

PROTECTING THE RIGHT TO IDENTITY AGAINST CATFISHING: WHAT'S THE CATCH?

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SUMMARY

Catfishing is a common social media phenomenon affecting a person's right to identity. It involves using a person's image without their consent to create a fake social media profile. Catfishing has legal implications because a person's image is a facet of the right to identity and using an image without a person's consent interferes with their right to identity and dignity. While catfishing is a novel legal issue in South Africa, courts and legislators in the United States (US) have addressed catfishing. In the US states of California and Oklahoma, catfishing is tackled through statutory interventions directed at online impersonation and catfishing. Accordingly, victims of catfishing have remedies in addition to the existing causes of action related to common-law torts and breaches of the right to publicity. This comparative study analyses the remedies available to US victims of catfishing to ascertain whether South African victims have adequate statutory and common-law remedies against catfishing, to protect their identity from interference with their subjective right, and from assaults to their dignity.

1 INTRODUCTION

Social media platforms are currently grappling with the conundrum of fake profiles.¹ Users can freely decide how to present themselves online without anyone monitoring the accuracy of that representation, which contributes to

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¹ The definition of "social media" used throughout this article is as recorded in s 1 of the Films and Productions Act 65 of 1996 (amended by s 1 of the Films and Productions Amendment Act 11 of 2019); see Simmons and Lee "Catfishing: A Look into Online Dating and Impersonation" in Meiselwitz (eds) *Social Computing and Social Media Design, Ethics, User Behaviour, and Social Network Analysis* (2020) 3; Armstrong ("16 % of All Facebook Accounts Are Fake or Duplicates" <https://www.statista.com/chart/20685/duplicate-and-false-facebook-accounts/> (accessed 2021-02-07)) reported that 16% of all Facebook accounts are fake or duplicates.

the prominence of fake profiles online.² Catfish accounts are a type of fake profile created using another person's images. There is a correlation between the fake-profile conundrum faced by platforms and the lack of mechanisms for verifying the accuracy of information or images provided by users when creating profiles on social-media platforms. On the face of it, a catfish account appears harmless and can simply be reported to the platform and removed. However, these accounts present a legal issue because they involve using another person's image without their authority.

A catfish is a fictitious social media persona created using another person's pictures for deceptive purposes.³ Catfishing is a form of online impersonation that involves using other people's images to create fake online profiles.⁴ It is often used to entice online users into romantic relationships or as a harassment tool, among other things. There are three parties involved in this practice: the creator of the catfish persona that uses another person's photographs without permission, the person whose images are misappropriated, and a third party who is deceived by the catfish persona.⁵ The person who has their image misappropriated is as much a victim as the third party who is duped by the catfish account.⁶ However, the present discussion focuses only on the person whose images are used without their consent in the creation of a catfish profile.

Image is a legally protected aspect of personality. A person's appearance or image is a facet of their identity, which is protected at common law. In South Africa, using any facet of a person's identity, including their image, without consent violates their right to identity; this occurs by misappropriation or by falsification.⁷ The right to identity is aimed at protecting a person's identity features against unlawful interference. Catfishing would fall within the scope of the right to identity because it involves using a person's images without consent.

² Kahn "Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms" 2010 XI *The Columbia Science and Technology Law Review* 176 177; Mangan and Gillies *The Legal Challenges of Social Media* (2017) 2.

³ Smith, Smith and 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 33.

⁴ Reznik "Identity Theft on Social Networking Sites: Developing Issues of Internet Impersonation" 2013 29 *Touro Law Review* 455; Kambellari "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 Online Journal* <https://ssrn.com/abstract=3351507> 1.

⁵ Derzakarian "The Dark Side of Social Media Romance: Civil Recourse for Catfish Victims" 2017 50 *Loyola of Los Angeles Law Review* 741 744; Koch "To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation" 2017 88 *University of Colorado Law Review* 234 262; Santi "Catfishing: A Comparative Analysis of U.S v. Canadian Catfishing Laws and Their Limitations" 2019 44 *Southern Illinois University Law Journal* 90.

⁶ Derzakarian 2017 *Loyola of Los Angeles Law Review* 744.

⁷ *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) par 19; *Grutter v Lombard* 2007 (4) SA 89 (SCA) par 8. Notably, the court in *Kumalo v Cycle Lab (Pty) Ltd* supra par 19 acknowledges the academic debate surrounding the unauthorised use of a person's image and whether it is a privacy-related issue or an identity-related issue. McQuoid Mason "Invasion of Privacy: Common Law v Constitutional Delict Does It Make a Difference?" 2000 14 *Acta Juridica* 227 23 is a proponent for the position that using a person's image without consent is an infringement of their privacy. This discussion is beyond the scope of the present article.

Social media users in the US also experience catfishing. In contrast to South Africa, US state courts have encountered the catfishing phenomenon and had the opportunity to address it through privacy and publicity law.⁸ In addition, victims in California are protected by an anti-impersonation statutory provision and in Oklahoma by the Catfishing Liability Act.⁹ Although the focus of this article is limited to the laws of California and Oklahoma, it is noteworthy that since 2020, the US Congress has been considering the “Social Media Fraud Mitigation Bill”,¹⁰ which is legislation that purports to prohibit people from creating and using fake social media accounts or profiles to send fraudulent emails and other electronic messages.¹¹ It is the author’s opinion that the statutory and common-law remedies in California and Oklahoma provide sufficient recourse to victims of catfishing and allow for more than one legal remedy to redress the harm they suffer from unauthorised use of their images.

