stems from social media. Users can use the report function on social networking platforms to report any abusive or infringing conduct. As discussed in chapter two, the service providers reserve the right to act on these reports. Hence, the respondent could not convince the court in *Heroldt v Wills* that Facebook would comply with such a request.³¹⁷ On interdicts, the court held that the takedown notices were not an alternative remedy that could preclude a person from seeking an interdict against infringing conduct occurring online.³¹⁸

The ECT Act discussed in chapter two also provides a takedown procedure.³¹⁹ However, the section 77 takedown procedures are contingent on the social network service provider's membership to the representative body. This procedure requires a person to send a written notice to the service provider setting out the grievance and the remedial action required.³²⁰

The previous chapter and the present chapter demonstrate that social media companies provide minimal remedies to assist victims of catfishing. South African victims of catfishing do not have statutory remedies on which they can rely. However, they can rely on common law actions to enforce their right to identity through the courts against the person that created the fake account. Alternatively, it is submitted that a victim of catfishing might succeed in seeking an interdict against a social networking platform, ordering them to remove the catfish account.

Notwithstanding the available remedies, the common law needs to be developed to appropriately address online infringements of identity, taking into account the nature of catfishing. This development would align with the constitutional imperative to develop the common law where necessary. It would be similar to developing the common law defamation to address defamation occurring on social networking platforms.

³¹⁶ *Heroldt v Wills* para 39.

³¹⁷ *Heroldt v Wills* para 38.

³¹⁸ *Heroldt v Wills* para 39.

³¹⁹ S 77 of Act 25 of 2002.

³²⁰ *Nel Information and Communications Technology Law* 528.

3.5 Conclusion

The law does not concern itself with trivialities. However, there is an unspoken expectation that people must act sensibly and reasonably both on and offline. Catfishing is unreasonable online conduct in the same way that impersonation is unreasonable offline. Therefore, catfishing should not be acceptable because it disturbs another person's right to identity. It has negative implications for a person's personality and can be damaging. Victims of catfishing can hold perpetrators accountable and liable for the harm they cause. South African victims have the *actio iniuriarum* and interdicts as remedies against catfishing. Although South African victims have some remedies, there is a need for legal development. South African law does not expressly provide for impersonation or catfishing, unlike the US states of California and Oklahoma that legislatively recognise and provide for impersonation and catfishing. It is, therefore, useful to consider the statutory interventions in the US to investigate the adequacy of the South African position.

CHAPTER 4: COMPARATIVE ANALYSIS OF US LAW ADDRESSING CATFISHING

4.1 Introduction

Due to the internet's borderless nature, catfishing is a problem for Internet users globally and does not only affect South Africans. The citizens of the USA also experience catfishing, so much so that they approached the courts to seek recourse.¹ In response, many states have enacted legislation to address online impersonation or have dealt with it through common law rules.² Some states deem catfishing or impersonation a criminal offence,³ whilst others view it as a civil wrong.⁴ In 2020, Congress Representative Kritzing introduced the “Social Media Fraud Mitigation Bill”⁵ to Congress. The legislation purports to prohibit people from creating and using fake social media accounts or profiles and sending fraudulent emails and other electronic messages.⁶ The House Committee on the Judiciary is still considering the Bill. Therefore, this chapter relies on the existing legal interventions addressing catfishing from Oklahoma and California.⁷

Chapter two of this thesis established that catfishing involves appropriating a person's image and using it to create a fake social networking profile through which a person deceives others.⁸ According to chapter three of this thesis, this type of conduct invades the right to identity by placing a person in a false light in South African law.⁹ The right to identity is protected under the common law of delict.¹⁰ This chapter investigates the adequacy of the right to identity and delictual remedies in addressing catfishing.

¹ See for instance, *Zimmerman v. Board of Trustees of Ball State University*, 940 F.Supp.2d 875 (S.D.Ind.,2013); *Matot v. CH*, 975 F.Supp.2d 1191 (D.Or. 2013) and *Kenneth C. Griffin, Citadel LLC v. Riley Barnes*, 2017 WL 6447802.

² Reznik 2013 *Touro Law Review* 457; Derzakarian 2017 *Loyola of Los Angeles Law Review* 742; Kambellarl 2017 *Timely Tech* 1-2; S Allen “Catfishing Bill Would Give Oklahoma Victims Legal Recourse Against Online Scammers” (2016) *The Oklahoman* <https://www.oklahoman.com/article/5474595/catfishing-bill-would-give-oklahoma-victims-legal-recourse-against-online-scammers> (accessed 20 August 2021).

³ For example, in California online impersonation is a criminal offence (Cal. Penal Code §528.5(a)). Similarly, in Oklahoma, Texas (Tex. Penal Code § 33.07) and in New York (N.Y Penal Law §190.25(4)).

⁴ Reznik 2013 *Touro Law Review* 456.

⁵ H.R. 6587 Social Media Fraud Mitigation Bill of 2020.

⁶ The Bill also criminalises using another person's identity without consent to threaten or cause financial or physical harm through social media communication. See <https://www.congress.gov/bill/116th-congress/house-bill/6587/all-actions?s=1&r=8&overview=closed> for more information on the Bill (accessed 21 August 2021).

⁷ Refer to chapter 1 para 1.4 for the limitations of the study.

⁸ Chapter 2 para 2.2.4.

⁹ Chapter 3 para 3.3.3.

¹⁰ Chapter 3 para 3.4.

The US equivalent of the South African law of delict is tort law. Tort law is the common law of civil wrongs,¹¹ and it is a state law. Tort law varies from state to state.¹² Like the law of delict, it is not concerned with punishing a wrongdoer. Instead, tort law is concerned with compensating the plaintiff for the harm they have suffered and compelling the wrongdoer to stop the harmful conduct.¹³ Each tort uniquely protects an individual against specific injuries and provides recourse for certain legal wrongs.¹⁴

The US protects identity under the right of publicity. Like the right to identity, the right of publicity protects features of a person's identity. The right of publicity ascended from the privacy torts. Privacy and publicity are interconnected to the extent that they protect the features of a person's identity.¹⁵ The privacy and publicity relationship is comparable to the South African identity and privacy relationship. As discussed in chapter three,¹⁶ before the *Grütter v Lombard* decision, courts often conflated identity and privacy.¹⁷

4.2 The states' approach to protecting personality rights

The US Constitution establishes a federal government that affords the states significant legal independence.¹⁸ The individual states govern themselves, enact their own laws, and the state courts settle legal disputes.¹⁹ The federal government only has those powers granted by the Constitution. Where the Constitution does not empower the federal government, the power rests with the states. Federal law is the supreme law of the land and trumps state law where the two intersect.²⁰ Individual states have different approaches and solutions to legal problems.

Unlike South African law, US law does not compartmentalise certain rights as rights relating to personality.²¹ Instead, a common law right of privacy gives rise to the invasion of privacy

¹¹ *Billeaud Planters, Inc v Union Oil Co. of Cal.*, 245 F.2d 14, 19 (C.A.5 1957); JF Witt and KM Tani *Torts: Cases, Principles and Institutions* 5ed (2020) 1.

¹² *Haag v Cuyahoga County* 619 F. Supp. 262, 276 -277 (D.C. Ohio 1985); Witt and Tani *Torts* 1.

¹³ Witt and Tani *Torts* 2.

¹⁴ *Prosch v Yale* 306 F. Supp. 524, 527 D.C. Mich 1969). In *In re Donahue Securities, Inc* 318 B.R. 667, 676 (Bkrtcy. S.D. Ohio 2004) the court highlighted that the law cannot provide redress under torts unless a defendant committed an act that is legally wrongful.

¹⁵ C Greer "International Personality Rights and Holographic Portrayals" (2017) 27 *Indiana International and Comparative Law Review* 247 at 247.

¹⁶ Chapter 3 para 3.3.1.

¹⁷ *Grütter v Lombard and Another* 2007 (4) SA 89 (SCA); Neethling Potgieter and Roos *Personality Rights* 351.

¹⁸ US. Const Art. VI; JM Sharnan "The Right of Privacy in State Constitutional Law" (2006) 37 *Rutgers Law Journal* 971 at 987.

¹⁹ In the states the lower courts, Circuit or District courts, and the higher courts, Courts of Appeal and Supreme Courts, hear and resolve legal disputes.

²⁰ Sharnan 2006 *Rutgers Law Journal* 987.

²¹ In *Pavesich v New England Life Insurance Co.* 50 S.E. 68 (Ga. 1905) the first case where the right of privacy was recognised, the Georgia Supreme Court based its recognition of the right of privacy on the idea that some rights formed part of natural law and were not positive law.

tort.²² The right of privacy protects a person's right to be left alone.²³ As state-based protection, the right of privacy does not have federal protection.²⁴ The US Constitution protects the vertical application of the right to privacy at the federal level, while the states' common law protects the horizontal application of privacy.²⁵ In *Katz v. United States*,²⁶ the US Supreme Court emphasised this principle by stating that the Constitution addressed governmental interferences with individual privacy, whilst state law dealt with the general right to be left alone.²⁷ The US Supreme Court interpreted privacy as a person's right to control the publication of information about themselves.²⁸

The individual states recognise four privacy torts in the common law or statute. The invasion of privacy torts are (a) the publication or disclosure of private facts, (b) unreasonable intrusion into a person's seclusion or solitude or his private affairs, (c) publicity that places a person in a false light, and (d) appropriation of a person's name or likeness for one's advantage.²⁹ The elements of each tort and the extent of protection offered to privacy vary in each state. Some

²² See B Bratman "Brandeis & Warren's 'The Right to Privacy' and The Birth of the Right to Privacy" (2002) 69 *Tennessee Law Review* 623 for a summary of the development of the common law right of privacy, which is said to be heavily influenced by the seminal article SD Warren and LD Brandeis "The Right to Privacy" (1890) 4 *Harvard Law Review* 193.

²³ EA Meltz No Harm, No Foul? 'Attempted' Invasion of Privacy and Tort of Intrusion Upon Seclusion" (2015) 83 *Fordham Law Review* 3431 at 3435. According to DJ Solove and NM Richards "Prosser's Privacy Law: A Mixed Legacy" (2010) 98 *California Law Review* 1887 at 1888, the division of the invasion of privacy tort into four separate torts is attributed to WL Prosser "Privacy" (1960) 48 *California Law Review* 383 at 388-389.

²⁴ Sharman 2006 *Rutgers Law Journal* 973 and 976. The suggestion here is not that the right of privacy is not recognised federally. Rather, Sharman suggests that the federal courts created a right of privacy that operates at a federal level through interpretation because the Constitution does not refer to privacy. Consequently, in cases calling for the recognition of the right of privacy, the courts interpreted and drew inference from the Constitutional text to recognise a right of privacy.

²⁵ Meltz 2015 *Fordham Law Review* 3437.

²⁶ 389 U.S. 347 (1967).

²⁷ *Katz v United States*, 350-351.

²⁸ *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 763 (1989).

²⁹ RE Nathan 'Let There Be False Light: Resisting the Growing Trend Against and Important Tort' (2002) *Minnesota Law Review* 713 at 713; R Amin "A Comparative Analysis of California's Rights of Publicity and The United Kingdom's Approach to the Protection of Celebrities: Where Are They Better Protected?" (2010) 1 *Case Western Reserve Journal of Law, Technology and the Internet* 93 at 100; Meltz 2015 *Fordham Law Review* 3436; Messenger 2018 *Widener Law Review* 260; and NA Heise "Reclaiming the Right of Publicity in the Internet Age" (2018) 12 *Charleston Law Review* 353 at 364.

states have adopted the invasion of privacy torts as formulated in §625 the Restatement of Torts (the Restatement),³⁰ which sets out the law relating to the right of privacy in the US.³¹

4.2.1 The right of privacy and publicity in US states

Although the Restatement generally formulates the law of torts as subscribed to by 50 states,³² Simmons and Means show that states have different underlying theories for adopting the right of publicity.³³ Two torts deal with the type of interference catfishing subjects to a person's identity: the false light tort and the appropriation of identity tort.³⁴ The misappropriation tort is also expressed in the statutory right of publicity.³⁵ The extent of protection differs from state to state. Heise suggests that some states have even replaced the privacy tort of appropriation with the right of publicity whilst other states have kept both.³⁶

In the US, states do not recognise a right to identity. Instead, the facets of a person's identity are protected under the right of privacy and publicity.³⁷ Some states, as discussed below, also have specific laws promulgated to address electronic impersonation, including catfishing. However, the general position is that the infringement of identity is a privacy issue, dealt with under the common law, or in statute if a state has codified its privacy laws.

It is worth noting that some states protect identity under the common law right of privacy and statutory right of privacy. California and Oklahoma are examples of such states. As such, this study will consider impersonation through the common law and statute. However, the theory underlying the protection of identity in the statutory provisions of each state differ. One theory posits that publicity is part and parcel of the right of privacy, whilst another theory separates publicity from privacy. The thesis will assess impersonation according to the legal position in

³⁰ The American Law Institute *The Restatement of the Law, Second, Torts* (1977) https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm (accessed 18 July 2021). The Restatements of law are a secondary source of law that regurgitate common law rules under different areas of law. The courts usually refer to this source of law and rely on it in resolving legal disputes. Each section of the legal rule in the Restatement is followed by comments explaining the scope of legal rule and giving its purpose. However, the Restatements are not binding on courts, they only have a persuasive value.

³¹ §625A sets out the basic principles of privacy and how it is infringed. §625B covers intrusion upon seclusion, §625C deals with the appropriation of name and likeness and §625D addresses publicity given to private life. Lastly, §625E deals with publicity that unreasonably places a person in a false light publicly.

³² Meltz 2015 *Fordham Law Review* 3438.

³³ Simmons and Means 2018 *Landslide* 2.

³⁴ In the Restatement these are dealt with under §625E and 625C respectively.

³⁵ For example, in California it is recorded in California Civil Code §3344 and in Oklahoma it is codified in OK ST T. 12 §1449.

³⁶ Heise 2018 *Charleston Law Review* 371-374. See also Amin 2010 *Case Western Reserve Journal of Law, Technology and the Internet* 102.

³⁷ MT Skosana *The Right to Privacy and Identity on Social Networking Sites: A Comparative Legal Perspective* (LLM Thesis, University of Pretoria, 2016) 89.

each state. The rationale is that there is an unsettled discussion regarding the dichotomy of the right of privacy and publicity³⁸ and without federal law the legal position in each state is different.³⁹

4.2.2 False light tort

The invasion of privacy by placing a person in a false light involves exposing an individual to uninvited false publicity.⁴⁰ According to the Restatement, a person who publishes a matter about another person to the public, placing them in a false light, is liable for invading that person's privacy.⁴¹ The false light in which a person is placed must be highly offensive to a reasonable person. The perpetrator must have known or must have recklessly disregarded the falsity of the publicised matter and the false light in which they placed the other person.⁴²

§625E comment (a) explains that this type of invasion of privacy is essentially concerned with a defendant publicising false matter about the plaintiff. It does not depend on any private facts being made public. For this section, publicity involves communicating a matter to the public at large or exposing it to so many people that it would become public knowledge.⁴³ This exposure is the problem with catfishing. It is not concerned with the publication of private information; instead, it is concerned with publishing an untruth about the victim.

4.2.3 Misappropriation of likeness

In the Restatement, the appropriation of likeness or name tort is in §625C. It provides that a person who appropriates another person's name or likeness for their benefit or use will be liable for invading another person's privacy. According to comment (a), this provision protects a person's interest in the exclusive use of his identity to the extent that their name or likeness represents it. Protecting a person's feelings against mental distress is the underlying premise for recognising this tort.

It bears mentioning that the appropriation of name or likeness intersects with the right of privacy and the modern right of publicity. Sharman explains that the common law right of

³⁸ Amin 2010 *Case Western Reserve Journal of Law, Technology, and the Internet* 103; Boisineau 2012 *Landslide* 26 and 27; Korotkin 2013 *Cardozo Law Review De-Novo* 274; Lee-Richardson 2013 *UCLA Entertainment Law Review* 193. D Marlan "Unmasking the Right of Publicity" (2020) 71 *Hastings Law Journal* 419 at 426.

³⁹ See B Lee-Richardson "Multiple Identities: Why the Right of Publicity Should be Federal Law" (2013) 20 *UCLA Entertainment Law Review* 190 for a detailed discussion on the discrepancies in state law right of publicity.

⁴⁰ Nathan 2002 *Minnesota Law Review* 715.

⁴¹ §625E of the *Restatement of the Law, Second, Torts* (1977).

⁴² The American Law Institute inserted a cautionary note that there was no legal position regarding the negligent publication placing a person in a false light.

⁴³ *The Restatement of the Law, Second, Torts* (1977) §625D, Comment (a).

privacy was formulated to protect a person's personal information from being exposed publicly.⁴⁴ This protection effectively created a right to claim tortious damages for the wrongful exposure of private information.⁴⁵ The Georgian Supreme Court in *Pavesich v. New England Life Insurance Co.*, supported and affirmed this conception of privacy.⁴⁶ This case set the example for courts in other states to recognise a right of privacy. The court dealt with a matter where the defendants took the plaintiff's picture and published it in a newspaper without his consent.⁴⁷ The court held that the right of privacy was a consequence of natural law, and it enabled people the freedom to decide to live a life of seclusion or a life of publicity. In other words, people were inherently entitled to keep themselves hidden away from the public if they wished, or they may live in the public's view.⁴⁸

This case was also the first time a court found that using a person's picture for advertising without authority violated privacy, entitling a person to damages.⁴⁹ This understanding of privacy gives rise to publicity because the two concepts refer to the same notion and are interchangeable. They are two sides of the same coin. Publicity is the degree of a person's public exposure. Similarly, privacy is the degree of seclusion from the public eye.⁵⁰ It follows that a person has a right to publicity and privacy. This conception of privacy and publicity supports the Restatement's interpretation of "publicity" under the privacy torts. Publicity under the Restatement of torts refers to making a matter public by communicating it to the public at large or so that it becomes public knowledge. Its reach characterises the communication to the public.⁵¹

The enactment of publicity statutes contributed to the impression that modern-day publicity is completely isolated from privacy.⁵² This impression, however, is not accurate because state legislatures enacted publicity statutes to expand the scope of privacy.⁵³ Consequently, there is an academic debate concerning the right of publicity. Arising from the privacy torts, the right

⁴⁴ Sharman 2006 *Rutgers Law Journal* 989 bases this suggestion on S. Warren and L. Brandeis's seminal article "The Right of Privacy" (1890) 4 *Harvard Law Review* 193.

⁴⁵ Sharman 2006 *Rutgers Law Journal* 990.

⁴⁶ 50 S.E. 68, 70-71 (Ga. 1905).

⁴⁷ *Pavesich v. New England Life Insurance Co.*, 68.

⁴⁸ *Pavesich v. New England Life Insurance Co.*, 70-71.

⁴⁹ *Pavesich v. New England Life Insurance Co.*, 79-80.

⁵⁰ Sharman 2006 *Rutgers Law Journal* 991. Having this understanding paints a full picture about the existence of the right of publicity and why some courts refer to a common law publicity and a statutory publicity.

⁵¹ *The Restatement of the Law, Second, Torts* (1977) §625D, Comment (a). Note that this is different from publication in the sense used in defamation cases.

⁵² J. Koehler "Fraleigh v. Facebook": The Right of Publicity in Online Social Networks" (2013) 28 *Berkeley Technology Law Journal* 963 at 968.

⁵³ Koehler 2013 *Berkeley Technology Law Journal* 971-972.

of publicity only retained the misappropriation invasion.⁵⁴ The debate stems from the theoretical discrepancies upon which publicity rights are based in each state.⁵⁵ The content of the right of publicity and its scope varies between the states.⁵⁶

Simmons and Means summarised the theoretical bases for publicity.⁵⁷ First, there was privacy. Publicity could not be wholly divorced from privacy because it was rooted in privacy, concerned with the right to be left alone.⁵⁸ Therefore, a right of publicity based on privacy centred its notion of harm on mental injury. Moreover, such a right of publicity was not transferable because privacy was a personal right. Therefore, the resultant publicity right was personal.⁵⁹ Second, there was property. The property motivation underlying publicity postulated that publicity was a property right, particularly an intellectual property right.⁶⁰

The property justification further branched out into the incentive or utilitarian theory and the labour desert theory. The incentive theory expressed the idea that the right of publicity created an economic incentive for people (usually celebrities) to invest in their crafts.⁶¹ They invested in their crafts to continue creating entertaining content for the public.⁶² This theory supported the idea that publicity rights are beneficial to celebrities only and protect their image rights.

The labour desert theory arose from John Locke's theory of property, which argued that people must enjoy the fruits of their labour. In essence, a person had a property right, enabling them to protect the ability to exploit their persona for commercial gain. The right that resulted was transferable.⁶³ Both property subcategories supported the view that the right of publicity applied only to people with commercially valuable identities. Third, the consumer protection theory argued that publicity prevented others from being unjustly enriched by appropriating another person's commercially valuable identity. Moreover, the legislature designed publicity

⁵⁴ JL Simmons and MD Means "Split Personality: Constructing a Coherent Right of Publicity Statute" (2018) 10 *Landslide* 1 at 2.

⁵⁵ Simmons and Means 2018 *Landslide* 1.

⁵⁶ *Ibid.*

⁵⁷ Simmons and Means 2018 *Landslide* 2.

⁵⁸ Korotkin 2013 *Cardozo Law Review De-Novo* 283.

⁵⁹ Simmons and Means 2018 *Landslide* 2.

⁶⁰ *Ibid.* This position was pronounced in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (U.S. Ohio, 1977).

⁶¹ Simmons and Means 2018 *Landslide* 2.

⁶² *Ibid.*

⁶³ *Ibid.* Authors such as Amin 2010 *Case Western Reserve Journal of Law, Technology and the Internet* 100- 101; Lee-Richardson 2013 *UCLA Entertainment Law Review* 191 and Heise 2018 *Charleston Law Review* 371 subscribe to the property-based theory of publicity.

to prevent public confusion about whether a celebrity endorsed a product that a person falsely depicted them to advertise.⁶⁴

Simmons and Means also suggested that statutory publicity claims were broader than the common law privacy tort. The statutory provisions defined the aspect of personality that they protected, whom they applied to, what use they prohibited. They also contained exceptions and rules on damages and transferability.⁶⁵ Although publicity and privacy protected the *indicia* of a person's identity against unauthorised use for a commercial purpose,⁶⁶ statutory publicity was broader. It often intersected with other areas of law, including intellectual property law. This intersection was the main difference between privacy and the right of publicity.

The US Supreme Court⁶⁷ compared the objectives of the right of publicity to those of copyright and patent law because publicity gave a person the right to reap the reward of their commercial endeavours, which has little to do with protecting feelings or reputation.⁶⁸ The court also contrasted the publicity claim with the false light tort. It stated that the false light tort was concerned with reputation and provided protection where harmful material was published. In contrast, publicity was concerned with who was allowed to publish.⁶⁹

Another notable difference had to do with the requirements of the claims. The invasion of privacy appropriation did not necessarily require a commercial benefit to arise from the appropriation for liability to attach. In contrast, statutory publicity relied on the defendant's commercial benefit to establish liability. The essence of the right of publicity was to provide individuals, famous or not, with domination over their identity.⁷⁰ As a state-based right, the

⁶⁴ Simmons and Means 2018 *Landslide* 3. The consumer protection theory is comparable to the court's discussion of infringement of identity in the South African case *Kumalo v Cycle Lab* para 22. The court in that case said that appropriating a the plaintiff's image and using it for advertising created the impression that she endorsed the products sold by the defendant and the defendant's campaign promoting women's cycling. L Korotkin "Finding Reality in the Right of Publicity" (2013) *Cardozo Law Review De-Novo* 268 at 285-286 highlights the similarity between the right of publicity and §1125 (a) of the Lanham Act 15 U.S.C (2012). The Lanham Act is a federal statute that regulates federal trademark and unfair competition. Section 1125 (a) specifically governs false designation, descriptions and representations in advertising goods and services. It protects consumers against confusion regarding the endorsement of goods. It is concerned with deceiving consumers through appropriation. See also Boisineau 2012 *Landslide* 26.

⁶⁵ Simmons and Means 2018 *Landslide* 3.

⁶⁶ Boisineau 2012 *Landslide* 26; Greer 2017 *Indiana International and Comparative Law Review* 248.

⁶⁷ *Zacchini v. Strippis-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

⁶⁸ *Zacchini v. Strippis-Howard Broadcasting Co.*, 573.

⁶⁹ *Ibid.*

⁷⁰ Boisineau 2012 *Landslide* 26- 27. The right of publicity appears to be futile to people that are not famous. Jung 2011 *Chicago-Kent Law Review* 386 suggests that the right of publicity was separated from the privacy because privacy did not adequately address the identity issues faced by celebrities. The protection of identity is unique for celebrities because they thrive off being publicly known. To sustain their income, they cannot necessarily live a life shielded from the public. Thus, the right of publicity allows them to enforce the commercial value of the unauthorised use of their identity. Celebrities' identities are inherently brands that allow the celebrities to profit

laws regulating publicity in the states vary greatly.⁷¹ Most states protect publicity in legislation, whilst others offer both common law and statutory protection or do not recognise it at all.⁷²

Statutory publicity is commonly confused with the privacy misappropriation tort. The two claims both protect against the unauthorised use of a person's identity.⁷³ The difference, however, is that the former is concerned with the ability to control who benefits financially from a person's identity and is akin to a property right. In contrast, the latter is concerned with protecting a person's privacy and is personal.⁷⁴ Another difference is that in some states, the right of publicity survives a person after death whilst privacy terminates with a person at death.⁷⁵ Privacy protects a person against having aspects of their personal life publicised.⁷⁶ Whilst publicity covers the commercialisation of facets of a person's identity.

Depending on the formulation of the law in the individual states and the merits of each case, a person can claim for the appropriation of facets of their identity under the invasion of privacy or publicity.⁷⁷ The social media revolution has equally impacted individuals and famous personalities.⁷⁸ Platforms such as Instagram, where users thrive on having many followers, blur the differentiation between famous and private individuals. Additionally, Boisineau infers those ordinary individuals would not have sought to prevent others from exploiting their identities commercially before the advent of social media.⁷⁹ This chapter will consider the right of publicity with catfishing using celebrity identities under the states discussed below. This

from certain endorsements. It follows that the right of publicity enables them to prevent others from capitalizing the unauthorised use of their identity. Misappropriation under the invasion of privacy tort does not serve celebrities because their claim is not based on emotional harm or an intrusion upon their seclusion. Rather, their claim is based on the pecuniary loss that comes from the unauthorised exploitation of their identity. See also Heise 2018 *Charleston Law Review* 363- 370 and Messenger 2018 *Widener Law Review* 261.

⁷¹ Jung 2011 *Chicago-Kent Law Review* 384; Lee-Richardson 2013 *UCLA Entertainment Law Review* 195; Messenger *Widener Law Review* 259.

⁷² K Riley "Misappropriation of Name or Likeness Versus Invasion of Right of Publicity" (2001) 12 *Journal of Contemporary Legal Issues* 587 at 587; Lee-Richardson 2013 *UCLA Entertainment Law Review* 196. See for example, *Kieu Hoang v. Phong Minh Tran.*, 60 Cal.App.5th 513, 538 (Cal. App. 2 Dist., 2021), a case based on the Californian common law right of publicity and *Cross v. Facebook, Inc.*, 14 Cal.App.5th 190, 208- 209 (Cal.App. 1 Dist., 2017) where the court differentiates between the Californian common law and statutory right of publicity.

⁷³ Messenger 2018 *Widener Law Review* 261.

⁷⁴ Riley 2001 *Journal of Contemporary Legal Issues* 591; Jung 2011 *Chicago-Kent Law Review* 389; Messenger 2018 *Widener Law Review* 261.

⁷⁵ Hartney 2018 *Minnesota Journal of Law, Science and Technology* 283.

⁷⁶ Jung 2011 *Chicago-Kent Law Review* 386.

⁷⁷ *Jim Henson Productions, Inc., v. John T Brady & Associates*, 687 F. Supp 185, 188 -189 (SDNY 1994).

⁷⁸ Boisineau 2012 *Landslide* 26.

⁷⁹ *Ibid.* To illustrate this point, see for instance *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805 (N.D.Cal. 2011) where the court noted that the plaintiffs were celebrities in their own Facebook social networks. This illustrates that social media has changed the way we categorise people. This case is discussed in detail below under para 4.3.4.3.

thesis treats the misappropriation tort under privacy as separate from the appropriation claim under publicity, insofar as the relevant state laws allow.

4.3 California

California protects privacy against false light invasion under the common law.⁸⁰ California also has statutory protection for identity under California Civil Code §3344. The Californian legislature created this provision to complement the common law invasion of privacy by appropriating name or likeness for a commercial purpose.⁸¹ §3344(a) provides that a person who knowingly uses another person's identity in any manner on or in products, merchandise, goods, and services without consent shall be liable for any damages sustained.

California is one of the few states with statutory protection against online impersonation,⁸² found in the Penal Code §528.5(a).⁸³ Although this provision criminalises online impersonation, it also provides for civil damages. §528(e) provides that in addition to other civil remedies, a person who suffered damage or loss due to electronic impersonation may institute a civil action against the violator for compensatory damages. This provision also allows a person to seek injunctive relief.

4.3.1 California Penal Code §528.5 false electronic impersonation

States have enacted legislation dealing with impersonation in response to catfishing and other types of online impersonation.⁸⁴ California has statutory provisions dedicated to online impersonation despite the common law remedy. The Penal Code provides civil recourse against impersonation perpetrated through social media and other internet-based tools.⁸⁵ Section 528.5 provides that in addition to other laws, a person who knowingly and without consent credibly impersonates another person on a website or by other electronic means is guilty of an offence.⁸⁶

⁸⁰ K Malone "Parody or Identity Theft: The High- Wire Act of Digital Doppelgangers in California" (2012) 34 *Hastings Communications and Entertainment law Journal* 275 at 289. This is formulated in the same way as §625E of the Restatement.

⁸¹ *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362, 367 (Cal.Ct.App. 2000).

⁸² Clanton 2014 *Cardozo Journal of Conflict Resolution* 333.

⁸³ Clanton 2014 *Cardozo Journal of Conflict Resolution* 334.

⁸⁴ Hartney 2018 *Minnesota Journal of Law Science and Technology* 285.

⁸⁵ Santi 2019 *Southern Illinois University Law Journal* 88.

⁸⁶ Cal. Penal Code §528.5 (a). According to subsection (b), credible impersonation occurs when another person is caused to reasonably believe that the defendant is the person who was impersonated. Subsection (c) defines "electronic means" as opening an email account, creating an account or profile on social networking platforms in another person's name.

According to the provision, the unlawfulness of impersonation arises from a person acting with the intent to harm, intimidate, threaten and defraud another person.⁸⁷

Notably, section 528.5 criminalises online impersonation and provides an additional civil remedy for victims of online impersonation that suffer damage or loss as a result. It allows a victim to institute an action for compensatory damages or injunctive relief (an interdict).⁸⁸ The difficulty in this remedy may arise in proving the purpose. This requirement is subjective and highly dependent on the defendant's motive, which a victim of catfishing is unlikely to be able to prove.

Hartney takes the view that this provision is limited to impersonating an actual person. She suggests that a person must use the victim's name and photograph in a fake online profile instead of a photograph.⁸⁹ According to this view, the provision would not be helpful when a person only used the victim's picture to catfish. The reason for this conclusion is that in some instances, a catfish account only uses another person's pictures, their physical appearance and not their name. However, Derzakarian disputes this view and holds that a picture depicting a person is a real person since it illustrates their physical appearance. Therefore, a picture does satisfy the "actual person" requirement.⁹⁰

Derzakarian's suggestion is acceptable since, in the case *In re Rolando S*,⁹¹ the court noted that a person could contravene section 528.5 by posting comments on a website pretending to be another person.⁹² In this regard, the court's comment illustrates that courts can interpret the provision widely to accommodate catfishing. Moreover, using the facets of the plaintiff's identity online in a manner that could reasonably lead others to believe that the defendant is plaintiff amounts to impersonation under the statute.⁹³

⁸⁷ Cal. Penal Code §528.5 (a); Reznik 2013 *Touro Law Review* 475; Santi 2019 *Southern Illinois University Law Journal* 88.

⁸⁸ Cal. Penal Code §528.5 (e).

⁸⁹ Koch 2017 *University of Colorado Law Review* 260; Hartney 2018 *Minnesota Journal of Law Science and Technology* 286; M Cohen "Angling for Justice: Using Federal Law to Reel in Catfishing" (2019) 2 *The Journal of Law and Technology at Texas* 51 at 71.

⁹⁰ Derzakarian 2017 *Loyola of Los Angeles Law Review* 753 -754.

⁹¹ 197 Cal.App.4th 936 (Cal.App.5 Dist. 2011).

⁹² *In re Rolando S*, 945 fn 6.

⁹³ *Collier v. Doe*, No. 30-2012-00609744, 2013 WL 12154700 (Cal. Supp., Orange County June 11, 2013) 2; Cal. Penal Code §528.5 (b).

4.3.2 Misappropriation of name or likeness

The state of California recognises the tort of misappropriation of name or likeness in the common law and statute.⁹⁴ The common law elements for this tort are that the defendant used the plaintiff's identity, the defendant's appropriation of the plaintiff's name or likeness was commercially, or otherwise, advantageous to the defendant, the plaintiff did not consent to the use of their identity, and the use resulted in injury.⁹⁵ A plaintiff is required to prove all four aspects in order to succeed in a misappropriation claim. However, the courts presume harm or injury if the first three elements are proven.⁹⁶

California Civil Code §3344 entrenches the right of publicity. According to this provision, statutory publicity protects name, likeness, voice, signature and picture.⁹⁷ The definition of offensive use serves to limit or expand the scope of publicity.⁹⁸ In California, unauthorised use for advertising purposes on products or merchandise or services and goods are considered offensive use.⁹⁹ Simmons and Means are correct that this provision may be wider or narrower in scope than the common law privacy.¹⁰⁰ The provision is narrow because it limits offensive use to the identified commercial purposes. It is also broad in the sense that it protects more than just name and likeness.¹⁰¹ The privacy misappropriation tort only limits protection to name and likeness and applies to any advantage the defendant gains from using the victim's identity.

§3344 provides that a person who knowingly uses another person's photograph or likeness on or in products, or goods or for adverting or selling or soliciting the purchase of products or services without consent will be liable for damages suffered by the victim.¹⁰² Interestingly, in *Cross v. Facebook*, the court referred to a common law and statutory right of publicity.¹⁰³ The court emphasised that the legislature had created section 3344 to add to the common law

⁹⁴ Cal. Civ Code §3344 (a); *Eastwood v. Super Ct.*, 198 Cal. Rptr. 342, 347 (Super.Ct. of L.A. 1983).

⁹⁵ *Eastwood v. Super Ct.*, 347; Malone 2012 *Hastings Communications and Entertainment Law Journal* 287.

⁹⁶ Malone 2012 *Hastings Communications and Entertainment Law Journal* 287 referred to the instance where the court granted damages even though there was no evidence presented regarding material harm suffered from the publication.

⁹⁷ Cal. Civ Code §3344 (a); Simmons and Means 2018 *Landslide* 4.

⁹⁸ Simmons and Means 2018 *Landslide* 4.

⁹⁹ Cal. Civ Code §3344 (a); Simmons and Means 2018 *Landslide* 5.

¹⁰⁰ Simmons and Means 2018 *Landslide* 8.

¹⁰¹ Malone 2012 *Hastings Communications and Entertainment Law Journal* 288.

¹⁰² Cal. Civ Code §3344 (a).

¹⁰³ This idea was first highlighted in *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 541- 543 (Cal.App.2 Dist., 1993). *Cross v. Facebook, Inc.*, 14 Cal.App.5th 190 (Cal.App.1 Dist., 2017).

claim.¹⁰⁴ It stated that to succeed in the statutory remedy, a person must satisfy all the common law elements.¹⁰⁵

The courts often conflate common law appropriation tort and the statutory appropriation remedy as protections of the right of publicity.¹⁰⁶ This conflation, coupled with the court's comments in the *Cross v. Facebook* illustrate Sharman's argument that not only did publicity arise out of privacy, but they were also the same in that they protected the same interest.¹⁰⁷ However, Simmons and Means took the argument further and showed that the publicity protections in statutes were broader than the common law privacy misappropriation tort. The common law privacy misappropriation tort protected a person against reputational and emotional harm. The publicity claim that protected a person against purely financial harm was an example of the extended range of protection provided by publicity statutes.¹⁰⁸ Furthermore, the statutory provision defined the 'commercial gain' referred to in the common law tort.

However, Riley argued that misappropriation of name or likeness and the invasion of publicity were not the same.¹⁰⁹ They were similar because they had the exact requirements,¹¹⁰ but the difference lay in the two actions' underlying interests.¹¹¹ The statutory claim relied on the patrimonial advantage that the defendant acquired from using a person's identity. Conversely, the common law claim allowed a court to award damages even where the defendant did not gain a pecuniary advantage.¹¹² The common law claim aims to protect a personal interest, and the statutory claim aims to protect a commercial interest.¹¹³

Riley's analysis is correct insofar as it relates to the differences between the two claims. However, it neglects that the application of the claims depends on the theory underlying the recognition of the publicity statute. Moreover, the separation of publicity from privacy is on the edge of arbitrarily limiting the right of publicity to celebrities and adopts a purely economic

¹⁰⁴ This point is also made in the text of the statute at Cal. Civ. Code §3344 (g).

¹⁰⁵ *Cross v. Facebook, Inc.*, 208-209.

¹⁰⁶ *Cross v. Facebook, Inc.*, 208-209.

¹⁰⁷ Sharman 2006 *Rutgers Law Journal* 991.

¹⁰⁸ Koehler 2013 *Berkeley Technology Law Journal* 967.

¹⁰⁹ Riley 2001 *Journal of Contemporary Legal Issues* 587.

¹¹⁰ *Maxwell v. Dolezal*, 231 Cal.App. 4th 93, 97 (Cal.App.2 Dist., 2014).

¹¹¹ Riley 2001 *Journal of Contemporary Legal Issues* 588.

¹¹² *Ibid.*

¹¹³ This idea was also expressed by the court in *Halean Labs v. Topps Chewing Gym, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) where the court understood the right of publicity as an economic interest. Riley 2001 *Journal of Contemporary Legal Issues* 591. Another difference highlighted by Riley is that the personal nature of the appropriation tort effectively only allows the victim of appropriation to bring a claim. However, the statutory remedy can be brought by a party acting in the interest of the victim.

underlying theory.¹¹⁴ If one construes section 3344 as complementary to the common law misappropriation tort, California is an example of the states that subscribe to the privacy theory. This construction discredits the notion that two different protections for identity apply to different categories of society. Both common law misappropriation and statutory publicity apply to all individuals, celebrities, and non-celebrity alike.¹¹⁵

Koehler suggests that the legislation's language further points to an extension of protection to all individuals. She particularly notes that it provides recovery for injury resulting in actual damages suffered or a minimum claim for damages of \$750.¹¹⁶ According to Koehler, this provision enables private persons who struggle to prove commercial value and loss to claim under the statute.¹¹⁷

Notably, the state of California extends post-mortem publicity protection only to celebrities.¹¹⁸ In section 3344.1, the legislature created a descendible property right in a person's identity.¹¹⁹ The property right is limited to people with commercially valuable personalities and not for private people.¹²⁰

4.3.3 Interpreting and applying the statutory remedies

4.3.3.1 *Fairfield v. American Photocopy Equipment Company*, 291 P.2d 194 (Cal. 1955)

In *Fairfield v. American Photocopy Equipment Company*, the plaintiff instituted an action for damages and an injunction against the defendant for the unauthorised use of his name in the defendant's advert.¹²¹ The plaintiff was an attorney who practised in New York and California, and the defendant manufactured and sold photocopy machines in California. The defendant distributed a printed advertisement to legal professionals claiming that the plaintiff was a satisfied user of its machines.¹²² The defendant did not have the plaintiff's consent to use his name in this manner.

¹¹⁴ Koehler 2013 *Berkeley Technology Law Journal* 971-972.

¹¹⁵ *Dora v. Frontline Video, Inc.*, 542. The court in *Belen v. Ryan Seacrest Productions, LLC*, 280 Cal. Rptr. 3d 662, 677 (Cal.App.2 Dist., 2021) confirms the view that both celebrities and non-celebrities have a protectable right to not have their likeness appropriated and exploited without consent. Simmons and Means 2018 *Landslide* 6.

¹¹⁶ Cal. Civ. Code §3344 (a).

¹¹⁷ Koehler 2013 *Berkeley Technology Law Journal* 973- 974.

¹¹⁸ Cal. Civ. Code §3344.1(h) specifically provides that deceased personality should be interpreted to mean a person whose identity had commercial value at the time of their death or because of their death, regardless of whether they used their identity for commercial purposes during their lifetime.

¹¹⁹ Cal. Civ. Code §3344.1 (b).

¹²⁰ Cal. Civ. Code §3344.1 (b) read with ss (h).

¹²¹ *Fairfield v. American Photocopy Equipment Company*, 194 - 195.

¹²² *Fairfield v. American Photocopy Equipment Company*, 196.

Evidence proved the defendant sold a machine to the plaintiff before the advertisement was published, but the plaintiff returned the machine for a refund. The trial court dismissed the claim on the ground that there was no evidence of damage suffered. According to the appeal court, it was settled law that the right of privacy was enforceable in California. The right to privacy entitled a person to be free from unwarranted and unauthorised publicity. Using or publishing a person's name without authority was an actionable invasion of their right.¹²³ Moreover, exploiting a person's personality for commercial purposes amounted to a gross invasion of privacy.¹²⁴

The court said that the privacy cause of action did not remedy an injury to character or reputation. Instead, it rectified a wrong of a personal nature that resulted in injury to a person's feelings, irrespective of the publication's effect on any patrimonial interests or an individual's standing in the community.¹²⁵ The invasion of privacy was subjective because privacy concerned a person's peace of mind and mental peace and comfort. The court highlighted that a business' desire for publicity was not a justification for invading a person's privacy.¹²⁶ It added that the motive was irrelevant where a defendant had invaded a person's right, and malice was not essential. Furthermore, one could not raise mistake as a defence where their conduct had invaded the right of privacy.