In this light, this article’s main aim is to ascertain the adequacy of the legal remedies available to South African victims of catfishing. The article begins with a brief historical outline of catfishing on social media, and thereafter it traces the legal history of catfishing and its legal definition. The article then analyses the legal remedies for the infringement of the right to identity through catfishing in South Africa. The South African remedies are compared to the remedies available to US victims in California and Oklahoma who have both statutory and common-law remedies. The analysis includes a consideration of the South African Cybercrimes Act¹² with regard to possible statutory protection of a person’s identity against catfishing online.

2 THE SOCIAL MEDIA NET

2.1 Many fish in the sea

Catfishing did not originate on social media. People concealing their identity by pretending to be another person is a longstanding practice offline.¹³ However, the advent of social media presented a unique opportunity for

⁸ Generally, see The American Law Institute *The Restatement of the Law, Second, Torts* (1977) https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm (accessed 2021-07-18), which sets out the law of torts as followed in various US states. The privacy torts are found in section 625; see also Meltz “No Harm, No Foul? ‘Attempted’ Invasion of Privacy and Tort of Intrusion Upon Seclusion” 2015 *Fordham Law Review* 3438. The state of California subscribes to the Restatement of Torts and also has a statutory right of publicity found at California Civil Code §3344. Similarly, the state of Oklahoma subscribes to the Restatement of Torts and also has a statutory right of publicity in OK ST T 12 §1449.

⁹ OK ST T 12 §1450.

¹⁰ H R 6587 Social Media Fraud Mitigation Bill of 2020.

¹¹ 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 2021-08-21).

¹² 19 of 2020.

¹³ Pearl “How Catfishing Worked Before the Internet” (2015) <https://www.vice.com/en/article/5gk78n/how-did-people-catfish-before-the-internet> (accessed 2021-02-17).

impersonation because social media has made different identities easily accessible to those who wish to conceal their true identity. Moreover, the different Internet-based tools have had few measures in place to actively monitor and verify user profiles for accuracy.¹⁴ In addition, many people using the Internet and its tools sought visibility, and freely uploaded their images online to attain that visibility.¹⁵ It is easy to find people's images online through the search engine Google.¹⁶ Consequently, catfish creators have access to more images and identities online, as well as people to deceive, resulting in an expansive freedom to recreate themselves online with few restrictions.

Social media platforms have selective verification mechanisms because identity is only authenticated under limited circumstances. For instance, some platforms verify the identities of popular users or offline public figures by requesting formal identification, after which the user's name is assigned a verification symbol for all to know that the user is authentic.¹⁷ This type of verification occurs after an account and profile have been created but accommodates only well-known users such as politicians, businesses, well-known brands and celebrities, leaving regular users unprotected.¹⁸

Regular users' identities are verified by requiring a valid email address.¹⁹ It is submitted that this is inadequate because it assumes that users provide accurate information when creating an email address.²⁰ This implies that there is no certainty that the identity of the user behind an email address provided on a social media account is accurate since email service providers also do not authenticate user identity.²¹ There is thus a gap in verification procedures at the account-creation stage. Some platforms prohibit impersonation, while others expressly require users to use their real names when signing up.²² User identity is also verified when other users report an

¹⁴ Koch 2017 *University of Colorado Law Review* 251.

¹⁵ Dixon "Number of Social Media Users Worldwide From 2018 to 2027" (2022) <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (accessed 2022-06-19).

¹⁶ Koch 2017 *University of Colorado Law Review* 251.

¹⁷ The common verification mark for popular users and verified accounts is a blue check mark. Platforms such as Instagram https://help.instagram.com/733907830039577/?helpref=uf_share, Facebook https://www.facebook.com/help/196050490547892/?helpref=uf_share, Twitter <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts#requirements>, TikTok <https://support.tiktok.com/en/using-tiktok/growing-your-audience/how-to-tell-if-an-account-is-verified-on-tiktok> and Tinder <https://www.tinderpressroom.com/tinder-introduces-safety-updates> use a blue check mark to illustrate a verified account. Ndyulo *Protecting The Right to Identity Against Catfishing* (LLM Thesis, Rhodes University) 2021 36.

¹⁸ Shorman and Allaymoun "Authentication and Verification of Social Networking Account Using Blockchain Technology" 2019 11 *International Journal of Computer Science and Information Technology* 1 3–4.

¹⁹ Koch 2017 *University of Colorado Law Review* 251.

²⁰ Zarsky and Gomes de Andrade "Regulating Electronic Identity Intermediaries: The Soft eID Conundrum" 2013 74 *Ohio State Law Journal* 1352; Koch 2017 *University of Colorado Law Review* 251.

²¹ Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1352.

²² Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1352–1354; Koch 2017 *University of Colorado Law Review* 250–251. It is noteworthy that in some instances, using

account to question the authenticity of the user's identity, or when a victim of catfishing brings the impersonation to the platform's attention.²³

It is not easy to differentiate a catfish account from authentic accounts because catfish accounts generally mimic the behaviour of authentic accounts.²⁴ This can be contrasted with parody and fan accounts, which are allowed by some platforms on condition that the account is transparent about being a parody or fan account.²⁵ A catfish creator is able to imitate an authentic account because they deceive other users; to succeed, they must behave in a similar manner and familiarly to other users.²⁶ For example, catfish profiles make themselves convincing by using more than one picture of the victim and also by using videos, if these can be found online.²⁷

a real name is not favourable because some users rely on the protection that anonymity on social media affords them to express views that may endanger them.