The appeal court found that on the facts, the defendant invaded the plaintiff's privacy by publishing an advertisement with the plaintiff's name. Furthermore, the statement in the advert was a misrepresentation. The court inferred that when the defendant circulated the advertisement, it was aware that the representation was false. It held that the advertisement endorsed the defendant's product and was an unwarranted and unauthorised appropriation of the plaintiff's persona as a lawyer.¹²⁷ It was clear to the court that there was a legal wrong, and the trial court should not have dismissed the claim. As such, the appeal succeeded, and the trial court's judgment was reversed.¹²⁸

The case indicates that a claim for the invasion of privacy by misappropriation may succeed even where the purpose of the appropriation was not to advertise.¹²⁹ Therefore, this tort is helpful in catfishing because catfishing does not always involve a commercial purpose, and a

¹²³ *Fairfield v. American Photocopy Equipment Company*, 197.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Fairfield v. American Photocopy Equipment Company*, 197- 198.

¹²⁸ *Fairfield v. American Photocopy Equipment Company*, 200.

¹²⁹ Derzakarian 2017 *Loyola of Los Angeles Law Review* 756 -757.

person is interested in being left alone. This interest includes preventing others from using their identity without consent. This position is different from the South African position. The courts in South Africa only recognised and acknowledged claims for the appropriation of identity for a commercial purpose.¹³⁰ Whether a claim for mere appropriation, the use without consent, would succeed in South Africa is left open. The reason for the difference is philosophical. The state of California recognises the right to recover damages for mental or emotional distress resulting from an invasion of privacy.¹³¹

It follows that the mere unauthorised use of a person's identity *indicia* is a valid cause of action for which a court is likely to grant damages. Even where there is no material injury or loss suffered, appropriating features of a person's identity is actionable because it offends their mental peace.¹³² Moreover, the purpose of appropriation does not have to be commercial.

4.3.3.2 *Lugosi v. Universal Pictures, Cal., 603 P.2d 425 (Cal., 1979)*

In *Lugosi v Universal Pictures*, the court defined the right of publicity. The deceased contracted with the defendant to play the movie character "Count Dracula". The agreement granted the defendant certain rights to use the deceased's identity to the extent related to the movie. The plaintiffs, the deceased's heirs, filed a complaint against the defendant, alleging it appropriated their property continuously, which was not part of the agreement.¹³³ They contended that the defendant undertook many licencing agreements allowing licensees to use the deceased's character.¹³⁴ The trial court concluded that the subject of the license agreements entered into by the defendants was the individual likeness and appearance of the deceased in the movie role. The trial court reasoned that the deceased had a protectable property right in his likeness and image as Count Dracula during his lifetime.¹³⁵ As such, the property interest did not terminate upon his death; it descended to his heirs.

¹³⁰ For example, *O'Keeffe v Argus Printing Co* 1954 (3) SA 244 (C); *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) and *W v Atoll Media* [2010] 4 All SA 548 (WCC).

¹³¹ In California, the right to privacy seeks to protect a person from being exposed to unwanted outrage from others who become aware of the publicized matter because of the invasion of a person's privacy. In South Africa, the underlying basis for seeking compensation for the injury of personality rights, and particularly identity, has little to do with a person's subjective feelings being offended. Instead, it has more to do with their dignity as a human being which the South African constitutional dispensation holds valuable. See Malone 2012 *Hastings Communications and Entertainment Law Journal* 286 -287 for a discussion of the intentional infliction of emotional distress.

¹³² Malone 2012 *Hastings Communications and Entertainment Law Journal* 287

¹³³ *Lugosi v. Universal Pictures*, 426.

¹³⁴ *Lugosi v. Universal Pictures*, 427.

¹³⁵ *Ibid.*

The defendant sought an appeal against the judgment for damages in favour of the plaintiffs. The appeal court discussed privacy torts at length and emphasised that the deceased had the right to use his identity as a right of value during his lifetime.¹³⁶ A legal object through which he could make a profit. If he chose not to exploit his identity commercially, he could prevent others from using it in that manner through injunction or suit for damages. In privacy law, the right of value does not succeed a person after death.¹³⁷ The court said that the law of privacy protected the right to be left alone through four distinct invasions of different interests.

Moreover, the court acknowledged that privacy torts protected a personal right. A person could not transfer a personal right to other people, nor can other people assert that right after the holder's death.¹³⁸ The court said that this rule's rationale was that the decision to exploit one's identity was personal. Thus, it could not accept the assertion that just because a person did not exploit their identity during their life, their heirs could do so on their behalf. The court said the common law did not have such a rule, nor did the statute. However, the legislature could amend the law.¹³⁹

The court held that the question before it stemmed from the trial court construing a person's identity as a property right that passed to their heirs, instead of construing it as a right of privacy. Consequently, the main question was why the right to exploit one's identity could not pass to their heirs if it could be assigned since it was a property right. The court held that assigning the right to exploit went hand in hand with the exercise of the right. The right holder had to have assigned it during their lifetime. Asserting the right to exploit in instances the deceased did not exploit during his lifetime was not an exercise of the right by the holder.

The court said it was irrelevant whether that right was a personal or a property right. The right of publicity had the effect that if a person had an identity linked to commercially exploitable opportunities, the public's reaction to that identity was its source of income. This effect was different from protection against unwarranted intrusion or exploitation envisaged by the law of privacy.¹⁴⁰ In other words, a person who had a persona that they used for profit had a right of publicity, which was different from a person without a profitable persona who sought to

¹³⁶ *Lugosi v. Universal Pictures*, 428.

¹³⁷ *Ibid.*

¹³⁸ *Lugosi v. Universal Pictures*, 429-430.

¹³⁹ *Lugosi v. Universal Pictures*, 430. The legislature accordingly altered the legal position by enacting Cal. Civ. Code §3344.1.

¹⁴⁰ *Lugosi v. Universal Pictures*, 431.

prevent others from profiting from their persona. The court reversed the trial court's judgment in favour of the defendants.

The principles from this case were that the right to exploit one's identity was a personal right protected by the law of privacy. It follows that such a right did not succeed its holder and terminates at death.¹⁴¹ However, the legislature amended this position by making the right descendible and available for 70 years after death.¹⁴² The court rejected the assertion that section 3344 of the Civil Code created a property right in a person's identity. Instead, section 3344 was the common law appropriation claim codified, which defined circumstances under which a person could claim. Moreover, the provision did not purport to create an inheritable right.¹⁴³

4.3.3.3 *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D.Cal. 2011)

The plaintiffs brought a class action against Facebook for violating the publicity statute by misappropriating their names, likenesses and profile pictures and using them in paid adverts without consent.¹⁴⁴ The plaintiffs averred that the Facebook feature "sponsored stories" was a new type of advertising that Facebook used for financial gain.¹⁴⁵ The defendants sought a dismissal of the claim because the plaintiffs failed to allege ascertainable injury. Consequently, the defendant argued that the plaintiffs failed to allege an actionable injury in terms of section 3344 since they consented to the use of their identities. The defendants further argued that the "sponsored stories" content was newsworthy in terms of section 3344.¹⁴⁶

In dealing with the misappropriation claim, the court highlighted that California recognised two methods of protecting a person's name and likeness against appropriation: the common law cause of action for commercial misappropriation and the statutory remedy for commercial misappropriation.¹⁴⁷ The court set out the common law requirements that a plaintiff must satisfy to succeed. The requirements were that the defendant used the plaintiff's identity; the defendant appropriated the plaintiff's identity for their advantage, commercial or otherwise; the plaintiff did not consent and suffered injury due to the use.¹⁴⁸

¹⁴¹ *Lugosi v. Universal Pictures*, 428.

¹⁴² T Breiton and P Bowal "The Right of Publicity" (2014) 4 *Arizona State University Sports and Entertainment Law Journal* 273 at 282. California Civil Code §3344.1(g) creates a property right of the right of publicity and makes it transferable.

¹⁴³ *Lugosi v. Universal Pictures*, 428 fn 6.

¹⁴⁴ *Fraley v. Facebook, Inc.*, 790.

¹⁴⁵ *Fraley v. Facebook, Inc.*, 791-92.

¹⁴⁶ *Fraley v. Facebook, Inc.*, 795.

¹⁴⁷ *Fraley v. Facebook, Inc.*, 803.

¹⁴⁸ *Ibid.*

The requirements for the statutory claim included all four common law requirements and proof that the defendant knew that they were using the plaintiff's identity in one of the prohibited ways and that there was a direct connection between the use and the commercial purpose.¹⁴⁹ The court then dealt with one of the grounds that the defendants raised supporting the dismissal: the sponsored stories fall within the newsworthy exception.¹⁵⁰ According to the court, newsworthiness under section 3344 was a manifestation of the First Amendment right to freedom of expression.¹⁵¹ Under the court's construction, this exception meant that publications about people who drew attention to their activities through their accomplishments, professional standing or mode of living did not attract section 3344 liability.¹⁵²

On the one hand, the court favoured the defendant's argument. The plaintiffs were celebrities to their networks on Facebook, making them subjects of interest to their audiences, rendering their actions on the platform newsworthy.¹⁵³ However, on the other hand, the court rejected the argument that the defendant's commercial use of the plaintiff's newsworthy actions fell within the scope of the section 3344(d) exemption. In other words, the defendants did not use the plaintiff's identities in a journalistic sense. However, they used it for their commercial advertising purposes, which did not form part of any news, public affairs, or sports broadcasting. Therefore, it was inappropriate for the court to dismiss the claim on this ground.¹⁵⁴

The other ground that the defendant based their prayer for dismissal was that the plaintiffs consented to have their identities used in this manner by registering to use Facebook under its terms of use. The court disregarded this contention because it was not proper grounds for dismissal and was still in dispute.¹⁵⁵ The court stated that it was trite that a violation of the right of privacy in California resulted in an injury to feelings. The appropriation of identity with commercial value was economic. The court said that the right of publicity was a tool to control commercial use for those with a commercially valuable identity.¹⁵⁶

¹⁴⁹ *Ibid.*

¹⁵⁰ Section 3344(d); *Fraley v. Facebook, Inc.*, 804.

¹⁵¹ U.S Const. amends. I, XIV.

¹⁵² *Fraley v. Facebook, Inc.*, 804; Korotkin 2013 *Cardozo Law Review De-Novo* 275; Koehler 2013 *Berkeley Technology Law Journal* 1977.

¹⁵³ *Fraley v. Facebook, Inc.*, 805.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Fraley v. Facebook, Inc.*, 805- 806.

¹⁵⁶ *Fraley v. Facebook, Inc.*, 806 citing *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362, 366, 92 Cal. Rptr. 2d 713 (2000).

The court's statements are enlightening because they illustrate the source for the belief that the right of publicity is only available or valuable to celebrities. The court further clarified the confusion by explaining that the statute did not require a plaintiff to show pre-existing commercial value.¹⁵⁷ The court said the provision could be understood as creating a presumption of injury stemming from the unauthorised use of a plaintiff's identity for commercial purposes.¹⁵⁸ In cases that involved celebrity plaintiffs, the injury requirement was satisfied by proof of no compensation. In conclusion, the court found in favour of the plaintiffs.¹⁵⁹

As illustrated earlier, actual financial damages are not essential to claim under the statute. It is presumed that this provision would also be available to victims of catfishing.¹⁶⁰ In any case, a victim of catfishing would not be instituting an action for damages to assert the commercial value over their identity.¹⁶¹ Derzakarian disagreed with the notion that the statutory publicity claim was limited to instances where a person has a commercially valuable identity.¹⁶² Instead, she suggests that this remedy purports to protect ordinary individuals. The *Fraley v Facebook* decision shows that a victim would not need to prove commercial value or injury to succeed in this claim.

Celebrity victims of catfishing may benefit the most through the statutory appropriation remedy in §3344.¹⁶³ The statutory remedy aims to protect a person's identity from commercial appropriation.¹⁶⁴ Except, according to Derzakarian, this does not mean that this remedy is only available to celebrities.¹⁶⁵ Moreover, the provision stipulates which commercial uses are actionable; but it does not mention catfishing or online impersonation.¹⁶⁶

A private individual who is a victim of catfishing linked to a commercial purpose involved may rely on either remedy to protect their identity. They can contend that the defendant used their identity for a commercial purpose by showing their commercial gains through the fake

¹⁵⁷ *Fraley v. Facebook, Inc.*, 806.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Fraley v. Facebook, Inc.*, 815.

¹⁶⁰ Korotkin 2013 *Cardozo Law Review De -Novo* 284 suggests that it is suitable for a non-celebrity plaintiff to claim from the common law tort because where they have no quantifiable damages, seeking recourse through statute might be futile and not worth the litigation costs.

¹⁶¹ Derzakarian 2017 *Loyola of Los Angeles Law Review* 762.

¹⁶² Derzakarian 2017 *Loyola of Los Angeles Law Review* 762.

¹⁶³ Amin 2010 *Case Western Reserve Journal of Law, Technology and the Internet* 105- 106.

¹⁶⁴ Korotkin 2013 *Cardozo Law Review De -Novo* 269.

¹⁶⁵ Derzakarian 2017 *Loyola of Los Angeles Law Review* 762 fn 142; Koehler 2013 *Berkeley Technology Law Journal* 984.

¹⁶⁶ BM Lange "Shopping for the California Right of Publicity" (1993) 16 *Hastings Communication and Entertainment Law Journal* 151 at 160 -161; Cal. Civ Code §3344(d).

account linked to their identity. The underlying purpose of their cause of action would be to protect their interest in being left alone.¹⁶⁷

4.3.4 False light invasion of privacy

4.3.4.1 Solano v. Playgirl, Inc., 292 F.3d 1078

Solano v. Playgirl, Inc. sets out the elements of the false light tort.¹⁶⁸ In that case, the plaintiff sought damages against the defendant, a magazine publisher, for invading his privacy by portraying him in a false light and misappropriating his likeness.¹⁶⁹ He based his claim on the defendant's contravention of the common law and statute.¹⁷⁰ The plaintiff contended that publishing his image in a magazine that typically contained nude photos of men humiliated and embarrassed him.¹⁷¹

The court stated that the requirements a plaintiff had to satisfy in a false light claim were that the defendant disclosed information concerning the plaintiff to one or more persons and had presented that information as factual when it was false or created a false impression about the plaintiff.¹⁷² The plaintiff also had to show that the recipients of the information would understand it as stating or implying something highly offensive to injure his personality. He also had to show that the defendant acted with constitutional malice and, lastly, that the defendant's disclosure injured him.¹⁷³

In this case, the plaintiff's claim in the district court failed because, in the court's opinion, the plaintiff failed to show that the defendant created a false impression of what readers would see of the plaintiff inside the magazine.¹⁷⁴ On appeal, the court reversed the decision of the district court. The Ninth Circuit agreed with the plaintiff that in the context of a magazine that generally features sexually suggestive nude pictures of men, there was an actionable issue regarding the falsity of the message conveyed by the defendant.¹⁷⁵ Publishing his image along with the headlines was equivalent to an implied false message. The court highlighted an established

¹⁶⁷ Lange 1993 *Hastings Communication and Entertainment Law Journal* 160.

¹⁶⁸ *Solano v. Playgirl, Inc.*, 1082.

¹⁶⁹ *Solano v. Playgirl, Inc.*, 1081.

¹⁷⁰ The statute in question was the California Civil Code §3344.

¹⁷¹ *Solano v. Playgirl, Inc.*, 1080 and 1081.

¹⁷² *Solano v. Playgirl, Inc.*, 1082.

¹⁷³ *Ibid.*

¹⁷⁴ *Solano v. Playgirl, Inc.*, 1081.

¹⁷⁵ *Solano v. Playgirl, Inc.*, 1082.

principle that a defendant is liable for an insinuation equally as he would be for an explicit statement.¹⁷⁶

The court held that it was irrelevant that the plaintiff's image in the magazine was relatively innocent and not of a sexual nature. The court found that the defendant's magazine cover conveyed that the plaintiff was not as wholesome as he claimed and that he was willing to sell himself naked to a women's sex magazine. Regarding the actual malice, the court held that the plaintiff had the onus of proving that the defendant deliberately made statements in a manner insinuating a false message to the reader. Alternatively, the defendant acted with a reckless disregard of whether the recipient could interpret them as false statements of fact.¹⁷⁷ The court found that the defendant knowingly and recklessly published a misleading cover to promote magazine sales.¹⁷⁸

4.3.4.2 *Flores v. Von Kleist*, 739 F.Supp.2d 1236 (E.D.Cal. 2010)

The elements for a false light claim were also enunciated in *Flores v. Von Kleist*. In this case, the plaintiff sued the defendants for terminating his employment as a school principal and teacher. The plaintiff's cause of action was that his termination was unlawful because it violated his First, Fifth and Fourteenth Amendment rights.¹⁷⁹ He contended that the defendants terminated his employment in retaliation because he was a school board member in a neighbouring school district.¹⁸⁰ Additionally, the defendants deprived him of his liberty or property interest. They deprived him of the right to procedural due process because the defendants did not allow him to make representations before his termination.¹⁸¹

Among these contentions, the plaintiff also asserted that the defendants defamed him by stating that he was a "sexual harasser".¹⁸² Attached to this assertion was a false light claim. Regarding false light, the plaintiff alleged that by portraying him as a sexual harasser, the defendants placed him in a false light in the public eye.¹⁸³ In addressing the false light claim, the court outlined the tort of false light elements: the defendant generated false or misleading publicity

¹⁷⁶ *Solano v. Playgirl, Inc.*, 1083.

¹⁷⁷ *Solano v. Playgirl, Inc.*, 1084.

¹⁷⁸ *Solano v. Playgirl, Inc.*, 1086.

¹⁷⁹ *Flores v. Von Kleist*, 1247. The plaintiff's First Amendment right protected his right to assemble and this right manifested in his position as a board member of a school and Fifth Amendment applies to due process by federal government. The Fourteenth Amendment protects individuals against deprivation of liberty or property without due process by state government.

¹⁸⁰ *Flores v. Von Kleist*, 1248.

¹⁸¹ *Ibid.*

¹⁸² *Flores v. Von Kleist*, 1258.

¹⁸³ *Flores v. Von Kleist*, 1259.

concerning the plaintiff. The publicity was offensive to the reasonable person, and that the defendant acted with malicious intent.¹⁸⁴

The court found that the plaintiff did not prove that the First Amendment protected his position as a school board member.¹⁸⁵ It also held that the false light claim failed because the plaintiff did not adduce admissible evidence that the defendants caused false or misleading publicity to be generated about him. A person seeking to claim under the false light tort in California must satisfy all the elements highlighted in the cases above. Unreasonable and highly objectionable publicity is publicity that places a person in a false light by attaching characteristics, conduct or beliefs that are false to them.¹⁸⁶ The effect thereof is that the public would have a false perception of the person.¹⁸⁷

The Restatement places emphasis on the meaning of the term publicity. In California, publicity is also an essential element. The Californian common law publicity is interpreted as sufficient publicity if the defendant communicates the false narrative to the general public or many people instead of an individual or a few people.¹⁸⁸ However, the determining factor is not the number of people receiving the information but the recipients' interest in the subject matter.¹⁸⁹

4.3.5 Analysis of the remedies

For a catfishing victim to successfully claim damages in California, they have four legal remedies through which they may approach a court for recourse. Two remedies are in common law under the right of privacy, and the other two are statutory. To succeed in a false light invasion of privacy claim, a catfishing victim must show the court that the defendant publicised information about them to multiple people. The defendant presents false information as true, or the information portrayed the victim in a false light.¹⁹⁰ The victim also has to prove to the court that the recipients of the information would understand it as conveying a highly offensive message about the victim. Furthermore, that the defendant intended to cause the injury they suffered.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Flores v. Von Kleist*, 1248.

¹⁸⁶ *Cabanas v. Glood and Associates*, 942 F.Supp. 1295 (E.D.Cal 1996).

¹⁸⁷ *Cabanas v. Glood and Associates*, 1310.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Solano v. Playgirl, Inc.*, 1082.

The Californian courts have interpreted false light to include insinuations. This interpretation is similar to the position in South Africa in respect of defamation cases. In *Le Roux v Dey*, the Constitutional Court accepted that innuendos in illustrations could carry a defamatory meaning if the audience knew the statement's special circumstance.¹⁹¹

Under the common law misappropriation, a victim of catfishing would have to prove that the defendant used their name or likeness without consent for their commercial or other advantage, which harmed them. Catfishing is an excellent example of a person's likeness being used without permission for another person's benefit, irrespective of whether the benefit is commercial or not. *Fairfield v. American Photocopy Company*¹⁹² is similar to the South African *Grütter v Lombard* case.¹⁹³ Both cases involve attorney plaintiffs whose names were used without permission by the defendants for their benefit. The benefit in both cases was commercial.¹⁹⁴

Fairfield v. American Photocopy Company also has elements of false light invasion of privacy. The evidence showed that the defendant falsely represented to the public that the plaintiff was a satisfied customer when that was not true.¹⁹⁵ Whether this claim would have succeeded is questionable because whether this false representation was highly offensive is debatable. The Californian courts recognise a person's right to be free from unwarranted and unauthorised publicity.¹⁹⁶ Recognising this entitlement is vital in addressing catfishing. Victims of catfishing are also users of social networks. However, another problem is that the catfish will take their content from one social networking platform and use it in a fake profile on another platform. This conduct amounts to unwarranted and unauthorised exposure on other platforms, which cannot be justified.

Californian common law protections and statutory protections adequately protect an individual's identity against catfishing. The reason for this conclusion is that the privacy tort protects a person's right to be left alone, which adequately includes cases of catfishing where the harm suffered by the victim is a disturbance of their seclusion and privacy.¹⁹⁷ A victim of catfishing could succeed in their claim if they prove that the defendant used a feature of their identity without consent. Moreover, the victim has to prove that the defendant's use of their

¹⁹¹ *Le Roux v Dey* para 87.

¹⁹² 291 P.2d 194 (Cal. 1955).

¹⁹³ 2007 (4) SA 89 (SCA).

¹⁹⁴ *Fairfield v. American Photocopy Company*, 196; *Grütter v Lombard* para 13.

¹⁹⁵ *Fairfield v. American Photocopy Company*, 197.

¹⁹⁶ *Fairfield v. American Photocopy Company*, 197- 198.

¹⁹⁷ Derzakarian 2017 *Loyola of Los Angeles Law Review* 753.

identity was either portraying them in a false light¹⁹⁸ or appropriating it for their advantage and disturbing the plaintiff's privacy by causing them emotional distress.¹⁹⁹

Furthermore, a victim of catfishing does not only have one remedy available to them. Instead, they may claim concurrently under the statutory provision and the common law torts.²⁰⁰ The remedies in California are also acceptable because different victims of catfishing are not limited to one remedy. Since no two cases are the same, no two victims are the same. The availability of multiple remedies means that the law caters to the needs of different victims, whether famous or not. Ultimately, the purpose of catfishing and the harm that the victim sustains will determine which remedy a victim relies on when seeking damages for the appropriation of their identity.

The *Fraley v. Facebook* case and the right of publicity underline a critical consideration regarding ISP liability.²⁰¹ Since the right of publicity intersects with intellectual property,²⁰² a person may hold an ISP liable for suffering from catfishing since section 230 of the CDA exclusion does not apply to intellectual property.

The electronic impersonation provision is also helpful for victims of catfishing. It specifically applies to instances where a person impersonates another online. The courts have construed this provision widely to include instances where a person creates blog posts pretending to be another person.²⁰³ Catfishing is the type of conduct envisaged by the provision because catfishing is essentially impersonating another person through social networks. It is usually a credible impersonation because a catfish easily dupes a third party into thinking that the person depicted by the profile is real even though the information is false.²⁰⁴

4.4 Oklahoma

In Oklahoma, torts involve breaching a legal duty or obligation, excluding those arising from contracts. The breach constitutes a civil wrong entitling the injured party damages.²⁰⁵ The

¹⁹⁸ Derzakarian 2017 *Loyola of Los Angeles Law Review* 758.

¹⁹⁹ Derzakarian 2017 *Loyola of Los Angeles Law Review* 754 -755. In *Fairfield v. American Photocopy Equipment Company*, 291 P.2d 194 (Cal. 1955) it was decided that mere mental anguish was an actionable injury under this claim.

²⁰⁰ Derzakarian 2017 *Loyola of Los Angeles Law Review* 753.

²⁰¹ In *Fraley v. Facebook, Inc.*, 802 the court held that the defendant was not allowed immunity because immunity depended on the interactive computer service provider not being an information content provider.

²⁰² *Alterra Excess & Surplus Insurance Company v. Snyder*, 234 Cal.App. 4th 1390, 1409 (Cal.Ct.App. 2015).

²⁰³ *In re Rolando S.*, 945 fn 6.

²⁰⁴ Cal. Penal Code §528 (b).

²⁰⁵ *Murchison v. Progressive Northern Ins. Co.*, 572 F. Supp. 2d 1281, 1284 (E.D. Okla. 2008).

Supreme Court of Oklahoma²⁰⁶ interpreted the wrongfulness requirement of civil actions as any act that in its ordinary course would infringe on another person's rights resulting in the other person suffering damage. The court also highlighted that the fault element, referred to as malice, was intentionally performing a wrongful act without legal justification or excuse.²⁰⁷ One of the torts recognised in Oklahoma is the false light invasion of privacy tort.²⁰⁸ The false light invasion of privacy tort is a common law protection.²⁰⁹

The state of Oklahoma also protects identity through the misappropriation of name or likeness tort and statutory claim. §1449(A) of the Oklahoma statute is similar to California's Civil Code §3344. It provides that a person that uses facets of another person's identity in or on, or for selling, or advertising products, merchandise, goods, or services without the person's consent shall be liable for damages suffered. Oklahoma offers protection for identity against catfishing through its Catfishing Liability Act entrenched in section 1450. The catfishing statute aims to protect a person against harm arising from online impersonation occurring on social media.

4.4.1 Oklahoma Catfishing Liability Act, OK ST T. 12 §1450

Oklahoma was the first state to enact legislation directly addressing catfishing.²¹⁰ The Catfishing Liability Act²¹¹ provides that a person who knowingly uses facets of another person's identity through social media without consent to harm, intimidate, threaten, or defraud them, will be liable for any damages arising from the online impersonation. However, no liability arises from impersonation that is satirical or a parody.²¹² According to this provision, facets of a person's identity include name, voice, signature, photograph, or likeness. It defines a photograph as any picture or photographic reproduction, whether still or moving. This definition extends to videos or television transmissions where the impersonated person is readily identifiable.²¹³

The provision also defines social media, including electronic communications that enable users to create online communities to share information, personal messages and other content.²¹⁴ The statutory remedy is extensive for three reasons. First, its definition of social media specifies

²⁰⁶ *Mangum Elec. Co. v. Border*, 222 P. 1002, 1005 (Okla. 1923).

²⁰⁷ *Mangum Elec. Co. v. Border*, 1005.

²⁰⁸ The state of Oklahoma also subscribes to the Restatement (Second) of Torts false light invasion of privacy.

²⁰⁹ *Colbert v. World Pub Co.*, 747 P.2d 286, 289 (Okla., 1987).

²¹⁰ Derzakarian 2017 *Loyola of Los Angeles Law Review* 745.

²¹¹ Catfishing Liability Act of 2016, H.B. 3024, 55th Leg, 2d Sess (Okla. 2016) enacted as OK ST T. 12 §1450.

²¹² OK ST T. 12 §1450B.

²¹³ OK ST T. 12 §1450A (1).

²¹⁴ OK ST T. 12 §1450A (2).

the types of Internet tools the Act applies to. The types of Internet tools described in the definition are social networking websites. These are websites on which catfishing occurs, where users create communities and share various forms of content, including their images and personal messages.²¹⁵

Second, unlike the Californian statute,²¹⁶ this provision extends protection to multiple facets of a person's identity, not just their name and image. The provision protects name, voice, signature, photograph, or likeness. Furthermore, a photograph also includes video and still images from which a person can be identifiable.²¹⁷ As mentioned in chapter two, this protection is essential because people who create catfish accounts are determined and collect a victim's other online content to post using the fake profile to maintain the false appearance. They go beyond using one picture for a profile and may take video content as well. The phrase "such that the person is readily identifiable" gives the impression that as long as the victim is recognisable from the profile, they will have a claim.

Although the purposes for catfishing are limited to harming, intimidating, threatening, and defrauding, liability will attach for any damages that arise from injury resulting from catfishing.²¹⁸ This is the third reason in support of the view that the protection provided by the provision is broad. According to the statute, actual damages include funds spent in counselling and any profits arising from the unauthorised use of a person's identity.²¹⁹ This statutory protection of identity against catfishing is exemplary. The remedial action a person can seek from a court includes damages and injunctive relief.

4.4.2 Misappropriation of name or likeness

The common law and statute contain identity protections. Oklahoma adopted the Restatement's formulation of the misappropriation tort in legislation.²²⁰ There is no differentiation between the right of publicity and the right of privacy in Oklahoma. The courts refer to the common law

²¹⁵ Chapter two of this thesis highlighted that most of the social networking websites take the format of online communities aimed at enabling users to share content and ideas to vast audiences unlimited by geographic location.

²¹⁶ Cal. Penal Code §528.5.

²¹⁷ OK ST T. 12 §1450A (1) and §1450B.

²¹⁸ OK ST T. 12 §1450B.

²¹⁹ OK ST T. 12 §1450D.

²²⁰ The Restatement of Laws (Second) Torts §625C; OK ST T. 12 §1449. In *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okla., 1980) the court acknowledged that state of Oklahoma did not formally recognise the all the tort actions for the invasion of privacy. Thus, the Supreme Court expanded the common law by adopting all the categories of invasion of privacy.

invasion of privacy by appropriation as the invasion of the right of publicity.²²¹ It bears mentioning that the invasion of privacy is also codified, but the present discussion is limited to the common law invasion of privacy claim.²²² The reason for this limitation is that the statutory right of privacy criminalises the unauthorised use of a person's identity, and criminal law falls outside the scope of this thesis.

Oklahoma's statutory right of publicity protects more than a person's name and likeness and protects other identity features.²²³ Section 1149(A) is analogous to California's section 3344. However, Oklahoma follows a property-based theory for its recognition of publicity. According to the court in *Cardtoons, L.C. v. Major League Baseball Players Association*,²²⁴ the right of publicity was an intellectual property right that protected a person's right to control the commercial use of their identity.²²⁵ Following *Zacchini v. Scripps-Howard Broadcasting Co.* position,²²⁶ the court likened publicity to copyright and trademark by characterising it as a property right. Under this characterisation, it enabled people to profit from the commercial value of their identities.²²⁷

Under the statute, offensive use is similar to the position in California.²²⁸ Publicity extends to everyone in Oklahoma, whether famous or not. However, like California, post-mortem publicity rights extend only to people with commercially valuable identities.²²⁹ Section 1448 creates a transferable property right.²³⁰ Similar to California, one must note that there are exceptions to liability under both sections 1448 and 1449(A).²³¹ The first exception is using a

²²¹ See for instance *Brill v. Walt Disney Co.*, 246 P.3d 1099 (Okla.Civ.App.Div. 3, 2010) where the court uses the two terms interchangeably. TA Watson "Right of Publicity Laws: Oklahoma" *Practical Law Intellectual Property and Technology* (2020) para 1 suggests that the state of Oklahoma protects publicity under three statutes. One of the statutes is the Catfishing Liability Act. According to Watson, the privacy statute includes the right of publicity.

²²² OK ST T. 21 §839.1 makes the invasion of privacy by using the features of a person's identity without consent for advertising a misdemeanour. §839.2 creates a right of action allowing a person to claim damages against the person who invaded their privacy. The Supreme Court of Oklahoma confirmed this position in *LeFlore v. Reflections of Tulsa, Inc.*, 708 P.2d 1068, 1075 (Okla. 1985).

²²³ In Oklahoma, publicity protects a person's name, voice, signature, likeness, and photograph, like California.

²²⁴ 95 F.3d 959 (C.A.10 (Okla.), 1996).

²²⁵ *Cardtoons, L.C. v. Major League Baseball Players Association*, 967. See also the discussion under *Cardtoons, L.C. v. Major League Baseball Players Association*, 973-976 where interestingly, the court rejected the incentive justification for recognising publicity by holding that it was not a convincing justification since celebrities still profited heavily without the incentive. On the non-economic justifications, the court says that the prevention of mental anguish argument fails because that is not the purpose of publicity. Publicity rights, according to the court, protected a person against loss of financial gain.

²²⁶ *Zacchini v. Scripps-Howard Broadcasting Co.*, 573.

²²⁷ *Cardtoons, L.C. v. Major League Baseball Players Association*, 968.

²²⁸ *Simmons and Means* 2018 *Landslide* 5.

²²⁹ OK ST T. 12 §1448(A) and (H).

²³⁰ OK ST T. 12 §1448(B).

²³¹ *Cardtoons, L.C. v. Major League Baseball Players Association*, 968.

person's identity for news, public affairs, or sports broadcasting.²³² The second exception relates to using that is ancillary to commercial uses. In other words, using a person's identity in a commercial medium will not be offensive merely because the medium that is sponsored commercially is linked to paid advertising.²³³

4.4.3 Interpreting and applying the statutory remedies

4.4.3.1 *Brill v. Walt Disney Co.*, 246 P.3d 1099 (Okla. Civ.App.Div. 3, 2010)

In *Brill v. Walt Disney Co.*, the court explained the difference between the common law claim and the statutory claim. This case was an appeal against the trial court's dismissal of a claim for damages following the misappropriation of his likeness.²³⁴ The plaintiff alleged that the Disney animation movie character "Lightning McQueen" was based on a car he used to race and drive.²³⁵ In the appellate court, the appellant argued that the common law right of publicity was broader because it allowed recovery of damages for using a person's identity and not only their likeness or name.²³⁶

The court disagreed with this construction and held that the common law right of publicity was limited to the appropriation of a person's name or likeness. The court emphasised that the Restatement, therefore the common law, protected a person's interest in the exclusive use of their identity to the extent represented by their name or likeness.²³⁷ In contrast, the statutory right protected a person's interest against having a feature of their identity used for a commercial purpose. The features protected were name, likeness, signature, voice, and photographs.²³⁸ Therefore, the issue before the court was whether the vehicle character depicted in the animation movie amounted to the appellant's likeness.²³⁹

The court interpreted the phrase "name or likeness" to mean a person's character. According to the court, "likeness" did not include general incidents in a person's life. It referred to pictures and a person's distinctive voice.²⁴⁰ Relying on the persuasive value of a federal court decision, the court found that it could not construe the character in the appellee's movie as the appellant's likeness.²⁴¹ To succeed in a case of statutory violation of the right of publicity, the appellant

²³² OK ST T. 12 §1448(J) and OK ST T. 12 §1449(D).

²³³ OK ST T. 12 §1448(K) and OK ST T. 12 §1449(E).

²³⁴ *Brill v. Walt Disney Co.*, 1101.

²³⁵ *Ibid.*

²³⁶ *Brill v. Walt Disney Co.*, 1102.

²³⁷ *Ibid.*

²³⁸ OK ST T. 12 § 1449A.

²³⁹ *Brill v. Walt Disney Co.*, 1103.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

had to satisfy the following elements: the appellees knowingly used his name or likeness on products, merchandise or goods, and they did not have his consent. The likeness was limited to a person's identity features and did not apply to their car.²⁴² As such, the court affirmed the trial court's decision.²⁴³

4.4.3.2 *Bates v. Cast*, 316 P.3d 246 (Okla. Civ.App.Div. 1, 2013)

Bates v. Cast is an excellent case illustrating the legal position in Oklahoma regarding the misappropriation of name and likeness. This case was an appeal against the dismissal of a claim for damages arising from defamation, invasion of privacy by misappropriation of name and likeness and portraying the plaintiff in a false light.²⁴⁴ The plaintiff approached the court after the defendants used her name in a sequel in their book series. She alleged that they used her name without consent and depicted her in a defamatory manner injuring her personal and professional reputation. Additionally, they appropriated her name for their gain and depicted her in a false light.²⁴⁵

The defendants contended that the plaintiff could not prove an essential element to the misappropriation claim – that her name had an intrinsic commercial value.²⁴⁶ The trial court granted the defendant's motion to dismiss and dismissed the plaintiff's claim.²⁴⁷ The appellate court held that no defamation occurred because the book and its characters were wholly fictitious.²⁴⁸ Moreover, no reasonable reader would conclude that the plaintiff was the person depicted as the character in the book.²⁴⁹ Regarding the false light claim, the court also maintained the decision of the trial court.²⁵⁰ It held that the book's subject matter was fictitious and fantastic and therefore could not be said to be false to sustain claims for false light or intentional infliction of emotional distress.²⁵¹

On the appropriation of name or likeness, the court reiterated the law as adopted from the Restatement. The court explained that the claim rested on a person's interest in the exclusive use of their name.²⁵² The right created by section 625C was similar to a property right which

²⁴² *Brill v. Walt Disney Co.*, 1103– 1104.

²⁴³ *Brill v. Walt Disney Co.*, 1106.

²⁴⁴ *Bates v. Cast*, 249.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Bates v. Cast*, 250.

²⁴⁸ *Bates v. Cast*, 252.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Bates v. Cast*, 253.

allowed a person to grant a license to a third party to use it.²⁵³ Liability under this provision was not limited to commercial appropriation but also included instances where the defendant used a plaintiff's name or likeness for their purpose and benefit.²⁵⁴ The use did not need to be commercial, and the benefit sought did not need to be patrimonial. The court said that merely mentioning the plaintiff's name or referring to their public activities did not amount to appropriation. Appropriation took place when a defendant published the plaintiff's likeness to take advantage of his reputation, prestige and value associated with him.²⁵⁵ The defendant invaded the right of privacy when they publicised the plaintiff's name or likeness to appropriate it for the defendant's commercial or other benefits.²⁵⁶

The court stated that misappropriation of name claim in Oklahoma was statutory protection.²⁵⁷ Section 1449A provides that a person that knowingly uses facets of another person's identity in any manner on or in products or goods for advertising or selling or soliciting purchases said products or goods without prior consent will be liable to damages. In deciding the quantum of actual damages, the profits a person obtains from unauthorised use will be considered. The provision also allows a court to grant punitive damages.

The court in *Bates v Cast* held that Oklahoma was one of the states where the misappropriation claim relied on an allegation of unauthorised use of a person's name for a commercial purpose.²⁵⁸ However, that did not mean that the plaintiff had to prove that her name had an intrinsic commercial value. In this regard, the plaintiff's appeal failed because she failed to show the court the defendants' profits from using her name.²⁵⁹

4.4.4 False light invasion of privacy

4.4.4.1 *Colbert v. World Pub Co.*, 747 P.2d 286 (Okl., 1987)

In *Colbert v. World Pub Co.*, the court set out the legal position regarding the false light tort in Oklahoma. The Oklahoma Supreme Court heard an appeal against a decision by the trial court awarding the appellee damages for an action against a newspaper. The appellants mistakenly published the plaintiff's picture in connection with an article reporting the death of a mentally

²⁵³ *Bates v. Cast*, 253; Restatement of Laws (Second) Torts 2d §625C comment a.

²⁵⁴ *Bates v. Cast*, 253; Restatement of Laws (Second) Torts 2d §625C comment b.

²⁵⁵ *Bates v. Cast*, 253; Restatement of Laws (Second) Torts 2d §625C comment d.

²⁵⁶ *Bates v. Cast*, 253.

²⁵⁷ *Ibid*; OK ST T. 12 §1449.

²⁵⁸ *Bates v. Cast*, 254.

²⁵⁹ *Ibid*.

ill local teacher who was convicted for murder.²⁶⁰ The appellee was informed about the article by his family members, who knew that he was not the convicted murderer.²⁶¹

After the article was published, the people who knew the plaintiff subjected him to ridicule and embarrassment. He contacted the appellants to ask them to remove or correct the article to no avail. After which, the appellee instituted action against them for recklessly placing him in a highly offensive false light in the public eye.²⁶² The appellants contended that his claim had prescribed and denied having knowledge or reckless disregard for the falsity of the matter. The trial court held that to succeed on a false light invasion of privacy claim. The plaintiff did not have to show that the defendant had subjectively entertained serious doubts regarding the truth of the publication. In a false light claim, the test for reckless disregard as to the falsity of the matter was not the same as that of libel actions.²⁶³ The court did not find proof of malice in the form of reckless regard for the falsity of publication. As a result, the trial court found the appellants liable because they were negligent.

The court had to decide whether negligence satisfied the fault element required under the false light tort.²⁶⁴ It held that the elements of the tort adopted in Oklahoma are those formulated under §635E of the Restatement. The Restatement required intentional conduct that could be reasonably regarded as extreme or a highly offensive intentional intrusion on a person's solitude.²⁶⁵ The Oklahoma Supreme Court noted the decision of the US Supreme Court where it held that knowingly publishing false statements with a reckless disregard for the truth was not afforded constitutional protection under the constitutional guarantee of freedom of the press.²⁶⁶ It also noted that, although the US Supreme Court had decided that a private individual could claim against a media defendant for the invasion of their privacy by false light, the court did not decide whether states could relax the standard of fault to negligence for the tort.²⁶⁷

The Oklahoma Supreme court emphasised that the standard used in Oklahoma was the one stated in the Restatement.²⁶⁸ The law in Oklahoma required a plaintiff had to show that the defendant had a high degree of knowledge of possible falsity or entertained serious doubts

²⁶⁰ *Colbert v. World Pub Co.*, 287.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Colbert v. World Pub Co.*, 288.

²⁶⁴ *Colbert v. World Pub Co.*, 287.

²⁶⁵ *Colbert v. World Pub Co.*, 290.