²³ The user reporting function involves reports made by other users regarding suspicious accounts. In essence, users are meant to police one another on platforms so that service providers do not have to do so. Consequently, the reporting function is made available for users to report a variety of potential violations of service terms. In most instances, a platform will request proof of identity from the reported account once a report for catfishing has been lodged. According to Clanton ("We Are Not Who We Pretend to Be: ODR Alternatives to Online Impersonation Statutes" 2014 *Cardozo Journal of Dispute Resolution* 328), if the impersonation was reported by the victim, then the platform will require the victim to prove their identity. Notably, platforms such as Facebook and Twitter <https://help.twitter.com/en/rules-and-policies/twitter-impersonation-and-deceptive-identities-policy> (accessed 2022-11-01) do not monitor user accounts for authenticity.

²⁴ Dunlop *App-ily Ever After: Self-Presentation and Perception of Others on the Dating App Tinder* (M.A., University of Central Florida) 2018 55; Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1343–1344; Heck "'Catfish' Added to the Sea of Litigation" 2017 21 *TYL* 411.

²⁵ Nel (*Information and Communications Technology Law* (2016) 506) mentions that parody and satire are forms of protected speech in South African law. However, she suggests that parody and satire accounts may have a defamatory effect on the victim. As such, parody accounts are likely to be dealt with under the law of defamation since they tend to mimic famous people. In *Laugh it Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) par 35, the court defined parody as an imitative literary or artistic work with a comical effect making the work seem ridiculous. Parody accounts are used to mimic famous or popular people. *Cele v Avusa* ([2013] 2 All SA 412 (GSJ) par 51) is an example of a case where mimicry used a politician's image to comment on statements he made publicly.

²⁶ It is worth noting that catfishing is different from identity theft. Cassim ("Protecting Personal Information in the Era of Identity Theft: Just How Safe Is Our Personal Information From Identity Thieves?" 2015 18 *FER/PELJ* 69 72) notes that identity theft is the acquisition, without consent, of personal information to commit theft or fraud. The type of personal information envisaged includes identity numbers, medical aid numbers, addresses, financial account information and biometric information such as fingerprints. The personal information is usually used fraudulently to create bank accounts, obtain credit facilities and purchase goods under the victim's name (73–74). This is different from catfishing because catfishing is not necessarily intended to harm the victim, but to deceive others online. However, catfishing may be used to commit fraud and identity theft.

²⁷ Hartney "Likeness Used as Bait in Catfishing: How Can Hidden Victims of Catfishing Reel in Relief" 2018 19 *Minnesota Journal of Law, Science & Technology* 278.

2.2 Casting the net

Social media platforms are beneficial for maintaining interpersonal relationships,²⁸ communicating,²⁹ and e-commerce activity, but these Internet tools present various legal challenges.³⁰ One of those challenges is conduct that undermines individual identity online.³¹ This challenge was brought on by the emergent culture of maintaining an online presence and the increased user traffic on social media websites. Over time, the emphasis on social media websites has shifted from merely maintaining contact with users known offline, to boosting popularity, encouraging users to widen their networks and sphere of interaction online by connecting with people they have never met.³² Consequently, one of social media's main attractions is the ability to connect with many people and gain popularity without having to accurately present oneself.³³

Today, how a person presents their profile is important for social and commercial reasons.³⁴ Some users tweak their true identities to fit the personalities they have recreated online to make friends, profit or as mere artistic expression. There is a high probability that the most attractive profiles will become the most popular, so it is important for some users to carefully curate their profiles to make a good impression, since impressions are vital online.³⁵ Another important consideration is that some users may lack the confidence to appear as themselves online and may wish to conceal their true identity altogether. It is, therefore, not surprising that some users might find it alluring to depict themselves as someone else online by using another person's images and a fictitious name.

Although there is seemingly no legal issue in a user inaccurately presenting themselves online, there is room for abuse. Catfishing is an example of users overstepping boundaries to exercise certain freedoms online. Indeed, platforms allow users to explore and express their personalities online, although there are limits to enjoying this freedom. The limit is that in

²⁸ Kaplan and Haenlein "Users of The World, Unite! The Challenges and Opportunities of Social Media" 2010 *Business Horizons* 59 63.

²⁹ Hart "Social Media Law: Significant Developments" 2016 72 *Business Lawyer* 235 235.

³⁰ Pelletier ("The Emoji That Cost \$20,000: Triggering Liability for Defamation on Social Media" 2016 52 *Washington University Journal of Law & Policy* 229–230 and 232) lists examples of legal challenges recognised by US courts; Hartney 2018 *Minnesota Journal of Law, Science & Technology* 277 278.

³¹ Clanton "We Are Not Who We Pretend to Be: ODR Alternatives to Online Impersonation Statutes" 2014 16 *Cardozo Journal of Conflict Resolution* 323 324.

³² Boyd and Ellison "Social Network Sites: Definition, History, and Scholarship" 2008 *Journal of Computer-Mediated Communication* 211–213. The emphasis on being popular on social media began on the platform www.Friendster.com, which is no longer functional.

³³ Boyd and Ellison 2008 *Journal of Computer-Mediated Communication* 216.

³⁴ Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1337.