²⁶⁶ *Ibid.*, citing *Time, Inc v. Hill*, 385 U.S. 374, 389-90 17 L.Ed.2d (1967).

²⁶⁷ *Colbert v. World Pub Co.*, 291 citing *Contrell v. Forest City Publishing Company*, 419 U.S. 245 42 L.Ed.2d (1974).

²⁶⁸ *Colbert v. World Pub Co.*, 291.

about the truth of the publication to prove actual malice.²⁶⁹ The rationale for this position was that there had to be a standard by which legal certainty could be maintained and to distinguish between frivolous suits and actions following the intolerable intrusions on privacy.²⁷⁰ As such, the court concluded that there was no need to develop the law to allow for claims arising from negligently or accidentally injured feelings. The purpose of the false light invasion of privacy was a legal response to emotional distress inflicted intentionally on another person by portraying them falsely in public.²⁷¹ The appeal failed, and the court reversed the trial court's decision.

4.4.4.2 *Grogan v. Kokh, LLC*, 256 P.3d 1021 (Okla. Civ.App.Div. 2 2011)

Another case that outlines the legal position in Oklahoma is *Grogan v. Kokh, LLC*. This case was an appeal against the decision of the District Court granting summary judgment in favour of the appellees. The appellant was a high school teacher who sued the appellees for broadcasting a story about him.²⁷² The main issues regarding the broadcasting were that his picture was displayed when the news anchor reported that parents at his high school were angry about terrorist threats.²⁷³ Therefore, he averred that the appellee defamed him during the broadcast because he did not threaten students. The broadcast invaded his privacy by falsely portraying him as a terrorist.²⁷⁴ First, the court dealt with the defamation claim and found that the appellee published a true statement. Thus, the claim failed, and there was no need for the court to consider the constitutional implications of the claim.

Second, the court dealt with the invasion of privacy claim. The court reiterated the legal position highlighted in *Colbert v. World Pub Co.*, that the state of Oklahoma adopted the Restatement that the elements for the tort were the same as those in the Restatement.²⁷⁵ The appellant contended that by showing his picture while discussing terrorist threats at schools unreasonably and falsely portrayed him as a terrorist or someone involved in student shootings.²⁷⁶ The court held that the introductory statements made in the broadcast were capable of the meaning derived by the appellant from the report as a matter of law. The court understood the broadcast contextually and found that it gave an account of what parents had

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*, citing *Munley v. ISC Financial House Inc.*, 584 P.2d 1336, 1338-1339 (Okla. 1978).

²⁷¹ *Colbert v. World Pub Co.*, 292.

²⁷² *Grogan v. Kokh, LLC*, 1025.

²⁷³ *Grogan v. Kokh, LLC*, 1026.

²⁷⁴ *Ibid.*

²⁷⁵ *Grogan v. Kokh, LLC*, 1028.

²⁷⁶ *Grogan v. Kokh, LLC*, 1028-1029.

said, and it was not a story about terrorism. However, whilst on the topic of threats, the reporter began speaking about an unrelated incident. Therefore, the court said it was not unreasonable to conclude that the appellant was linked to terrorism.²⁷⁷

The court found that the appellant satisfied the three elements for a false light claim because he was not a terrorist as portrayed in the broadcast. Being portrayed in that light would be highly offensive to a reasonable person.²⁷⁸ Regarding the fault element, the court said that the requirement was proof that the appellee knew that the matter they publicised was false. Alternatively, the appellee acted in reckless disregard for the falsity of the publicised matter and the false light that would be attached to the appellant.²⁷⁹ The court explained that "reckless disregard of the truth" meant that the defendant was subjectively aware of the likelihood of his publication being false but chose to ignore that and published the matter.²⁸⁰

The court said that this element had two components: either that the defendant knew the publication was false and would portray the plaintiff in a false light, or that the defendant acted with a reckless disregard for the statement's falsity and would portray the plaintiff in a false light.²⁸¹ On the first leg of the test, the court rejected the argument that the appellee did not know the broadcast could be construed in a manner, placing the appellant in a false light.²⁸² The court concluded that based on the nature of the broadcast, a false portrayal was reasonably possible.

The appellee also contended that they did not intend to portray the appellant falsely, effectively arguing that this was a mistaken portrayal.²⁸³ The court also rejected this argument because it misconstrued the law. The element was not concerned with intention, rather the outcome of the conduct and its effect on the plaintiff.²⁸⁴ The false light aspect of the claim was reversed and remanded for further proceedings because there was a dispute regarding material facts, whilst the court upheld the decision on defamation.

4.4.5 Analysis of the remedies

Like California, Oklahoma is one of the 50 states that subscribe to the Restatement of Torts and have adopted it into law. To succeed in a claim for the invasion of privacy by false light, a

²⁷⁷ *Grogan v. Kokh, LLC*, 1029.

²⁷⁸ *Grogan v. Kokh, LLC*, 1030.

²⁷⁹ *Ibid.*

²⁸⁰ *Grogan v. Kokh, LLC*, 1031.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Grogan v. Kokh, LLC*, 1032.

²⁸⁴ *Grogan v. Kokh, LLC*, 1033.

plaintiff must convince the court that the defendant publicised a statement, representation, or imputation about them. The publicised material effectively portrayed them in a false light that any reasonable person would find highly offensive, and that portrayal caused them damage.²⁸⁵ Proving actual malice establishes the fault element for this claim. A plaintiff must show that the defendant acted intending to inflict emotional distress on them.²⁸⁶ A plaintiff establishes actual malice by showing that the defendant knew or acted with reckless disregard for the falsity of the publicised material and how it would portray the plaintiff.²⁸⁷

The cases make it clear that a person cannot negligently or accidentally place another person in a false light under Oklahoman law. What the common law requires is intent to cause harm.²⁸⁸ Regarding the nature of the publicised material, it must be offensive to the reasonable person. The rationale behind this standard is to avoid frivolous litigation and *de minimus* claims. Publicised material is unacceptable and highly offensive to the reasonable person if it goes beyond the bounds of human decency, and a civilised community would not tolerate it.²⁸⁹ This standard arises from the recognition and adoption of the intentional infliction of emotional distress tort.²⁹⁰

In the case of catfishing, a person alleging the invasion of privacy by false light has to show the court that the defendant used their picture to create a fake profile online. The defendant knew they were falsely portraying the plaintiff as the person behind the fake profile and the person connected to the conduct of that profile online. The plaintiff may also contend that the defendant recklessly disregarded that using the plaintiff's image in this manner would portray them in a false light. The question that arises is whether catfishing meets the offensiveness standard. It is submitted that it does because catfishing connects the victim to the fake account's conduct online.

The elements of the appropriation of likeness claim that a plaintiff must prove under the common law are that the defendant used the plaintiff's name or likeness without consent for their benefit. The common law claim is limited to appropriation of name and likeness and does not extend protection to a person's identity.²⁹¹ Conversely, the statutory claim extends

²⁸⁵ *Colbert v. World Pub Co.*, 290.

²⁸⁶ *Colbert v. World Pub Co.*, 289.

²⁸⁷ *Grogan v. Kokh, LLC*, 1030- 1031.

²⁸⁸ *Colbert v. World Pub Co.*, 290; *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 719 (C.A. 10 (Okla.) 2000); *Grogan v. Kokh, LLC*, 1032 (Okla. Civ. App. Div. 2 2011).

²⁸⁹ *Zeran v. Diamond Broadcasting, Inc.*, 720- 721 (C.A. 10 (Okla.) 2000); J Gustafson "Privacy" *American Jurisprudence* 2ed (2021) §115.

²⁹⁰ *Restatement (Second) of Torts* §46 (1) (1965).

²⁹¹ *Brill v. Walt Disney Co.*, 1102 – 1103.

protection to more identity features such as image, voice, and signature. However, the *Brill v. Walt Disney Co.* court gave the word "likeness" a broad interpretation and held that it included pictures and a person's distinctive voice.²⁹² This interpretation is noteworthy because it suggests that a victim of catfishing may claim under the common law for the unauthorized use of their image since likeness includes a person's picture.

The difference between the common law and the statutory claims is that the legislative claim is limited to instances where a person appropriates another's identity features for commercial uses such as advertising, selling, or soliciting purchases for goods and services. The common law claim is not limited to commercial uses. Instead, a person can institute an action for damages if they can show that the defendant appropriated the plaintiff's name or likeness for their advantage. A victim of catfishing would fail in a claim brought under the statutory misappropriation claim because it applies explicitly to appropriation committed for advertising products or services. However, a victim can successfully claim under the common law.

The Catfishing Liability Act is the best remedy a victim of catfishing has in Oklahoma.²⁹³ The legislative remedy is specifically designed to address catfishing online. The Oklahoma courts have not had the opportunity to interpret the provision. A reading of the statute shows that protection against catfishing is only available where the purpose of catfishing is to defraud, intimidate, threaten, and harm the plaintiff.²⁹⁴ This position is different from the Californian statute that requires the defendant to have intimidated, threatened, defrauded, or harmed another person.²⁹⁵ This thesis established that the intention to harm the victim does not always accompany catfishing. Instead, a person catfish to deceive third parties. Catfishing is rarely concerned with inflicting harm on the victim.²⁹⁶ Nevertheless, the plaintiff may satisfy this element by showing that they suffered emotional harm from the catfishing.

Victims of catfishing may rely on this statutory provision together with any other remedy available to seek recourse against a person who used their identity in catfishing on social networking platforms. The reason for this suggestion stems from section 1450F that states that the remedy is cumulative and additional to other legal remedies. It follows then that a victim of catfishing can bring a claim for damages under this provision and one of the invasions of privacy claims.

²⁹² *Brill v. Walt Disney Co.*, 1103.

²⁹³ The Catfishing Liability Act is enacted under OK. ST. T 12 §1450.

²⁹⁴ OK. ST. T 12 §1450B.

²⁹⁵ Cal. Penal Code §528.5(a); Derzakarian 2017 *Loyola of Los Angeles Law Review* 754.

²⁹⁶ Derzakarian 2017 *Loyola of Los Angeles Law Review* 754.

The state of Oklahoma adequately protects an individual's identity against catfishing online. It provides multiple avenues through which a victim may claim damages against the person who misused their identity. Moreover, where the victim is likely to not succeed in an action brought under one of the remedies, they may succeed in another if pleaded alternatively.

4.5 Differences and similarities to South Africa

As the South African law of delict, US tort law is also subject to significant academic philosophical debate.²⁹⁷ Engaging at length with the discussion is beyond the scope of the present study. Victims of catfishing have various legal remedies at their disposal to vindicate their rights. If a victim brings their claim to assert their right to be left alone and being subjected to emotional anguish, they will rely on the privacy misappropriation tort. If they wish to assert their right to control the commercial exploitation of their identity, then they can bring a misappropriation claim under publicity.

There are two main differences between the US and the South African protection of personality. The first is that in South Africa, identity and privacy are given separate protection, whereas, in the US, privacy embraces identity. Its protection is based on a person's right to be left alone and the desire to maintain seclusion, which indicates no *eo nomine* recognition of identity.²⁹⁸ The second difference is that in South Africa, there is no statutory protection against catfishing or online impersonation. At the same time, many states have codified laws addressing online impersonation or catfishing in the US.²⁹⁹

4.5.1 Appropriation of name or likeness

The first difference is that there is no need for a pecuniary gain for a plaintiff to succeed under the misappropriation tort in California. The phrase "defendant's advantage, commercial or otherwise" is open to interpretation.³⁰⁰ Similarly, in Oklahoma, under the common law claim, a plaintiff is only required to show that the defendant used the plaintiff's name or likeness for their benefit. Conversely, under the analogous South African claim, a commercial advantage

²⁹⁷ See for example, Messenger 2018 *Widener Law Review*; Heise 2018 *Charleston Law Review*, Lee – Richardson 2013 *UCLA Entertainment Law Review* and Koehler 2013 *Berkeley Technology Law Journal* for discussions of the right of publicity and whether misappropriation should be classified under publicity or privacy.

²⁹⁸ Skosana *The Right to Privacy and Identity on Social Networking Sites: A Comparative Legal Perspective* 89; Greer 2017 *Indiana International and Comparative Law Review* 247.

²⁹⁹ OK. ST. T 12 §1450B in Oklahoma and Cal. Penal Code §528.5 in California are specifically designed to address impersonation online.

³⁰⁰ Derzakarian 2017 *Loyola of Los Angeles Law Review* 756.

is an essential element in an infringement of identity claim. The South African common law protects a person's identity against appropriation for a commercial purpose such as advertising or selling goods and services.³⁰¹

It follows that in California and Oklahoma, a victim of catfishing has a legal remedy even though their identity was not used for a commercial purpose. They can claim damages for the appropriation of their identity for non-patrimonial harm that ensues. The Californian and Oklahoman statutory appropriation claims are more parallel with the South African position because they are limited to instances where facets of identity are used for commercial purposes.³⁰² The statutory claim would apply in cases such as *W v Atoll Media*. In that case, the court held that using a child's image in a magazine sold for profit amounted to appropriating identity for a commercial purpose.³⁰³ The statutory claim would also apply to instances such as *Kumalo v Cycle Lab*.³⁰⁴

In South Africa, a victim of catfishing would not be able to bring a claim for the infringement of their identity by appropriation unless there was a commercial purpose for the appropriation. This formulation of the requirements for appropriation is an issue because catfishing does not always involve a commercial purpose. One could argue that the common law positions of the two states manifest the understanding that catfishing involves a disturbance of a person's enjoyment of their identity. Identity entitles an individual to prevent others from using it without consent, even if the use is not for a commercial purpose.³⁰⁵

The second difference is that Californian courts also acknowledge that some conduct is harmful because it is an assault on a person's peace of mind, and therefore, it is actionable.³⁰⁶ The South African common law bases its identity protection on the goal of respecting and protecting human dignity.³⁰⁷

4.5.2 False light

The third difference relates to the false light tort. The false light tort only extends protection against false impressions that a person of ordinary sensibilities would find highly offensive in

³⁰¹ See for example, *W v Atoll Media* [2010] 4 All SA 548 (WCC), *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ), *Cele v Avusa* [2013] 2 All SA 412 (GSJ) and *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C).

³⁰² Cal. Penal Code §528.5; OK. ST. T 12 §1450 (2).

³⁰³ *W v Atoll Media* para 49.

³⁰⁴ *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ).

³⁰⁵ Derzakarian 2017 *Loyola of Los Angeles Law Review* 757.

³⁰⁶ *Ibid.*

³⁰⁷ Greer 2017 *Indiana International and Comparative Law Review* 247.

California and Oklahoma.³⁰⁸ This standard is different from the South African common law position that requires that the use of a person's identity must have placed them in a false light. Dissimilarly, in *Kumalo v Cycle Lab* the court expressly stated that the impression created did not have to be degrading or humiliating or insulting.³⁰⁹ Illustrating that merely portraying a person in a false light would suffice to give rise to a claim for damages. One can argue that the US standard expresses the *de minimis non curat lex* rule that is followed in South Africa.

Another similarity that stands out is that in Oklahoma and South Africa injuring a person's personality right requires fault in the form of intention. A person cannot negligently infringe another person's right to identity.³¹⁰

4.6 Conclusion

In conclusion, some parallels can be drawn between the South African right to identity and the US privacy torts and statutory publicity claims, almost as if South African law derives its protection of identity from US law.³¹¹ However, the South African law of personality evolved and developed by recognising an independent right of identity with its own characteristics. US States still protect identity features under privacy, but the rise of publicity rights has expanded the protection afforded to a person's identity. There is room for improvement in South African law protecting identity against catfishing. A victim of catfishing in the US is not short of legal remedies as they have multiple to choose from and may use more than one simultaneously. South African law is lacking since a victim only has one remedy in the common law, which is not fully suited to address the unique problem that is catfishing.

³⁰⁸ *Grogan v. Kokh, LLC*, 1030; *Flores v. Von Kleist*, 1259; Derzakarian 2017 *Loyola of Los Angeles Law Review* 758.

³⁰⁹ *Kumalo v Cycle Lab* para 31.

³¹⁰ Chapter 3 para 3.1.1.2; *Colbert v. World Pub Co.*, 292.

³¹¹ *O'Keeffe v Argus Printing and Publishing Co* 249B-C; *Universiteit van Pretoria v Tommie Meyer Films* 386H; *Grütter v Lombard* para 7.

CHAPTER 5: APPLYING PRIVATE INTERNATIONAL LAW TO CATFISHING ON SOCIAL MEDIA

5.1 Introduction

The borderless nature of internet communications and social networking platforms connect people from different countries. Social networking platform users can connect with users from different countries expanding their social network's geographical reach.¹ The agreements users enter with social networking service providers are transnational, implying that the parties to the contracts are from different countries.² One of the disadvantages of global interactions is that harmful conduct can affect people in different locations. The lack of urgency in responding to catfishing contributes to the impression that it is harmless and not serious. Therefore, people with deceitful intent perceive access to many identities and user content as an advantage and opportunity to catfish.³

Deceitful people are motivated by the high level of trust users display online and the unlikelihood of victims becoming aware of a catfishing scheme. This motivation is even stronger if the victim and the deceiver are from different countries. Loubser and Midgely suggested that technology changed the medium through which people committed delicts.⁴ Similarly, Forsyth argued that technological advancements and online delicts make private international law an essential consideration in discussions surrounding modern communications.⁵ Even if the victim and perpetrator are in different countries, catfishing attracts legal consequences because private international law principles address these circumstances.

Therefore, this chapter engages with principles of private international law in respect of delict⁶ since the best remedy for a South African victim of catfishing lies in delict.⁷ It also considers private international law in respect of contractual disputes because a user has a contractual

¹ Chapter 1 para 1.1.

² RP Youngblood "Choice Of What; The New York Court of Appeals Defines the Parameters of Choice-of-Law Clauses in Multijurisdictional Cases" (2018) 82 *Albany Law Review* 1241 at 1241.

³ Chapter 2 para 2.2.1

⁴ Loubser and Midgley *et al The Law of Delict* 16.

⁵ J Kigunndu "Choice of Law in Delict: The Rise and Rise of the *lex loci delicti commissi*" (2006) 18 *South African Mercantile Law Journal* 97 at 98; FE Marx "At Last a South Africa Proper Law of Delict *Burchell v Anglin* 2010 3 SA 48 (ECG)" (2011) *Obiter* 224 at 224; Forsyth *Private International Law* 349.

⁶ This discussion began in chapter 2 under para 2.5.3.

⁷ P Terblanche "*Lex fori* or *lex loci delicti*? The Problem of Choice of Law in International Delicts" (1997) *Comparative and International Law Journal of Southern Africa* 243 at 243.

relationship with the Internet service providers (ISP).⁸ This thesis defined the social networking platforms' terms of service (TOS) as a contract between the ISP and the user in chapter two. Therefore, this chapter considers the forum-selection clauses in those contracts that apply in the event of a dispute. Private international law, also known as conflict of laws,⁹ governs the application of foreign law to legal disputes between individuals. This body of law aims to resolve private law disputes that require the application of foreign law.

In some instances, a forum may find it appropriate to apply the law of another country to resolve a dispute instead of using its own law.¹⁰ The law of the land in which the forum is presiding is *lex fori*, and foreign law is *lex causae*.¹¹ Private international law is not universal in that its principles vary in each country. As such, South African conflict of laws rules differ from those the USA subscribes to.

5.2 Private international law in contracts

Considering catfishing as a global problem requires a consideration of the victim's relationship with the catfish and their relationship with the ISP. The statutory immunity afforded to ISPs creates a challenge for victims of catfishing who wish to seek legal recourse for having their identities used without consent through the platforms.¹² Chapter two demonstrated that to become a member of a social networking platform, a person enters an agreement with the ISP. The user agreement contains terms governing the use of the platform. The agreement also contains a dispute resolution clause setting out how disputes will be resolved. Cognisant of the global nature of social networks and their multijurisdictional users, the clause further provides which law will govern the agreement and any dispute arising.¹³

The legal position regarding conflict of laws of contracts in the US is that the parties to a contract will usually indicate their intention regarding the law that governs the contract.¹⁴ Therefore, where parties have indicated such an intention, the contract will be governed

⁸ PGJ Kroonhof "The Enforceability of Incorporated Terms in Electronic Agreements" (2012) 2 *Speculum Juris* 41 at 42.

⁹ FK Juenger "Private International Law or International Private Law" (1995) 5 *The Kings College Law Journal* 45 at 45; M Dendy *LAWSA* Vol 7(1) 3ed (2019) "Conflict of Laws" para 306.

¹⁰ Reference to "forum" means a court or tribunal or any legal body established for the purpose or tasked with hearing a legal dispute concerning private international law.

¹¹ Forsyth *Private International Law* 2.

¹² ISP immunity provision in the USA is in §230 of the CDA and in South Africa ISP immunity is in s 73 of Act 25 of 2002. Chapter 2 para 2.5.

¹³ Kroonhof 2012 *Speculum Juris* 42.

¹⁴ Restatement (Second) of Conflict of Laws §186 (1971), where the parties do not choose a governing law then §188 of the Restatement prescribes how a court must determine the applicable law through the most significant relationship approach. M Gruson "Governing Law Clauses Excluding Principles of Conflict of Laws" (2003) 37 *The International Lawyer* 1023 at 1023.

according to the parties' intention.¹⁵ The parties' intention is unenforceable where contractual performance is unlawful,¹⁶ or an unequal bargaining power between the parties exists. The public policy doctrine does not allow a court to enforce a contract that violates the public policy of *lex fori*. It follows that a contract that contravenes a state's constitution, legislation or precedents will be unenforceable.¹⁷

In South Africa, the courts use the "proper law of the contract" approach.¹⁸ The proper law of the contract is the law of the country that the contracting parties intended and agreed will govern the agreement between them.¹⁹ If there is no provision on choice of law and the contract was concluded in another country and performed in another, a court will presume that the proper law is the country of performance.²⁰ The proper law methodology determines the nature, effect, and interpretation of the contract. Like US law, contracts that are illegal to perform because they contravene *lex fori* or contradict the public policy of *lex fori* are unenforceable.²¹

5.2.1 Social media policies on the choice of law

5.2.1.1 Facebook and Instagram

Following strong recommendations and directions from the European Commission, Facebook amended their TOS for more transparency and accommodating users.²² As a product of the Facebook company,²³ Instagram's TOS reiterate the same message.²⁴ The first part of Facebook and Instagram's clause on disputes provides that:

"If you are a consumer, the laws of the country in which you reside will apply to any claim, cause of action or dispute that you have against us that arises out of or relates to these Terms

¹⁵ J Gustafson and KL Schultz 16 *American Jurisprudence* 2d "Conflict of Laws" § 72; *Developers Small Business Inv. Corp. v. Hoeckle*, 395 F.2d 80, 83 (C.A.Cal. 1968).

¹⁶ According to Gustafson and Schultz 16 *American Jurisprudence* 2d "Conflict of Laws" § 73, the unlawfulness of contractual performance is not limited to *lex fori* and includes contracts concluded with the intention of violating the laws of another country.

¹⁷ Gustafson and Schultz 16 *American Jurisprudence* 2d "Conflict of Laws" § 73.

¹⁸ Forsyth *Private International Law* 316.

¹⁹ *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W) 31A.

²⁰ In *Guggenheim v Rosenbaum* (2) 31A, Trollip J referred to the law of the performance country as *lex loci solutionis*.

²¹ Dendy *LAWSA* Vol 7(1) para 362.

²² European Commission "Facebook Changes its Terms and Clarify its Use of Data for Consumers Following Discussions with the European Commission and Consumer Authorities" (2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048 (accessed 22 September 2021); N Lomas "Facebook Agrees to Clearer T&Cs in Europe" (2019) *Tech Crunch* <https://techcrunch.com/2019/04/09/its-free-youre-the-product/> (accessed 22 September 2021).

²³ "What are Facebook Products" <https://www.facebook.com/help/1561485474074139/?ref=share> (accessed 7 May 2021); <https://help.instagram.com/581066165581870> (accessed 20 September 2021).

²⁴ <https://help.instagram.com/581066165581870> (accessed 20 September 2021).

or the Facebook Products, and you may resolve your claim in any competent court in that country that has jurisdiction over the claim."²⁵

The first notable aspect of this clause is its reference to users as "consumers". Since Facebook and its Products offer e-commerce services, there are additional agreements for users depending on the type of user.²⁶ Users that use Facebook and its Products to conduct commercial or business activities, including advertising and selling goods or services, are subject to an additional set of terms.²⁷ Moreover, Facebook has a business in publishing adverts for third parties. For these reasons, the TOS implicitly differentiate between different users. One infers that the private user who does not use the business features on the platforms is a "consumer" since they are the ones to whom Facebook displays adverts.

The second notable aspect of this part of the clause is that users can approach the courts in their own countries regarding disputes against Facebook. The laws of their countries apply to the claim they bring relating to or arising from the TOS. It is submitted that Facebook included this in its TOS because on multiple occasions where users brought claims against the ISP in their own countries, and the courts disregarded the exclusive jurisdiction of California.²⁸ Applying the rules of interpretation highlighted in chapter two²⁹ to the clause, one can infer that it allows a South African user to institute action regarding or arising from the TOS against Facebook in a South African court. According to the text-based approach,³⁰ South African law will apply to the claim.

Significantly, the TOS refer to users as "consumers", giving the impression that an electronic transaction occurs in the relationship between a user and the ISP. This impression implies that

²⁵ Facebook Terms of Service Additional Provisions 4. Disputes <https://www.facebook.com/legal/terms/update> (accessed 20 September 2021); Instagram "Terms of Service" <https://help.instagram.com/581066165581870> (accessed 20 September 2021).

²⁶ Businesses use social media platforms to communicate with their consumers, advertise directly and sell to users. M Groen "Swipe Up to Subscribe: The Law and Social Media Influencers" (2020) 21 *Texas Review of Entertainment and Sports Law* 113 at 114 – 118 notes that business have changed from the traditional methods of advertising and now rely on their relationships with third parties to advertise on social media. The third parties are popular users on platforms like Instagram known as 'influencers'. Influencers accept money or gifts in exchange for word-of-mouth marketing online.

²⁷ Facebook Commercial Terms https://www.facebook.com/legal/commercial_terms (accessed 5 October).

²⁸ See for example, R Lister "Advocate General Considers Jurisdictional Questions in Relation to Privacy and Data Protection Claims Against Facebook" (2018) 29 *Entertainment Law Review* 66 who discusses *Schrems v Facebook Ireland Ltd* (C-498/16) EU:C:2017:863; [2017] 11 WLUK 294 (AGO) where the Austrian Advocate General decided that Austrian courts had jurisdiction over consumers' claims against Facebook. In another case a court in Paris disregarded the jurisdiction selecting clause in Facebook's TOS. See <https://www.chicagotribune.com/business/ct-facebook-france-nude-painting-20160212-story.html> (accessed 5 October 2021).

²⁹ Chapter 2 para 2.4.1.1.

³⁰ C Botha *Statutory Interpretation An Introduction for Students* 5ed (2012) 92.

chapter 7 of the ECT Act applies to the relationship.³¹ In terms of the ECT Act, Facebook is an intermediary in consumer transactions online.³² It provides e-commerce and advertising services to its professional users and third-party businesses that are not users on its platforms.

Chapter 7 of the ECT Act deals with consumer protection for electronic transactions, excluding the listed transactions.³³ The ECT Act defines a consumer as a natural person who enters or intends to enter an electronic transaction as an end-user of the goods or services offered by a supplier.³⁴ Regarding the application of foreign law to electronic transactions, section 47 of the ECT Act provides that the consumer protection provisions in chapter 7 apply irrespective of chosen law in the agreement. Agreements excluding the application of the rights provided in chapter 7 of the ECT Act are void.³⁵

The clause allowing users to launch legal proceedings against the ISP in the countries where they reside is commendable because choosing the law of the country of the ISP's incorporation and a forum in the same country creates an undue hurdle for users to access the courts. Effectively, disallowing users the ability to approach the courts in their own countries only protected the ISP. Consequently, Facebook's position allowing users to approach courts in their country of residence aligns with section 47 of the ECT Act.

The second part of the clause then provides that "in all other cases", a user grants exclusive jurisdiction to resolve a claim arising from or related to the TOS to the US District Court for the Northern District of California or state courts in San Mateo County. According to the clause, the laws of California govern the agreement between the user and the platform ISP. The claim and the terms are governed by the laws of California, disregarding the conflict of law's provisions.³⁶ Moreover, a user submits to the personal jurisdiction of the mentioned courts to litigate the claim.

This part of the clause begins with the phrase "in all other cases", which suggests that in instances where a user brings a dispute against the ISP are solely subject to the jurisdiction of the user's domicile. In terms of the text-based approach to interpretation, the clause provides that in instances where the ISP brings a claim against the user, Californian law will govern the

³¹ Act 25 of 2002.

³² S 1 of Act 25 of 2002.

³³ S 42 (1) and (2) of Act 25 of 2002.

³⁴ S 1 of Act 25 of 2002.

³⁵ S 48 of 25 of 2002.

³⁶ Facebook Terms of Service Additional Provisions 4. Disputes <https://www.facebook.com/legal/terms> (accessed 20 September 2021); Instagram Terms of Service <https://help.instagram.com/581066165581870> (accessed 20 September 2021).

claim and the TOS. The dispute will be resolved by Californian courts, in which case the user submits themselves to the court's personal jurisdiction.³⁷ The exclusion of private international law provisions and the inclusion of personal jurisdiction suggest that in litigation, a user is precluded from arguing a lack of jurisdiction of the Californian courts on any grounds.³⁸

Essentially, if a user is a plaintiff, they can institute an action in their own country and a competent court applying *lex fori*. Conversely, if the user is a defendant, the hearing will be conducted in California by Californian courts applying Californian law. The clauses only provide a dispute resolution mechanism for the contractual and vertical relationship between users and the ISP. The clauses do not provide which country's courts have jurisdiction or laws apply in disputes between users. The reason for not providing for user disputes is that the cause of action between users is not contractual but tortious or delictual. Consequently, the legal relationship between the parties only begins when a person commits a delict or tort. It follows that the parties cannot pre-empt which law will govern the relationship.³⁹

Therefore, a court would not apply this clause in a catfishing case because catfishing is a delictual matter, and the clause forms part of a contract between the users and the ISP. The choice of law clause in the TOS does not apply to the horizontal relationship between users. Users would have to rely on the private international law rules on delict in their respective countries. A person could argue that catfishing amounts to a breach of the TOS. Thus, a catfishing dispute between users is a dispute on the TOS triggering the application of the chosen law and forum. However, this argument would not sustain since a catfishing claim stems from a violation of identity and not a breach of contract. Moreover, the provision states that it applies to the relationship between the user and the ISP.

Interestingly, the Instagram TOS further provide that without prejudice to the Facebook company, a user agrees that the company has the sole discretion to claim against a user. The claim may be related to abuse, interference or engagement with products in unauthorised ways. Moreover, A competent court where the user resides may hear the claim.

³⁷ Personal jurisdiction refers to a court's power to exercise authority over a litigant where the court sits. *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement* 326 U.S. 310, 316, S. Ct. 154, 90 L.Ed. 95 (1945).

³⁸ M Gruson "Governing Law Clauses Excluding Principles of Conflict of Laws" (2003) 37 *The International Lawyer* 1023 at 1025.

³⁹ Younghood 2018 *Albany Law Review* 1247.

5.2.1.2 Twitter

Twitter's TOS provide that California's laws apply to the contractual agreement between a user and the platform provider, excluding the choice of law provisions.⁴⁰ A federal court or any courts in the San Francisco County of California will hear any dispute relating to the contract or services between a user and Twitter. A user consents to the personal jurisdiction of the courts and waives objection to the inconvenience of the forum.⁴¹ The inclusion of this provision precludes a litigant from challenging the jurisdiction of the chosen courts.

Unlike Facebook and Instagram, Twitter's TOS do not provide for foreign jurisdiction. According to the TOS, a user can only bring their claim against Twitter to courts in California. Californian law alone applies to the TOS. Like Facebook and Instagram's TOS, Twitter's TOS regulate the relationship between the ISP and the user and do not provide for disputes between users. It follows that the law of contract would not govern a dispute between users, rendering the TOS irrelevant to the dispute between users insofar as they determine governing law and select a forum in a delictual claim.

5.2.1.3 Tinder

Tinder's user agreement is different from the surveyed platforms because it prescribes arbitration as the dispute resolution mechanism.⁴² The arbitration clause in Tinder's TOS states that users waive their right to resolve disputes or claims arising from or relating to the agreement or the service through the courts.⁴³ Instead, a user submits themselves to binding arbitration in the event of a dispute. The arbitration will be dealt with on written submissions unless the user or Tinder invoke the right to make oral submissions to the arbitrator.

Tinder's TOS has an exception to the exclusive arbitration. The effect of the exception is that the user or the company can approach a small claims court to resolve the dispute. The user also waives their right to proceed in a class action, class arbitration, or other representative action against Tinder.⁴⁴ The arbitration clause further provides that any court of competent jurisdiction may hear the proceedings to enforce the arbitration agreement. If the arbitration

⁴⁰ Twitter "6. General" <https://twitter.com/en/tos> (accessed 20 September 2021). Note that Twitter provides a different set of terms of service for users residing in Europe.

⁴¹ Twitter "6. General".

⁴² Tinder "15. Arbitration, Class Action Waiver and Jury Waiver" <https://policies.tinder.com/terms/intl/en> (accessed 20 September 2021). Note that this provision does not apply to members who live within the European Union or the European Economic Area.

⁴³ Tinder "15. (1) Arbitration, Class Action Waiver and Jury Waiver".

⁴⁴ Tinder "15. (2) Arbitration, Class Action Waiver and Jury Waiver".

agreement is unenforceable, a user may commence litigation against Tinder in federal or state courts in Dallas County, Texas.⁴⁵

5.2.2 Analysis

In chapter two, this thesis established that ISPs do not have any legal or contractual obligation to address catfishing or actively address infringements of their terms. A user also cannot force an ISP to respond desirably to reports of impersonation since the ISP has the discretion to decide whether conduct infringes their TOS or not.⁴⁶ However, one infers from this understanding that if a user is unsatisfied with the response following an impersonation report, they can apply the dispute resolution clause. Therefore, a user can approach a court in their own country seeking an order compelling a take-down.⁴⁷

Users may approach a court in their country to resolve a dispute, and the law of their country applies to the dispute against Facebook. One assumes that Facebook cannot challenge the court's jurisdiction in a user's country. In all other instances, US courts located in California have jurisdiction over the claim and the user, and the law of California will apply to the dispute and govern the TOS. When appearing in Californian courts, the TOS preclude a user from arguing on the jurisdiction of the Californian courts.

Unlike Instagram and Facebook, a Twitter user does not have the liberty to approach their own country's court for legal recourse against the ISP. Instead, they are bound to the exclusive jurisdiction of the selected forum. Twitter's TOS also provide that Californian law governs the claim and the TOS. Under Twitter, Facebook, and Instagram's TOS, users cannot challenge the Californian courts' jurisdiction because they agreed to submit themselves to the personal jurisdiction of those courts. Moreover, the TOS disregard the choice of law rules.

Tinder users are limited to exclusively addressing their claims against the company through arbitration. Alternatively, they may approach a small claims court. Tinder's policy is commendable because it considers the financial inequality between users and companies since civil litigation can be expensive.⁴⁸ The small claims court approach also limits the value of damages a user can claim against the company to the maximum amount allowed in a small claims court in Texas.

⁴⁵ Tinder "15. (3) Arbitration, Class Action Waiver and Jury Waiver".

⁴⁶ Chapter 2 para 2.4.1.2.

⁴⁷ For example, in chapter 2 para 2.5.1 it was noted that ISP statutory immunity in South Africa does not override court orders.

⁴⁸ Manta 2019 *Wake Forest Law Review* 244; Clanton 2014 *Cardozo Journal of Conflict Resolution* 340.

The TOS of the surveyed platforms imply that diversity jurisdiction applies. Diversity jurisdiction is a state-federal court's competence to hear cases that do not involve a federal question.⁴⁹ This jurisdiction applies in instances where the parties to the dispute are from different states or countries. The implied recognition of diversity jurisdiction supports the competence of the selected courts since the users of these platforms are citizens of the respective US states and citizens of other countries. The effect of diversity jurisdiction is that the court will apply *lex fori*.⁵⁰ Accordingly, the court will apply that state's rules on choice of law.

It follows that even in the case of arbitration agreements, as Tinder has contracted for, a court would apply *lex fori* to decide which law applies to the arbitration.⁵¹ This rule indicates that since a user consented to the jurisdiction of the courts in Texas to enforce the arbitration agreement, a court in Texas would apply the choice of law rules of the state of Texas. In Texas, the position regarding arbitration is that arbitration stems from a contract, and the requirement to arbitrate is found in a valid arbitration agreement.⁵² The general rule is that the arbitration agreement binds parties, and a court may compel parties to arbitrate if they have entered into a valid arbitration agreement.⁵³

One challenge that surfaces in cases of catfishing is that the person behind the account might be anonymous and their identity hard to ascertain. To unmask that person's identity, a user will have to institute action against the company to compel them to make the information available to a litigating victim. To compel Facebook and Instagram to provide information about a catfish user, the victim of catfishing can apply for the order requesting Facebook and Instagram to disclose the information in a court in their own country.

Facebook's privacy policy allows it to share user information with regulators or law enforcement on a good faith belief that the law requires them to respond to legal requests. Legal requests include a court order. They also recognise that the legal request may stem from a jurisdiction outside the USA. The policy also highlights that they may comply with a legal

⁴⁹ This principle is known as the Erie Doctrine and stems from *Erie R. Co. v. Tompkins*, 304 U.S. 64 (U.S. 1938).

⁵⁰ *Ferguson v. Trans World Airlines, Inc.*, 135 F.Supp.2d 1304, 108 (N.D.Ga. 2000); *Sosa v. Onfido, Inc.*, 8 F.4th 631, 637 (7th Cir. 2021).

⁵¹ *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287 (3d Cir. 2021) 4.

⁵² *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, 2021 WL 3624718 (Tex. App.- Hous. (1 Dist.), 2021) 3.

⁵³ *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, 3.

request on a good faith belief that it is necessary to prevent, detect or address fraud, a breach of their TOS or policies, or other illegal activity.⁵⁴

Similarly, without disregarding its privacy policy, Twitter states that it may disclose a user's data if they believe it is reasonably necessary to comply with law, regulation, legal process, or government request. The purpose of disclosing the data is to protect the safety of any person or the platform's integrity, including preventing abuse or addressing fraud or protecting the rights or property of the ISP or the platform users.⁵⁵ Under Twitter's guidelines for law enforcement, a person must send requests for user account information to the Twitter offices in California or Dublin, Ireland. Furthermore, they will only disclose information about users following a valid court order issued in compliance with the applicable law.⁵⁶

Like the other platforms, Tinder also provides for the disclosure of user information. Tinder's privacy policy states that Tinder may disclose user information if reasonably necessary to comply with a legal process, such as a court order, government or law enforcement investigation or other legal requirements. Additionally, Tinder may share a user's information if such disclosure will mitigate the ISP's liability in a lawsuit or as necessary to protect users' legal rights and to prevent or act regarding wrongdoing.⁵⁷

Following the correct legal processes, a victim of catfishing seeking legal recourse against the person behind the catfish account can approach the ISPs to provide the information necessary to identify the person who impaired their rights. The ISPs are willing to comply with court orders directing them to reveal this information pursuant to litigation.

5.3 Private international law in delicts

5.3.1 The South African position

Private international law establishes a forum's jurisdiction,⁵⁸ selects the relevant substantive law applicable to the dispute and recognises and enforces foreign courts' judgments.⁵⁹ In South

⁵⁴ Facebook Data Policy "How do we respond to legal requests or prevent harm?" <https://www.facebook.com/about/privacy> (accessed 5 October 2021); Instagram Data Policy <https://help.instagram.com/519522125107875> (accessed 5 October 2021).

⁵⁵ Twitter Privacy Policy "Information we Share and Disclose" <https://twitter.com/en/privacy> (accessed 5 October 2021).

⁵⁶ Twitter Guidelines for Law Enforcement "Requests for Account Information" <https://help.twitter.com/en/rules-and-policies/twitter-law-enforcement-support> (accessed 5 October 2021).

⁵⁷ Tinder Privacy Policy "6. How We Share Information" <https://policies.tinder.com/privacy/intl/en/how-we-share-info> (accessed 6 October 2021).

⁵⁸ Jurisdiction of the forum speaks to the competence of legal body tasked with hearing the dispute, it may be a court or tribunal, to hear and decide the matter.

⁵⁹ Dendy *LAWSA* Vol 7(1) para 306.

Africa, the courts apply a jurisdiction-selecting approach to deciding cases falling under delict in private international law.⁶⁰ According to this method, after establishing its competence to hear and decide the case, the forum must determine which country's law is applicable.⁶¹

The forum will practically decide which body of substantive law is applicable by characterising the issue and finding the connecting factor. The classification aspect involves categorising the legal matter by one of the various areas of law, delict being one of those areas. The linking element consists of selecting a connecting factor flowing from the chosen classification.⁶² A connecting factor is an external element that founds a connection between the legal dispute and a legal system.⁶³ It is well-established that *lex fori* determines the connecting factor.⁶⁴ In other words, the court hearing the matter will use its own law to determine the connecting factor because a court uses *lex fori* to determine the applicable law.⁶⁵

Generally, the substantive aspect of a private international law case is governed by *lex causae* and the procedural element is controlled by *lex fori*.⁶⁶ A case that sets out the South African legal position is *Burchell v Anglin*, which guides conflict of laws in delictual cases.

5.3.1.1 *Burchell v Anglin 2010 (3) SA 48 (ECG)*

The plaintiff was a sole proprietor operating a game reserve and hunting business in the Eastern Cape, South Africa. He made an income from providing services to international visitors. Cabelas was the plaintiff's booking agent in the USA and contributed significantly to the plaintiff's business success.⁶⁷ The defendant was a hotel renovator in Texas, USA.⁶⁸ As friends and business associates, the parties concluded multiple contracts to purchase different properties. Their relationship broke down, and litigation ensued.⁶⁹ One of the actions brought by the plaintiff was a claim for damages arising from defamation. The issue before the court

⁶⁰ Dendy *LAWSA* Vol 7(1) para 307.