³⁵ Boyd and Ellison 2008 *Journal of Computer-Mediated Communication* 219; Roos "Privacy in the Facebook Era: A South African Legal Perspective" 2012 *SALJ* 385; Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1338; Clanton 2014 *Cardozo Journal of Conflict Resolution* 326.

concealing their own identity, or in crafting a new online persona, a user cannot impersonate another person or portray themselves as another person.³⁶

Catfishing has legal implications because it involves using, without consent, another person's image, which is a protected legal interest. The catfish creator uses another person's image attached to fictitious personal information such as a fake name and surname, location and biography.³⁷ The combination aims to create the false impression that the account belongs to the person depicted in the image. The use of a person's image in this manner interferes with aspects of their personality, which is cause for concern.

3 THE CATCH

3.1 A historical overview of catfishing

The release of "Catfish: The Documentary" and similarly titled television series drew attention to the act of impersonating another person on social media using their image. The documentary followed Nev Schulman's endeavour to meet a catfish creator who deceived him on Facebook.³⁸ The term "catfish" was coined on this documentary when the husband of a catfish creator likened fake social media accounts to using catfish to keep codfish alive and fresh during exportation.³⁹ According to the analogy, the nature of online communications is mysterious because a person never knows with whom they are communicating. Fake accounts keep people on their toes and encourage caution. The television series and documentaries on catfishing were created for entertainment and only cast light on the effects of catfishing on the misled third party. These media did not consider the impact of catfishing on the victim's personality rights and the legal consequences that flow from misusing a person's identity features. This article considers the victim's rights and the remedies available for the injury they have suffered.

³⁶ Instagram, Facebook, Tinder and Twitter are examples of platforms that have rules against impersonation in their terms of service.

³⁷ Clanton (2014 *Cardozo Journal of Conflict Resolution* 326) notes the difference between imposter and fake accounts. Fake accounts are profiles that appear real but depict a person who does not exist, while imposter profiles impersonate an existing person by using an aspect of their personality without consent. Catfishing would fall in the latter category because although the combination of fake name and another person's image do not accurately represent a living person, it is still a misappropriation of a person's image for a purpose to which they did not consent.

³⁸ The series follows a similar plot in which Schulman helps misled third parties uncover the identity of the catfish. To access the show, see "Catfish: The TV Show" (2012) <https://www.mtv.com/shows/catfish-the-tv-show> (accessed 2021-05-01). See Heck 2017 *TYL* 411; Hartney 2018 *Minnesota Journal of Law, Science & Technology* 278.

³⁹ Harris "Who Coined the Term 'Catfish'?" (2013) <https://slate.com/culture/2013/01/catfish-meaning-and-definition-term-for-online-hoaxes-has-a-surprisingly-long-history.html> (accessed 2021-05-01).

3 2 A legal definition for catfishing

Catfishing is not yet expressly regulated in South African law. There is no formal legal definition for catfishing in South Africa. Similarly, the US does not explicitly address and define catfishing federally.⁴⁰ However, catfishing is a recognised legal problem, and some states in the US have codified laws to address catfishing.⁴¹ Some US courts have also had to adjudicate matters concerning catfishing.⁴²

In the US, catfishing is defined as one of two forms of online impersonation⁴³ – that is, either logging into a person’s online profiles using their personal information and pretending to be them,⁴⁴ or creating a fictitious account using another person’s image and likeness.⁴⁵ Catfishing is usually the latter because a catfish creator misappropriates the victim’s image or likeness to construct a fake persona online.⁴⁶

The common denominators found in most authoritative definitions of catfishing include the creation of a fake profile on social media, using a combination of another person’s pictures and a fake name, in order to mislead others.⁴⁷ Most catfish accounts use images of a person who exists offline, accompanied by fabricated personal information like a name, date of birth, location, and interests.⁴⁸ It follows that a suitable legal definition of

⁴⁰ Santi 2019 *Southern Illinois University Law Journal* 85.

⁴¹ Reznik 2013 *Touro Law Review* 455–457; 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.

⁴² *In re Rolando* S 197 Cal App 4th 936 was not dealt with as a catfishing case – that is, 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 Panchumarthi* 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.

⁴³ 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 address online impersonation.

⁴⁴ In *In re Rolando* S 945 fn 6, the court differentiates between two types of online impersonation 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 while 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.

⁴⁵ Heck 2017 *TYL* 411; Kambellari 2017 *The University of Illinois Timely Tech* 1; *Calsoft Labs, Inc v Panchumarthi supra* 2.

⁴⁶ 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 has been lured by a catfish account.

⁴⁷ Pelletier 2016 *Washington University Journal of Law & Policy* 232; Hartney 2018 *Minnesota Journal of Law, Science & Technology* 281; *Zimmerman v Board of Trustees of Ball State University* 940 F. Supp. 2d 875 (S.D. Ind. 2013) 891.

⁴⁸ Derzakarian 2017 *Loyola of Los Angeles Law Review* 753–754.

catfishing would have to accommodate these aspects. Moreover, an appropriate definition would also consider that catfishing affects protected elements of personality. The following definition is suggested: “Catfishing is the creation of a fake social media profile on an Internet-based communication platform, using fake identification information and another person’s pictures without consent, to mislead or defraud other users.”