⁶¹ Dendy *LAWSA* Vol 7(1) para 309.

⁶² According to Dendy *LAWSA* Vol 7(1) para 309, a court may choose from one of the following universal connecting factors: domicile or habitual residence, nationality, place where property is located, where the court sits. In contractual cases where the transaction occurred or where performance took place and the intention of the parties. In delictual cases, where delict was committed. Failing to find any of these connecting factors, the court may rely on the law of the jurisdiction with closest and most real connection to the case.

⁶³ *Ex Parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W) 728A.

⁶⁴ *Ex Parte Jones: In re Jones v Jones* 727H.

⁶⁵ Forsyth *Private International Law* 135

⁶⁶ Dendy *LAWSA* Vol 7(1) para 309.

⁶⁷ *Burchell v Anglin* para 88.

⁶⁸ *Burchell v Anglin* para 2.

⁶⁹ *Burchell v Anglin* paras 2 and 3 The plaintiff instituted five claims against the defendant and the defendant instituted a counterclaim against the plaintiff.

was the choice of substantive law applicable in determining the plaintiff's claim for damages arising from defamation.⁷⁰

The plaintiff's averments regarding the defamation claim were that the defendant made defamatory statements to Strickland, his cousin,⁷¹ intended to be shared with Cabelas. The defendant made the comments to Strickland in South Africa.⁷² The plaintiff averred that the purpose of the statements was to destroy the relationship between the plaintiff and Cabelas.⁷³ Consequently, the defamatory comments led to the decline in the plaintiff's business. In response, the defendant contended that no publication took place in South Africa,⁷⁴ but in fact, the publication took place in the USA, and the recipients were in the USA.⁷⁵

After clarifying evidentiary issues surrounding the statements, the court dealt with South African law regarding the conflict of laws. The court referred to *Rogaly v General Imports (Pty) Ltd*,⁷⁶ a defamation matter, where the English court applied the double actionability rule.⁷⁷ The court also noted another delict matter that relied on the same rule and was criticised for it.⁷⁸ The court then dealt with English law and briefly highlighted the gist of the double actionability rule as requiring a plaintiff to have a cause of action in *lex fori* and in the place where the delict occurred (*lex loci delicti*).⁷⁹ According to the rule, a defendant would not be liable if he had a defence under *lex fori* or *lex loci delicti*.

Crouse AJ noted the exception created in *Boys v Chaplin*⁸⁰ and *Red Seas Insurance Co Ltd v Bouygues SA*.⁸¹ The exception enabled departure from the general rule to avoid injustice because a dispute had to be dealt with under the law of the country most significantly connected to the parties and the cause of action.⁸² The effect of the exception was that a court could favour *lex fori* over *lex loci delicti*, or it could apply *lex loci delicti* if the claim was unactionable under

⁷⁰ *Burchell v Anglin* para 11.

⁷¹ *Burchell v Anglin* para 89.

⁷² *Burchell v Anglin* para 14.

⁷³ *Burchell v Anglin* para 15 and 89.

⁷⁴ *Burchell v Anglin* para 14.

⁷⁵ *Burchell v Anglin* para 15.

⁷⁶ 1948 (1) SA 1216 (C).

⁷⁷ *Burchell v Anglin* para 95 citing *Rogaly v Genral Import (Pty) Ltd* 1948 (1) SA 1216 (C).

⁷⁸ *Burchell v Anglin* para 96 citing *Minister of Transport, Transkei v Abdul* 1995 (1) SA 366 (N) 369H.

⁷⁹ *Burchell v Anglin* para 101.

⁸⁰ [1971] AC 356 (CA) ([1968] 1 All ER 283).

⁸¹ [1994] 3 WLR 926 (PC).

⁸² *Burchell v Anglin* para 101.

lex fori.⁸³ The double actionability rule applied to defamation cases, and other delicts were dealt with under *lex loci delicti*.⁸⁴

The court noted that courts in the US followed the choice of law rules as stated in the First Restatement.⁸⁵ For delicts, the courts used *lex loci delicti*, also referred to as the "last event doctrine". According to the rule, a defendant who acted carelessly in one state and caused a delict to a plaintiff in another state would be liable under the law of the latter state.⁸⁶ The court noted that, practically, the courts applied the approach used for contractual disputes to torts. That approach is the proper law of the court. However, *Babcock v Jackson* challenged the approach recorded in the Restatement.⁸⁷

The matter concerned a motor vehicle accident that occurred in Canada involving two US citizens from New York. The court, in that matter, held that *lex loci delicti* could lead to unjust results and applied the proper law of the court rule.⁸⁸ The rule replaced the rule that the applicable law was the *lex fori* in the state, which had the most significant relationship with the tort and the parties.⁸⁹ Not all the states followed the Restatement on the choice of law rules in respect of delicts. According to Crouse AJ, the US courts preferred a balancing approach whereby the courts assessed the factors that connected the delict to the law of the jurisdictions.⁹⁰

The court in the present matter chose to apply the jurisdiction-selecting method.⁹¹ This approach involved three steps: characterisation, selection, and application.⁹² The court characterised the dispute between the parties as defamation. The connecting factor in delictual matters is the place where the defendant committed the delict. The court resolved that the defendant published defamatory information to harm the plaintiff in Nebraska, USA.⁹³ It highlighted that it was trite in South African law that publication took place where the public

⁸³ *Ibid.*

⁸⁴ *Burchell v Anglin* para 106. Crouse AJ discussed the criticism against the double actionability rule and the development of the law at paras 102-105.

⁸⁵ *Burchell v Anglin* para 107.

⁸⁶ *Ibid.*

⁸⁷ 12 NY2d 473.

⁸⁸ *Burchell v Anglin* para 108.

⁸⁹ *Burchell v Anglin* para 109.

⁹⁰ *Burchell v Anglin* para 111.

⁹¹ *Burchell v Anglin* para 114.

⁹² *Ibid.*

⁹³ *Burchell v Anglin* para 117.

received the defamatory words. The Cabelas' employees were in Nebraska when they received the statement. Therefore, the *lex loci delicti* was Nebraska.⁹⁴

The court then explored whether *lex loci delicti* could adequately achieve a just result between the parties. To decide on this question, the court considered defamation law in Nebraska and South Africa.⁹⁵ In South Africa, the defamation law presumed that the publication of a defamatory statement was unlawful and intended to injure a person. The intention presumption spoke to a defendant's state of mind, whilst unlawfulness was a presumption of objective facts and law.⁹⁶ To escape liability, the defendant had to rebut either unlawfulness or fault by raising one of the established defences.

In Nebraska, a plaintiff established defamation by proving a publication of defamatory words to a third party, which was false and resulted in injury. The court noted that freedom of speech took precedence over reputation in the US. Therefore, the law of defamation swayed in favour of the defendant.⁹⁷ The court pointed out that this was in contrast to the South African position because US defamation law placed a burden on the plaintiff to prove the falsity of the statements or the defendant's intention.⁹⁸

The court found that Nebraska had a closer relationship to the parties and the delict than South Africa by using a balancing test.⁹⁹ The parties and the delict were connected to South Africa because the plaintiff was domiciled in South Africa, and his business was in South Africa. The subject matter of the defamation occurred in South Africa, and the plaintiff felt the effect of the defamation in South Africa.¹⁰⁰ Crouse AJ said that her finding that Nebraska was *lex loci delicti* was significant since most of the plaintiff's customers from the US were acquired through his booking agent Cabelas. The plaintiff's booking agent was also from the US. The plaintiff also operated a US bank account to accept payments and often visited the US.¹⁰¹ The court concluded that the law of Nebraska applied to the dispute.¹⁰²

According to this decision, the court selects the choice of law or *lex causae* in delictual disputes with reference to the *lex loci delicti*. The court in *Burchell v Anglin* conducted the enquiry into

⁹⁴ *Burchell v Anglin* para 118.

⁹⁵ *Burchell v Anglin* para 120.

⁹⁶ *Burchell v Anglin* para 120 relying on *Hardaker v Phillips* 2005 (4) SA 515 (SCA) 524 -525.

⁹⁷ *Burchell v Anglin* para 121.

⁹⁸ *Ibid.*

⁹⁹ *Burchell v Anglin* para 122 and 125.

¹⁰⁰ *Burchell v Anglin* para 123.

¹⁰¹ *Burchell v Anglin* para 124.

¹⁰² *Burchell v Anglin* para 130.

which law applies to the dispute under *lex fori*. The court applied the South African method of choosing the applicable law in delictual cases. First, the court characterised the issue; second, the court selected an appropriate connecting factor. The connecting factor, in this case, was *lex loci delicti commissi* because the court decided that the matter was delictual. Third, it applied the substantive law of the country it decided applied to the matter. The court used its determination of *lex loci delicti* as a point of departure because there was doubt about whether this formula alone could produce a just result.¹⁰³ Thereafter, the court had to ascertain which jurisdiction has the most significant connection with the delict and the parties and must apply the law of that jurisdiction.¹⁰⁴

5.3.2 The US position

The position in the USA regarding conflict of laws is set out in the Restatement of conflict of laws, as the court noted in *Burchell v Anglin*.¹⁰⁵ The Restatements of law are not binding and only restate the law as observed in the states. Initially, states subscribed to *lex loci delicti* to govern tort disputes.¹⁰⁶ However, many states rejected this rule because it was rigid and irrational.¹⁰⁷ California and Oklahoma are part of the states that opted to move away from the *lex loci* rule of choice of laws in delict cases.¹⁰⁸

5.3.2.1 California

California uses the government interest test to determine the law applicable to a delictual matter.¹⁰⁹ The government interest test is a three-stage inquiry. First, the court must determine whether the laws of the potential jurisdictions are the same or different. Second, suppose the laws of the two jurisdictions are different. The court must determine whether there is a true conflict by examining each jurisdiction's interest in applying its law to the specific case.¹¹⁰ Third, if a court finds that the laws of the relevant jurisdictions conflict, then the court must assess the strength of each jurisdiction's interest in applying its law.¹¹¹ The purpose of the assessment is to determine which jurisdiction's interest would be compromised if its policy was

¹⁰³ *Burchell v Anglin* para 118 -119.

¹⁰⁴ Marx 2011 *Obiter* 231; Dendy *LAWSA* Vol 7(1) (2019) para 366.

¹⁰⁵ *Burchell v Anglin* para 107.

¹⁰⁶ *Brickner v. Gooden*, 525 P.2d 632, 636 (Okla. 1974).

¹⁰⁷ *Brickner v. Gooden*, 637.

¹⁰⁸ *Reich v. Purcell*, 67 Cal.2d 551, 555 (Cal. 1967); *Brickner v. Gooden*, 637.

¹⁰⁹ *Cover v. Windsor Surry Company*, 2016 WL 520991 (N.D.Cal., 2016).

¹¹⁰ According to MH Hoffheimer "California's Territorial Turn in Choice of Law" (2015) 67 *Rutgers University Law Review* 167 at 168, true conflict is present when two or more states have a governmental interest in the application of their laws to the matter. False conflicts exist where one state has an interest in the application of its law to the case.

¹¹¹ *Grace v. Apple, Inc.*, 328 F.R.D. 320, 343- 344 (N.D. Cal. 2018).

subordinate to the other. The outcome of this assessment is that the court would have to apply to the law of the country or state that would be significantly disadvantaged if its law were not applied.¹¹²

The Californian Supreme Court highlighted that some jurisdictions are interested in regulating tortious conduct within their borders under the government interest analysis.¹¹³ In other words, the place of wrong has a "predominant interest" in applying its law to conduct that occurs in its territory.¹¹⁴ The place of wrong is where the last event necessary to establish the actor's liability occurred.¹¹⁵

5.3.2.2 Oklahoma

In tort disputes, courts in Oklahoma rely on the significant relationship methodology of choice of law.¹¹⁶ The principle is the law of the state with the most significant relationship to the cause of action, and the parties must be applied.¹¹⁷ The court determines the significant relationship by considering where the injury occurred, where the conduct resulting in the injury occurred, where the parties live, their nationality, place of business or incorporation, and where the relationship occurred.¹¹⁸

Similar to states in the US, South African courts do not accept that *lex loci delicti* would bring about a just result. However, unlike some US states, it has not abandoned it completely. South Africa uses a balanced approach to delictual conflict of laws involving determining the *lex loci delicti* and the most significant relationship test. California relies on the government interest approach, and partially similar to South Africa, Oklahoma uses the significant relationship approach in delict cases.

5.3.3 Application in catfishing cases

5.3.3.1 South African victims of catfishing

Practically, a South African victim of catfishing can approach a competent court in South Africa to claim damages under the *actio iniuriarum*.¹¹⁹ The basis for the claim is that the

¹¹² *Cover v Windsor Surry Company*, 6.

¹¹³ *Offshore Rental Company, Inc. v. Continental Oil Company*, 22 Cal.3d 157, 168 (Cal. 1978). In this case the Supreme Court held that Louisiana had a significant interest in the application of its tort law over the law of California.

¹¹⁴ *Grace v. Apple, Inc.*, 348.

¹¹⁵ *Ibid.*

¹¹⁶ *Martin v. Gray*, 2016 OK 114, 385 P.3d 64, 67; *Key v. Exxon Mobil Corporation*, CIV-19-424-BMJ (E.D. Okla. 2020) 3.

¹¹⁷ *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974).

¹¹⁸ *Martin v. Gray*, 67.

¹¹⁹ Chapter 3 para 3.4.1.1.

defendant infringed the plaintiff's common law right to identity by portraying them in a false light or by appropriating their identity for commercial gain. The defendant used the plaintiff's images without consent to create a fake account on a social networking platform.¹²⁰ If the plaintiff knows the defendant's identity and is South African, litigating this matter would be straightforward. However, a procedural challenge arises for the plaintiff if they do not know the defendant's identity.

To overcome this challenge, a plaintiff has to approach a court for an order compelling the relevant ISP to disclose identifying information regarding the person behind the catfish account. Upon the ISP's disclosure, a challenge arising is discovering that the defendant is from another country. Private international law rules will help a plaintiff overcome this challenge. *Burchell v Anglin* sets the precedent on which law applies in delictual cases where the plaintiff and the defendant are in different countries. In South Africa, as a starting point, the court must determine the *lex loci delicti*.¹²¹ The court then weighs the *lex loci delicti* against the jurisdiction with the most significant connection to the parties and the matter.

A court determines *lex loci delicti* by referring to where the defendant committed the delict, or where the delict's effect was felt. A significant connection is established based on the jurisdiction most strongly connected to the parties and the delict.¹²² The *lex loci delicti* influences the significance of the connection jurisdiction has with a matter and the parties. Accordingly, if the delict occurred in South Africa, that would weigh strongly in favour of the application of the South African law on the matter. However, in making this analysis, the court must consider where the defendant is domiciled.

5.3.3.2 US victims of catfishing

Unlike South African victims of catfishing, victims from California and Oklahoma have multiple remedies at their disposal to protect and enforce their identity against catfishing. Both states provide recourse for online impersonation or catfishing in the statute. A victim of catfishing from Oklahoma may base their claim for damages on the defendant's contravention of §1450 and §1449(A) or §1450 and the common law false light invasion of privacy.¹²³ Under §1450 a plaintiff has to show that the defendant used their image without consent to harm them through social media. Under §1449(A), the plaintiff has to show the defendant invaded their

¹²⁰ Chapter 3 para 3.3.3.

¹²¹ Para 5.3.1.

¹²² *Burchell v Anglin* para 122 and 125.

¹²³ Chapter 4 para 4.4.5.

right of publicity by publishing their photographs without consent for the defendant's benefit regardless of whether the benefit was commercial.¹²⁴ The court may grant the plaintiff injunctive relief or damages suffered from having their identity appropriated.

In Oklahoma, a plaintiff seeking to rely on the false light invasion of privacy must prove that the defendant made a false statement, representation, or imputation about them and published that information. The defendant falsely represented the plaintiff by attaching their picture to the fake account and publishing it on social media. The plaintiff also has to show that the defendant's conduct portrayed them in a false light, which was highly offensive to the reasonable person and suffered harm.¹²⁵

In civil litigation, there must be a plaintiff and a defendant. If the plaintiff does not know who the defendant is, they may approach a court to direct the relevant ISP to reveal any information about the user behind the account. If that user is not in Oklahoma, a court must apply Oklahoma's conflict of laws rules to assess which state or country has the most significant relationship to the parties and the tort.¹²⁶ The court determines the most significant relationship by assessing where the injury occurred, where the parties live, where the defendant performed the conduct causing the injury, the nationality, place of business and lastly, where the relationship between the parties occurred.¹²⁷ As stated, the parties to a tort usually do not have a relationship before the tort. The legal connection between them begins with the tort.

Like Oklahoman victims of catfishing, Californian victims have multiple remedies available. A Californian victim of catfishing can approach a court in their state seeking damages arising from contravention of §528.5, §3344 or seeking damages through the privacy torts.¹²⁸ Under §528.5, a plaintiff has to show that the defendant impersonated them through an electronic means by creating an account on a social networking platform to harm or threaten another person.¹²⁹ Under §3344, a plaintiff must show that the defendant used their identity without consent for their commercial benefit and suffered harm due to the appropriation.

Under the common law, the privacy misappropriation tort has the exact requirements as §3344.¹³⁰ A plaintiff may also claim damages for the false light invasion of privacy. To succeed in this claim, the plaintiff must show that the defendant publicised information about them to

¹²⁴ Chapter 4 para 4.4.2.

¹²⁵ *Grogan v. Kokh, LLC*, 1028.

¹²⁶ Para 5.3.2.2.

¹²⁷ *Martin v. Gray*, 2016 OK 114, 385 P.3d 64, 67.

¹²⁸ Chapter 4 para 4.3.5.

¹²⁹ Chapter 4 para 4.3.1.

¹³⁰ *Cross v. Facebook, Inc.*, 208- 209.

one or more and presented false information as factual, creating a false impression about the plaintiff.¹³¹ Moreover, a plaintiff must prove to the court that the people who receive the information would understand the information as implying something highly offensive about the plaintiff.

If a plaintiff finds that the defendant is not from California, the court must apply the Californian conflict of laws rules. California uses the government interest methodology to conflict of laws. Under this approach, the court determines whether the laws of California and the defendant's jurisdiction have any commonalities. If the laws are different, the court must assess whether both jurisdictions have a substantial governmental interest in having their laws protecting identity applied. The court must apply the law of the jurisdiction, which will be significantly disadvantaged if its policy is ignored.¹³²

It is practically possible for a victim of catfishing to seek legal recourse against a person who is not in the same country and used their pictures to catfish. Private international law rules provide for these circumstances even in cases involving social media. South African law even allows litigants to serve court processes through electronic means such as Facebook or email.¹³³ Despite people using social media to injure others, social media helps to overcome the distance challenge in litigation.

5.4 Conclusion

In conclusion, if a user wants to institute action against an ISP, the TOS users sign to use the service select the forum and the law governing the agreement. Such pursuits would be challenging and expensive if the users are not US citizens since the platforms' chosen applicable laws are of US states. Fortunately, Facebook and Instagram allow users to bring a claim against the ISP in a competent court in their own country. However, the other platforms subscribe to the exclusive jurisdiction of US courts and law. The TOS of social networking platforms do not provide for disputes between users. Therefore, if a delictual dispute arises between users, they can approach the courts of their own countries to assert their rights and seek recourse. A victim of catfishing litigating against the catfish may obtain any information required about the identity of the catfish from the ISPs through a court order.

¹³¹ *Solano v. Playgirl, Inc.*, 1082.

¹³² Para 5.3.2.1.

¹³³ *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD) and Rule 4A of Uniform Rules of Court.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

Catfishing is unacceptable online conduct that negatively affects aspects of a person's personality. There is a lack of academic material analysing the legal repercussions of catfishing in South Africa. As such, this thesis set out to determine whether South African law offers protection against catfishing, ascertain the remedial action available to victims of catfishing, and determine whether the protection offered in South Africa is adequate. The thesis was conducted as desktop research to analyse catfishing, catfishing on social media, and the right to identity to achieve these goals. It also undertook a comparative study of the law in two US states, California, and Oklahoma, to assess the adequacy of the right to identity and its remedies to victims of catfishing in South Africa. Finally, the thesis explored the role of public international law in catfishing schemes involving users residing between South Africa, California, and Oklahoma.

Catfishing is a type of impersonation and a manifestation of freedom of expression occurring on social media.¹ This thesis limited the analysis of catfishing to the social networking platforms Facebook, Instagram, Twitter, and Tinder. According to the terms of service of the four platforms, users may not impersonate another person. The platforms have mechanisms dedicated to addressing infringements of the terms of service and also provide users with the means to alert the ISP of any infringements. However, the platforms specify that they will not monitor user behaviour and reserve the right to implement their policies following a report of a breach of terms of service.

6.1.1 Catfishing and social networking platforms

Catfishing remains a prevalent issue on social networking platforms for various reasons. This thesis established three main reasons. Firstly, social networking platforms have no incentive to address the catfishing problem.² Many social networking platforms make an income from targeted advertising and facilitate targeted advertising. Therefore, ISPs need many users to view and interact with the displayed advertisements when navigating their websites.³ Consequently, having a high number of users is financially beneficial whether the users are authentic or not.

¹ Derzakarian 2017 *Loyola of Los Angeles Law Review* 753.

² Koch 2017 *University of Colorado Law Review* 251; Shorman and Allaymoun 2019 *International Journal of Computer Science & Information Technology* 3.

³ Haan 2020 *University of Pennsylvania Journal of Constitutional Law* 632.

Secondly, the platforms do not have preventative measures in place. Instead, they have an inadequate email validation mechanism that insufficiently verifies user identities.⁴ Notably, this mechanism helps ensure that the platform users are real people and not inauthentic accounts such as bots.⁵ The platforms also use a blue check feature to signify verified accounts. This mechanism is inadequate since it is usually only used for public figures and popular profiles on the platforms. Platforms would benefit from implementing verification mechanisms to verify users' identities and curb catfishing at the account creation stage.

Thirdly, some platforms were established on the premise of creating online communities to encourage freedom of expression. Freedom of expression goes beyond the ability to speak freely. On platforms like Twitter and Instagram, freedom of expression manifests as expressing oneself as whomever they like. Users are free to represent themselves under pseudonyms and constructed identities. Whilst this is a commendable step toward protecting and enhancing the right to freedom of expression online, users do not heed the boundaries within which this right operates and often encroach on other users' rights, such as the right to privacy and identity. The fact that the service providers created spaces for users to interact freely without intervening in user conduct aggravates the infringement on the rights of other users.

6.2 Findings

6.2.1 Catfishing infringes the right to identity

This thesis established that the rights to identity and privacy are legally protected individual interests, falling under the common law *dignitas*. Interfering with another person's right to identity or privacy attracts legal consequences. In South Africa, a person who has suffered loss or injury from interference with their identity or privacy has legal remedies in the law of delict. A person violates another person's right to identity by falsification or by misappropriation for commercial gain. McQuoid- Mason argued that falsification and appropriation of name and likeness are infringements of privacy.⁶ However, this thesis supports the view that these are infringements of identity.⁷

⁴ Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1352.

⁵ D Merkl and E Weippl "Fake Identities in Social Media: A Case Study on the Sustainability of the Facebook Business Model" (2012) 4 *Journal of Service Science Research* 175 at 181.

⁶ McQuoid-Mason 2000 *Acta Juridica* 231.

⁷ Loubser and Midgley *et al The Law of Delict* 405.

The right to identity protects aspects of an individual beyond privacy,⁸ such as a person's name, likeness, image, signature, and voice, among other things. Falsification occurs when a person uses another person's identity to portray them in a false light contrary to their authentic identity.⁹ Appropriation of identity for commercial gain is when a person uses another's identity without consent for commercial purposes such as advertising.¹⁰ The types of identity infringement often exist simultaneously. The thesis explored several South African cases where falsification and appropriation of identity existed simultaneously. Catfishing is one of the instances where falsification and appropriation coincide.¹¹

Catfishing involves both types of identity infringement. To create a catfish account, a person takes another person's image without consent and uses it to portray them on a social networking account as someone they are not.¹² The act of downloading another person's social media content without consent is appropriation, while the act of creating a fake account with the content is a falsification.¹³ Catfishing infringes on a person's right to identity because it involves using a person's image without authority in a way that paints them in a false light.

Unfortunately, South African law only recognises the appropriation of identity for a commercial purpose, unlike Californian and Oklahoman law which recognise that a person may appropriate another's image for non-commercial purposes.¹⁴ Since catfishing does not always involve financial gain, a victim of catfishing in South Africa might only succeed on a claim based on being portrayed in a false light.

6.2.2 Remedies against catfishing

The thesis also examined remedial action available to a victim of catfishing in South Africa and found that they could claim damages under the *actio iniuriarum*. The *actio iniuriarum* protects a person's *dignitas* and is the action for *iniuria*. *Iniuria* is the intentional and wrongful injury of another person's personality.¹⁵ *Iniuria* requires fault in the form of intention to injure. Whether one can say that catfishing carries the requisite fault element is debatable because a perpetrator of catfishing rarely seeks to harm the person whose pictures they appropriate. Our

⁸ Loubser and Midgley *et al The Law of Delict* 405; Neethling Potgieter and Roos *Personality Rights* 353 and 359.

⁹ *Grütter v Lombard* 2007 (4) SA 89 (SCA); *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372.

¹⁰ *W v Atoll Media* [2010] 4 All SA 548 (WCC); *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ); *Cele v Avusa* [2013] 2 All SA 412 (GSJ); and Neethling Potgieter and Roos *Personality Rights* 353 and 357.

¹¹ Neethling Potgieter and Roos *Personality Rights* 357.

¹² Koch 2017 *University of Colorado Law Review* 242.

¹³ Chapter 3 para 3.3.3

¹⁴ *Fairfield v. American Photocopy Equipment Company*, 197; *Bates v. Cast*, 253.

¹⁵ *R v Umfaan* 1908 TS 62 66; *Delange v Costa* 1989 (2) SA 857 (A) 860I-861B.

law does not recognise the negligent injury of personality. Oklahoma holds a similar position confirmed by the Supreme Court which noted that Oklahoman law did not recognise the negligent or accidental injury of feelings.¹⁶

However, the *Kumalo v Cycle Lab* court explained that the defendant should have known that using the plaintiff's image without authority and falsely was wrongful.¹⁷ Intention under the *iniuria* did not encompass the mere intention to achieve a specific result, but it included the cognisance of the wrongfulness of the result.¹⁸ It followed that intention could be in the form of *dolus eventualis* or *indirectus*.¹⁹ Therefore, catfishing does satisfy the fault element for *iniuria* because the perpetrator should have foreseen the impairment of the victim's personality from using their image in catfishing.

There are defences against wrongfulness or fault available to the perpetrator. To exclude wrongfulness, a perpetrator relying on lack of knowledge of unlawfulness must also show that they were not negligent.²⁰ Another justification that a perpetrator can advance to exclude wrongfulness is freedom of expression. Freedom of expression has to be balanced with the right to human dignity because it indirectly protects the right to identity. Catfishing is a type of expression online. However, free expression is qualified and may be limited where it impinges on human dignity.²¹

A defence against the intention to injure in catfishing that is likely to come up is the defence of jest. A person who wishes to advance this defence has to show that the joke is not subjectively funny and would be viewed objectively as a joke. People of ordinary intelligence would not be offended.²² Another defence is a parody. Whilst parody is a protected speech in South African law, for a defence of parody to succeed, a person must show that they intended to use the appropriated identity to imitate the victim creatively.²³ The account created must expressly indicate that it is a parody.

Other remedies that a victim of catfishing can rely on include interdicts and takedown notices. A victim of catfishing can approach a court for an interdict against the perpetrator directing them to delete the catfish account and prohibiting them from further infringing on the victim's

¹⁶ *Colbert v. World Pub Co.*, 292.

¹⁷ *Kumalo v Cycle Lab* para 35.

¹⁸ *Kumalo v Cycle Lab* para 33.

¹⁹ *Kumalo v Cycle Lab* para 37.

²⁰ *Khumalo v Holomisa* para 20.

²¹ *Le Roux v Dey* para 72.

²² *Le Roux v Dey* para 114; Midgley *LAWSA* Vol 15 para 134.

²³ *Laugh It Off Promotions CC v SAB International (Finance) BV* para 77 -78.

rights.²⁴ Alternatively, a victim can rely on the takedown notice remedy, which informs a platform of infringing conduct occurring on their platforms and requests the platform to remove the offending account.²⁵

6.2.3 Adequacy of right to identity

California and Oklahoma have statutes and the common law of privacy to address catfishing and protect identity. In the US, California and Oklahoma protect the facets of a person's identity under privacy laws. Oklahoma was the first state to dedicate legislation to addressing the catfishing conundrum. Oklahoma holds a person who impersonates another person through social media liable for damages through its Catfishing Liability Act.²⁶ However, the state of California criminalises online impersonation and also offers civil damages.²⁷ These statutes are progressive strides in legally addressing tortious conduct online.

The US states of California and Oklahoma also protect facets of identity through the common law right of privacy or statutory publicity.²⁸ The right of privacy and right of publicity are legal concepts that give effect to a person's right to live in seclusion or protect a person's control over their publicity.²⁹ The common law protects privacy, whilst the derivative publicity is protected in the statute.³⁰ The right of privacy gives rise to four torts. However, only two apply to catfishing: the invasion of privacy by placing a person in a false light and by misappropriating a person's name or likeness for one's benefit.³¹ The statutory right of publicity is based on the misappropriation tort and extends the scope of identity protection to more than just name or likeness and includes other facets of identity.³²

In California, the common law misappropriation tort is also codified as the publicity statute.³³ To succeed in a claim under the statutory protection, a plaintiff must satisfy all the common law tort requirements.³⁴ Under the publicity statute, a victim of catfishing can institute an action

²⁴ Chapter 3 para 3.4.2; *Heroldt v Wills* para 39.

²⁵ Chapter 3 para 3.4.3.

²⁶ OK ST T. 12 §1450B.

²⁷ Cal. Penal Code §528.5 (a).

²⁸ MT Skosana *The Right to Privacy and Identity on Social Networking Sites: A Comparative Legal Perspective* (LLM Thesis, University of Pretoria, 2016) 89.

²⁹ Sharnan 2006 *Rutgers Law Journal* 991.

³⁰ The statutory right of publicity is found at California Civil Code §3344 in California and at OK ST T. 12 §1449 in Oklahoma.

³¹ Heise 2018 *Charleston Law Review* 364; Messenger 2018 *Widener Law Review* 260.

³² Koehler 2013 *Berkeley Technology Law Journal* 971-972; Heise 2018 *Charleston Law Review* 371-374; Simmons and Means 2018 *Landslide* 4.

³³ *Lugosi v. Universal Pictures*, 428.

³⁴ *Fraley v. Facebook, Inc.*, 803.

for damages. They have to prove that the defendant knowingly used a facet of their identity for advertising without their consent for their own commercial or another benefit.³⁵

Similarly, in Oklahoma, a victim of catfishing can claim damages for the invasion of their publicity through unauthorised use of a person's identity facets for advertising.³⁶ To succeed in a claim for the invasion of publicity, a plaintiff must prove that the defendant knowingly used a facet of their identity to advertise goods or services without consent.³⁷ Under the common law, a victim of catfishing can claim for the invasion of their privacy by misappropriation of name or likeness.³⁸ In both states, a victim of catfishing may also bring a claim for the invasion of privacy by exposing a person to publicity that portrays them in a false light.³⁹

California and Oklahoma are better equipped to protect identity against catfishing through their online impersonation statutes that the legislatures enacted to address catfishing.⁴⁰ South Africa does not have similar legislation. On this front, one can say that South African law does not adequately protect identity against catfishing. However, the suggestion does not imply that victims of catfishing do not have remedies available to them in South African law. South African victims of catfishing have remedies in the common law. From this perspective, South African law is better suited because the right to identity is adequately defined in the common law and its content and scope are clear. The difference is that the South African law does not recognise the appropriation of identity for any other purpose apart from a commercial purpose.

Recognising that it is possible to infringe identity by appropriation for any purpose other than commercial gain is important to address the nature of legal problems presented by social networking. On social networks, users sometimes perform or participate in conduct without justification and ignore the harm that it may cause other people. They also participate in conduct that would otherwise be frowned upon offline because there are no serious repercussions for that conduct online. Catfishing is an example of conduct that users participate in that is frowned upon, committed without the intention to gain financially and sometimes ignoring its implications on other people.

³⁵ Cal. Civ Code §3344 (a).

³⁶ OK ST T. 12 §1448(A); Simmons and Means 2018 *Landslide* 5.

³⁷ *Brill v. Walt Disney Co.*, 1103–1104.

³⁸ *Brill v. Walt Disney Co.*, 1102.

³⁹ §625E of the *Restatement of the Law, Second, Torts* (1977).

⁴⁰ Derzakarian 2017 *Loyola of Los Angeles Law Review* 753.

6.2.4 The application of private international law in cross-border catfishing cases

The thesis established that considering private international law rules was important because catfishing is not only a South African problem. The catfishing victim and perpetrator may be in different countries. Consequently, the thesis explored the rules of conflict of laws in South Africa, California and Oklahoma. Flowing from the conclusion that the relationship between a user and the ISP is contractual,⁴¹ the private international law rules concerning contract law were considered. The thesis found that usually, contracts stipulate the forum with jurisdiction and the law that will govern the agreement between the parties.⁴² However, where a contract does not contain such a clause, the regular rules of contract in conflict of laws will apply.

The thesis surveyed the terms of Facebook, Instagram, Tinder, and Twitter and found that the agreements indeed chose a forum to resolve disputes and a law to govern the agreement.⁴³ Facebook and Instagram's terms assign jurisdiction to Californian courts and also choose Californian law as the governing law over the agreement. Interestingly, these platforms allow users to launch actions against the ISP in the courts of the country where they reside.⁴⁴ In such an instance, the law of the country where the user brings the action will govern the agreement. This position is different from other platforms.

Twitter similarly assigns jurisdiction to Californian courts and elects Californian law as the agreement's law.⁴⁵ However, Twitter did not give its users the option to approach courts where they reside to resolve the dispute. In contrast to the other three platforms, Tinder's terms seek to deal with disputes through arbitration. However, if a user should elect to approach a court to resolve a dispute, only a small claims court in Texas has the jurisdiction to hear the matter.⁴⁶

The platforms' terms only provide for disputes between users and the ISP. One infers that the rationale for this position is that users do not contract with one another when they accept the TOS. Instead, users agree with the ISP; therefore, a dispute between users would not fall within the scope of the TOS. Consequently, a dispute between users is a tortious or delictual matter in a catfishing incident.

The thesis assessed the relevant conflict of laws principles and found that in South Africa, the choice of law applicable to the delictual dispute between users is determined with reference to

⁴¹ Kroonhof 2012 *Speculum Juris* 42.

⁴² *Ibid.*

⁴³ Chapter 5 para 5.2.1.

⁴⁴ Chapter 5 para 5.2.1.1.

⁴⁵ Chapter 5 para 5.2.1.2.

⁴⁶ Chapter 5 para 5.2.1.3.

the *lex loci delicti commissi*. The choice of law methodology used in South Africa is the jurisdiction selecting method, which consists of three steps, namely classification, selection, and application.⁴⁷

In California, the choice of law is determined through the governmental interest approach. According to this approach, the court applies the law of the country with the most significant interest in having its law applied to the matter.⁴⁸ Oklahoma relies on the significant relationship test to decide the choice of law. Under this approach, the court applies the law of the country most closely linked to the parties and the cause of action.⁴⁹

6.3 Recommendations

Firstly, it is recommended that the courts settle the debate surrounding falsification and appropriation for a commercial purpose. The ongoing debate on whether falsification and misappropriation are infringements of privacy or identity creates a hurdle in addressing catfishing. This thesis dealt with falsification and misappropriation as infringements of identity because catfishing affects aspects of personality that are not limited to publishing personal facts.⁵⁰ Catfishing interferes with a person's entitlement to prevent others from using their identity without consent and falsely.⁵¹ Thus, to adequately address the unique problem posed by catfishing, our courts should respectfully categorise these infringements and differentiate how they affect privacy and identity, respectively.

Secondly, it is recommended that the courts develop the common law rule on the misappropriation of identity. The development should recognise mere appropriation as an infringement of identity to adequately accommodate catfishing and protect the right to identity online even when the appropriation is not linked to commercial gain. The rationale for this recommendation stems from the fact that catfishing does not always involve a commercial purpose. Moreover, it infringes on a subjective right by unjustifiably interfering with or impairing the subject-object relationship, which allows a holder to use and enjoy the right.⁵²

In *Kumalo v Cycle Lab*, Boruchowitz J stated that what was legally relevant was the unauthorised use of the plaintiff's image. The unauthorised publication of her image infringed

⁴⁷ *Burchell v Anglin* para 114; *Dendy LAWSA* Vol 7(1) para 307.

⁴⁸ *Cover v. Windsor Surry Company*, 2016 WL 520991 (N.D.Cal., 2016); *Grace v. Apple, Inc.*, 343- 344.

⁴⁹ *Martin v. Gray*, 67; *Key v. Exxon Mobil Corporation*, CIV-19-424-BMJ (E.D. Okla. 2020) 3.

⁵⁰ Neethling Potgieter and Roos *Personality Rights* 353 and 359.

⁵¹ *Grütter v Lombard* para 13; Derzakarian 2017 *Loyola of Los Angeles Law Review* 757; Neethling Potgieter and Roos *Personality Rights* 355.

⁵² *Midgley LAWSA* Vol 15 para 80; *DE v RH* 2015 (5) SA 83 (CC) para 3 fn 5; Neethling Potgieter and Roos *Personality Rights* 60.

her personality rights and entitled her to sentimental damages.⁵³ From these words, it is not inconceivable that our courts will likely develop the right to identity in this manner.⁵⁴ Like the *Kumalo v Cycle Lab* case, using a person's image without consent to create a catfish account and portraying them in a false light is an assault on their dignity. The effect that catfishing has on a person's dignity necessitates an interpretation of appropriation of identity that recognises that there are non-financial purposes for which a person might appropriate identity.

In the context of defamation, the Constitutional Court in *Khumalo v Holomisa* reiterated that in balancing freedom of expression and defamation, the law was only interested in protecting the publication of truths.⁵⁵ Furthermore, it emphasised that there was no legal interest in protecting falsehoods. A person could not contend that they had a legitimate constitutional interest in protecting a reputation built on untruths.⁵⁶ Although the thesis' focus is the right to identity and common law *dignitas*, under the right to human dignity, all personality rights are interrelated and cannot be fully separated.⁵⁷

Catfishing is an example of the publication of falsehood, that false narrative is attached to the victim of catfishing because it is their face linked to the fake account. It follows that catfishing has ramifications for a person's reputation because a false image of the victim is made public on a social networking platform. Therefore, the principles expressed by the court in *Khumalo v Holomisa* can be extended to identity infringement because the purpose of the right to identity is to protect a person against false narratives that cannot be reconciled with their authentic identity.⁵⁸ On this basis, the law has to be developed to address the unjustified publication of falsehood on social networking platforms through catfishing.

The recommendations are aimed at giving effect to the constitutional imperative to develop the common law to keep it abreast with the needs of society. Catfishing infringes on the right to identity; the South African common law provides protection against and remedies for the infringement of identity. It follows that catfishing implicitly falls within the scope of the right to identity since South African law does not expressly address it. However, legal development is necessary to address catfishing adequately, as in the states of California and Oklahoma. The envisaged development would give effect to s 39(2) of the Constitution because technological

⁵³ *Kumalo v Cycle Lab* paras 31 and 39.

⁵⁴ *Kumalo v Cycle Lab* para 22.

⁵⁵ *Khumalo v Holomisa* para 37.

⁵⁶ *Khumalo v Holomisa* paras 35 and 36.

⁵⁷ *Khumalo v Holomisa* para 27; *Dendy v University of Witwatersrand Johannesburg* para 12.

⁵⁸ *Universiteit van Pretoria v Tommie Meyer* 386H.

changes present a new set of facts falling within the purview of the existing common law rules.⁵⁹

Thirdly, it is recommended that the statutes containing ICT law be reformed. The recommendation is that a provision be inserted in the ECT Act prohibiting impersonation through electronic communications, such as social networking platforms. The provision should purport to assign civil liability to anyone who contravenes the provision by impersonating or catfishing another person online.⁶⁰

6.4 Conclusion

In conclusion, catfishing invades a person's right to identity, and that invasion indirectly interferes with their right to human dignity. South African common law provides remedies to address the infringement of the right to identity through catfishing. Victims of catfishing can approach the courts to seek recourse for the injury to personality caused by catfishing. Although in comparison to the common law in California and Oklahoma, our common law requires development to address the unique nature of catfishing effectively, South African law protects the right to identity against catfishing. Moreover, in cross-border catfishing cases, private international law rules apply. In an instance where a victim seeks recourse against an ISP, the contract conflict of laws rules apply. Conversely, where a victim seeks recourse against another user, delict conflict of laws rules apply. It follows that the South African common law can remedy the personality injury caused by catfishing on social networking platforms.

⁵⁹ S 39(2) read with s 173 of the Constitution of the Republic of South Africa, 1996. In *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) para 28 the court noted that the common law was not only developed by changing an existing legal rule or introducing a new legal rule. Rather, development also occurred when determining whether new facts fell within the scope of an existing rule.

⁶⁰ This recommendation is drawn from and inspired by Cal. Penal Code §528.5 (e). § 528.5 criminalises electronic impersonation and provides a civil remedy for victims of electronic impersonation. The suggestion is not to criminalise impersonation but to provide a statutory remedy that outlines the scope of the prohibited conduct and the damages that would be awarded where there is infringement.

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