4 SOUTH AFRICAN INTERVENTIONS AGAINST CATFISHING

Personality rights are subjective rights innately linked to the right-holder and cease to exist upon death.⁴⁹ Under the common law, there are three categories of personality interest:⁵⁰ *corpus* encompasses the rights related to a person’s physical body; *dignitas* protects the rights related to a person’s self-worth and dignity;⁵¹ and *fama* protects the rights related to a person’s good name or reputation.⁵² A range of rights is protected under these interests, but *dignitas*, in particular, encompasses identity, privacy and all the rights not covered by *corpus and fama*.⁵³

The South African law of delict prescribes that wrongful conduct amounting to the intentional or negligent harm of another person entitles the victim to damages as compensation for the harm they have suffered at the hands of the wrongdoer.⁵⁴ Conduct that unlawfully and intentionally infringes on a personality interest is an *iniuria*,⁵⁵ which entitles a victim to claim satisfaction under the *actio iniuriarum*.⁵⁶ Under the *actio iniuriarum*, where there is voluntary unlawful conduct, delictual liability attaches either a statement or an action⁵⁷ that causes actual or potential harm⁵⁸ to a personality interest.⁵⁹ To succeed in a claim based on the *actio iniuriarum*, it

⁴⁹ *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 381F–G; Midgley “Delict” *LAWSA* 15(3) par 80; Neethling “Personality Rights: A Comparative Overview” 2005 *Comparative and International Law Journal of Southern Africa* 211; Neethling, Potgieter and Roos *Neethling on Personality Rights* (2019) 17.

⁵⁰ Neethling, Potgieter and Visser *Law of Delict* (2015) 341.

⁵¹ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) par 27; Neethling *et al Neethling on Personality Rights* 271.

⁵² Loubser, Midgley, Jabavu, Linscott, Mukheibir, Niesing, Perumal, Singh and Wessels *The Law of Delict* 3ed (2017) 86; Neethling *et al Neethling on Personality Rights* 197.

⁵³ *O’Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) 247F–248A; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 849E–F; Neethling *et al Neethling on Personality Rights* 272; Neethling and Potgieter *Delict* 8ed (2021) 16.

⁵⁴ Loubser and Midgley *et al The Law of Delict* 25.

⁵⁵ *Delange v Costa* 1989 (2) SA 857 (A) 860I–861A; *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) par 27; Neethling *LAWSA* 20(1) par 395; Neethling *et al Neethling on Personality Rights* 72.

⁵⁶ *Matthews v Young* 1922 AD 492 503; *O’Keeffe v Argus Printing and Publishing Co supra* 247C–E; *DE v RH* 2015 (5) SA 83 (CC) par 3 fn 5; Neethling *et al Neethling on Personality Rights* 92.

⁵⁷ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) par 20–21; Loubser and Midgley *et al The Law of Delict* 31.

⁵⁸ Loubser and Midgley *et al The Law of Delict* 75.

⁵⁹ *Matthews v Young supra*; Loubser and Midgley *et al The Law of Delict* 83.

is sufficient for a victim to show only that they suffered injury to their personality without patrimonial harm.⁶⁰

An infringement of the right to identity is an assault to *dignitas*, which also entitles a person to claim damages for the injury caused to their personality.⁶¹ Catfishing is an example of conduct interfering with a person's online use and enjoyment of their personality rights, namely their right to identity, because it involves the misuse of their image.

Image is a facet of a person's right to identity,⁶² which protects the aspects of a person that distinguish them from others.⁶³ A catfish creator impairs this interest by downloading another person's pictures to use them without permission in connection with nefarious purposes. Since the right to identity is a subjective right, its infringement is wrongful or unlawful.⁶⁴ It is important to establish the type of conduct envisaged in the infringement of the right to identity.

4 1 The right to identity

Identity is a personality interest that is closely interconnected to privacy, and both are protected in the common law.⁶⁵ However, in *Grütter v Lombard*,⁶⁶ the Supreme Court of Appeal (SCA) recognised the right to identity as a separate personality right.⁶⁷ South African law accepts that the right to identity is concerned with the use of identity features of a person that set them apart from others.⁶⁸ The facets of a person's identity include, among others, their name, image, likeness, voice and signature.⁶⁹

Wrongfulness, in a breach of the right to identity, is established when a person misappropriates the facets of another person for commercial gain, using them to place the person in a false light, inconsistent with their true identity.⁷⁰ The link between these infringements of identity in South Africa and the US "false-light" and "misappropriation" privacy torts was first drawn in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*.⁷¹ These

⁶⁰ Loubser and Midgley *et al The Law of Delict* 86.

⁶¹ *O'Keeffe v Argus Printing and Publishing Co Ltd supra* 249D.

⁶² For example, in *Grütter v Lombard* 2007 (4) SA 89 (SCA) par 8, *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) par 48–49, and *Kumalo v Cycle Lab (Pty) Ltd supra* par 15, the courts highlight which aspects of personality make up the right to identity. See Neethling *et al Law of Delict* 373.

⁶³ *Grütter v Lombard supra* par 9; *Kumalo v Cycle Lab (Pty) Ltd supra* par 15; Cornelius "Commercial Appropriation of a Person's Image: *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009)" 2011 14(2) *PER/PELJ* 182 199.

⁶⁴ Neethling *et al Neethling on Personality Rights* 55.

⁶⁵ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) par 65; *Khumalo v Holomisa supra* par 27; *Dendy v University of Witwatersrand Johannesburg* 2005 (5) SA 357 (W) par 12.

⁶⁶ *Supra*.

⁶⁷ *Grütter v Lombard supra* par 7 and 8; Neethling *et al Neethling on Personality Rights* 351.

⁶⁸ *Grütter v Lombard supra* par 8 and *Kumalo v Cycle Lab (Pty) Ltd supra* par 15; Mashinini "The Impact of Deepfakes on The Right to Identity: A South African Perspective" 2020 32 *SAMLJ* 407 414.

⁶⁹ *Kumalo v Cycle Lab (Pty) Ltd supra* par 18.

⁷⁰ Neethling *et al Neethling on Personality Rights* 352.

⁷¹ *Supra* 386H–387.

infringements amount to an interference with a person's subjective right because they constitute a disturbance of a person's enjoyment of the features of their identity.⁷²

In the landmark case of *Grütter v Lombard*,⁷³ where the SCA recognised the independence of the right to identity, the court had to decide whether Grütter was entitled to an order prohibiting Lombard from using his name. In this decision, the court set out the features of infringing the right to identity. Grütter and Lombard were attorneys running separate legal practices under a joint name. After the termination of their agreement, Lombard continued using the joint name.⁷⁴ The court held that Lombard's continued use of Grütter's name without consent was an infringement of Grütter's identity by falsification because it created the false impression that Grütter was still associated with the practice.⁷⁵ Moreover, the continued use also amounted to an infringement of identity by misappropriation for a commercial purpose because Lombard would use Grütter's name to attract clients who would approach the practice for his services.⁷⁶ According to the SCA, there was no legal justification for the misrepresentation created by Lombard's continued use of Grütter's name, which entitled him to assert that potential clients did not act on the false impression created.⁷⁷

Another matter illustrating how identity may be infringed is *Kumalo v Cycle Lab (Pty) Ltd*,⁷⁸ where the court held that using a person's image for advertising without consent was unacceptable and was an infringement of identity by falsification and misappropriation for commercial gain.⁷⁹ In this case, the plaintiff was a celebrity, and the defendant used her picture without consent to advertise women's cycling products.⁸⁰ The court held that identity was infringed when a person falsified another's true identity, which occurred when a person misappropriated an identity feature for advertising without consent.⁸¹ The appropriation creates a false impression that the person consented to the conduct or supports the advertised business or service.⁸² The court highlighted the interrelatedness of identity and privacy and held that both rights could be infringed upon simultaneously.⁸³

It is important to point out that, in South African law, the misappropriation of a person's identity facets has to be for a commercial purpose.⁸⁴ This is different from the equivalent tort in the US, which is discussed later in this article. In both *Grütter v Lombard* and *Kumalo v Cycle Lab (Pty) Ltd*, the

⁷² Neethling *et al* *Neethling on Personality Rights* 353.

⁷³ *Supra*.

⁷⁴ *Grütter v Lombard supra* par 2–3.

⁷⁵ *Grütter v Lombard supra* par 13.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Supra*.

⁷⁹ *Kumalo v Cycle Lab (Pty) Ltd* par 17.

⁸⁰ *Kumalo v Cycle Lab (Pty) Ltd* par 2–5.

⁸¹ *Kumalo v Cycle Lab (Pty) Ltd* par 17 and 22.

⁸² *Kumalo v Cycle Lab (Pty) Ltd* par 17.

⁸³ *Kumalo v Cycle Lab (Pty) Ltd* par 18 and 19. It is noteworthy that the SCA made the same point in in *Grütter v Lombard supra* par 8.

⁸⁴ Cornelius 2011 14(2) *PER/PELJ* 182 196.

plaintiff's name and image respectively were appropriated in circumstances that involved patrimonial gain. Catfishing is not always carried out for commercial gain since some users create catfish accounts to exercise anonymous expression, to find romantic partners, or to make friends because they are insecure about their own appearance.

A catfish creator misappropriates a person's images by downloading the images without consent and using them in the creation of a fake social media profile. The creator then falsifies the victim's identity by generating a false impression that the victim is the person controlling the account. The fallaciousness of the impression created relies on it being irreconcilable with the victim's identity.⁸⁵ Indeed, a catfish account cannot be said to reflect the victim's true identity because it is a fake persona created with a deceitful intent. However, the fake persona relies on using pictures of a person who exists offline and may be recognised by people who know them.

It is worth mentioning that the account's behaviour online is not the focus, although it may be relevant in considering the entire impression that the account creates about the victim. For example, this may injure a victim's subjective sense of dignity. However, the wrongfulness of an infringement on the right to identity does not depend on the victim's subjective sense of dignity. Rather, it depends on whether there has been an obstruction of the victim's subjective right and whether the conduct in question goes against public norms.⁸⁶

In South Africa, using a person's image in catfishing unjustifiably interferes with their right to identity and infringes their *dignitas* because it involves a disturbance of the victim's use and enjoyment of their own identity and their right to control the use of their identity.⁸⁷ Moreover, public norms as reflected by the common-law right to identity seek to protect a person against having the features of their identity misused to contradict their true identity without consent.⁸⁸

There is an argument to be made that, by agreeing to participate on social media and posting their images on a public platform, a person reconciles themselves with the possibility of having their images downloaded by others and used for various purposes.⁸⁹ However, the fault with this contention is that, when users sign up to social media platforms, they do not expect that another person will use their images to create fake profiles because some platforms prohibit impersonation. In addition, with regard to the level of

⁸⁵ Neethling *et al* *Neethling on Personality Rights* 353.

⁸⁶ *Ibid.*

⁸⁷ In *Kumalo v Cycle Lab (Pty) Ltd* (*supra* par 17, 22–23), the court found that using the plaintiff's image in an advertisement without her consent was misleading in that it generated a false impression about her. This amounted to an infringement of her identity. Therefore, the unauthorised appropriation and further use of her image was wrongful and constituted an *iniuria*.

⁸⁸ Neethling *et al* *Neethling on Personality Rights* 352 and 355; Cornelius 2011 *PER/PELJ* 199.

⁸⁹ The *volenti non fit iniuria* rule may only find application in limited circumstances. According to Neethling *et al* *Neethling on Personality Rights* 359, misappropriation of images in the public interest may justify the limitation of a person's right to identity. See for instance *Cele v Avusa* *supra* par 50–51.

publicity to which a person exposes themselves, the court's opinion in *Kumalo v Cycle Lab (Pty) Ltd* is persuasive in the present discussion because a person's social standing is irrelevant when deciding whether their identity has been misused.⁹⁰ That a victim of catfishing had uploaded the images to a public platform does not negate the fact that they are legally entitled to prevent others from misappropriating their image and using it to falsify their identity.⁹¹ Therefore, the right to identity appropriately protects a person's ability to control the use of their image, and other facets of identity, both on- and offline, irrespective of the level of publicity to which they are exposed.⁹²

It is important to consider opposing views, which may contend that fake social media profiles are a form of expression. It can be argued that catfishing is a form of expression⁹³ that may find protection under section 16 of the Constitution.⁹⁴ However, catfishing interferes with a subjective right protected by the common-law notion of *dignitas* and indirectly by the constitutional right to human dignity. The discussions in *Bool Smuts v Herman Botha*⁹⁵ and *Kumalo v Cycle Lab (Pty) Ltd*⁹⁶ highlight that conduct affecting a personality right and the right to freedom of expression requires a balancing exercise to be undertaken.

4.2 Balancing dignity and freedom of expression in the context of catfishing

As briefly mentioned above, *dignitas* is an all-embracing concept that includes all aspects of personality not covered by *corpus* and *fama*.⁹⁷ The Constitutional Court in *Khumalo v Holomisa*⁹⁸ differentiated between common-law *dignitas* and the constitutional right to human dignity. *Dignitas* is concerned with subjective self-worth.⁹⁹ In contrast, the right to human dignity in the Constitution is not limited to individual self-worth. Instead, it affirms the objective worth of all human beings in society.¹⁰⁰ O'Regan J emphasised that human dignity included the intrinsic worth of human beings that all people shared, as well as the reputation of each person. Therefore,

⁹⁰ In *Kumalo v Cycle Lab (Pty) Ltd* (*supra* par 24), the court found that a reasonable person would find the defendant's conduct offensive. It is worth noting that the plaintiff in this case was a celebrity who profited off her identity. This position is further supported by the court's view in *Heroldt v Wills* 2013 (2) SA 530 (GSJ) par 44–45, where the court emphasised that even celebrities enjoy the same human rights as all people, and their right to *dignitas* is also legally protected.

⁹¹ *Grütter v Lombard* *supra* par 13.

⁹² *Kumalo v Cycle Lab (Pty) Ltd* *supra* par 15; Cornelius 2011 *PER/PELJ* 199; Milo and Stein *A Practical Guide to Media Law* (2013) par 9.3; Mashinini 2020 *SAMLJ* 414.

⁹³ Trager and Dickerson *Freedom of Expression in the 21st Century* (1999) 17–18; Currie and De Waal *The Bill of Rights Handbook* (2014) 342; Nel 2007 *CILSA* 208–209.

⁹⁴ Constitution of the Republic of South Africa, 1996.

⁹⁵ *Bool Smuts v Herman Botha* [2022] ZASCA 3.

⁹⁶ *Supra*.

⁹⁷ *O'Keefe v Argus Printing and Publishing Co* *supra* 48A.

⁹⁸ 2002 (5) SA 401 (CC).

⁹⁹ *Khumalo v Holomisa* *supra* par 27.

¹⁰⁰ *Ibid*.

the value of human dignity covered both personal self-worth and the public's perception of the worth of an individual.¹⁰¹

In *Khumalo v Holomisa*, the Constitutional Court balanced freedom of expression with personality rights. According to O'Regan J, the role of freedom of expression cannot be understated in our legal system; however, it does not override the value of the dignity connected to individual reputation. As a foundational constitutional value, human dignity does not yield to freedom of expression.¹⁰² Social media users are aware of their right to freedom of expression and they use multiple methods of expressing themselves on social media.¹⁰³ Creating fake profiles is one way for a person to express themselves online or to protect their identity to exercise their right to freedom of expression. Yet, freedom of expression is not an absolute right and can be limited, even on social media.¹⁰⁴

When a catfish creator has misappropriated a person's image and created a fake profile, the continued existence of the profile contributes to the false impression created about the victim and increases the harm suffered. The impression created is that the account is the victim, regardless of how the account conducts itself online, because the catfish uses the victim's image and physical appearance (features that individualise them) as their own. This portrays the victim in a false light and enables other users to mistake the catfish for the victim. Using a person's identity to paint them in a false light is a way of infringing their identity and impairing their dignity.¹⁰⁵

In addition, the Constitutional Court in *Khumalo v Holomisa* emphasised that truth was central to balancing dignity and freedom of expression.¹⁰⁶ This article has established that catfishing affects a person's dignity because their image is used to create a false impression of them online. Since the law is concerned with protecting against falsehoods,¹⁰⁷ prohibiting others from using a person's image in a manner that portrays them falsely and inaccurately is a justifiable limitation of expression.

Under the common law, using any facet of a person's identity without consent and creating a false impression of them enables the victim to bring a delictual claim for damages under the *actio iniuriarum*. Catfishing would fall under the scope of this remedy because the cause of action arises from the unauthorised use of a person's image in the creation of a catfish account that portrays them in a manner that cannot be reconciled with their identity.

In the event that the aforementioned remedies might not be available to a victim of catfishing, a final prohibitory interdict compelling the catfish creator

¹⁰¹ *Ibid.*

¹⁰² *Khumalo v Holomisa supra* par 25.

¹⁰³ Freedom of expression is a right protected in s 16 of the Constitution of the Republic of South Africa, 1996 and is a cornerstone of 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.

¹⁰⁴ Iyer "An Analytical Look Into the Concept of Online Defamation in South Africa" 2018 32 *Speculum Juris* 124 125.

¹⁰⁵ *Grütter v Lombard supra* par 13.

¹⁰⁶ *Khumalo v Holomisa supra* par 36 and 37.

¹⁰⁷ In *Modiri v Minister of Safety and Security* (2011 (6) SA 370 (SCA) par 22), the court in an *obiter dictum* said that the publication of untruths could never be in the interest of the public.

to stop using the victim's images for the fake account.¹⁰⁸ For a court to grant an interdict, there must be a clear right, an actual or threatened infringement of that right and there must be a lack of any other remedy.¹⁰⁹ It is worth emphasising that in the context of social media, a victim may request a social media platform to take down the account, but there is no guarantee of success in this course of action. Regarding the lack of a remedy, the court in *Heroldt v Wills*¹¹⁰ held that in the context of social media, there was no guarantee that a social media platform would comply with a take-down request, leaving the victim wanting.¹¹¹ Therefore, by granting an interdict in relation to conduct occurring online, a court would be providing a remedy where there was no other.¹¹² It is also noteworthy that the interdict is not used to compel a social media platform to comply with the take-down request, but to put an end to the infringing conduct. In other words, an interdict would not, in these circumstances, be a last resort and may be a suitable remedy for a victim of catfishing, and an alternative to having to request a take down.

4 3 Possible statutory protection in South Africa

The Cybercrimes Act¹¹³ may possibly provide criminal law protection from online catfishing for the right to identity. Section 8 of the Cybercrimes Act criminalises cyber fraud. Cyber fraud is intentional and unlawful misrepresentation carried out using data or a computer program,¹¹⁴ or interfering with data or a computer program, or a computer data storage medium, that causes actual or potential prejudice to another person.¹¹⁵ This provision must be read with section 5(2)(a), (b) and (e) and section 6(2)(a).

In section 8(b), interfering with data or a computer program means temporarily or permanently deleting, altering data or a computer program, or obstructing, interrupting or interfering with the lawful use of data or a computer program.¹¹⁶ According to section 6(2)(a), interfering with a computer data storage medium or computer system refers to temporarily or permanently altering any resource of a computer storage medium or a computer system. The cyber-fraud provision is intended to create a statutory offence specifically criminalising fraud committed using data or a computer program or by interfering with data or a computer program.¹¹⁷

Fraud is generally understood as deceitful conduct that causes another person to suffer some form of prejudice, pecuniary or not.¹¹⁸ The

¹⁰⁸ Loubser and Midgley *et al The Law of Delict* 525.

¹⁰⁹ *Setlogelo v Setlogelo* 1914 AD 221 227.

¹¹⁰ *Supra*.

¹¹¹ *Heroldt v Wills supra* par 38.

¹¹² *Heroldt v Wills supra* par 39.

¹¹³ 19 of 2020.

¹¹⁴ S 8(a) of 19 of 2020.

¹¹⁵ S 8(b) of 19 of 2020.

¹¹⁶ S 5(2)(a), (b) and (e) of 19 of 2020.

¹¹⁷ Mabunda "Is It Cyberfraud or Good Ol' Offline Fraud: A Look at Section 8 of the South African Cybercrimes Bill" 2018 2 *Journal of Anti-Corruption Law* 58 59.

¹¹⁸ Burchell *Principles of Criminal Law* 5ed (2018) 742. For more on the history of fraud, see Snyman *Criminal Law* (2014) 523.

perpetrator's advantage in this instance has to prejudice the victim. The law does not criminalise mere deceit; rather, it criminalises deceit if it results in harm to another person.¹¹⁹ The prejudice envisaged under the offence of fraud may or may not be proprietary. Non-commercial prejudice includes personality interests such as a person's reputation,¹²⁰ or dignity.¹²¹

In the statute's definitions of computer program, computer system and computer data storage medium, social media platforms are not included.¹²² It cannot be assumed that these terms include social media platforms because social media platforms are Internet-based tools. In particular, websites are available on both Internet-enabled mobile devices¹²³ and computers. In other words, social media platforms are available not only through computers or computer systems and cannot themselves be considered computer programs.¹²⁴ Although catfishing involves using data such as a person's image represented electronically, this use of data cannot be said to fall within the scope of section 8 because such use of a person's data does not involve deletion, alteration or obstruction or interference.¹²⁵ Moreover, catfishing does not involve altering a resource of a computer data storage medium or computer system.¹²⁶

In the author's opinion, cyber fraud may not be applicable to catfishing because catfishing involves a distortion of a person's identity to mislead others for their own advantage.¹²⁷ The catfish creator's advantage is prejudicial to the victim only to the extent that it impairs the victim's right to undisrupted enjoyment and use of their identity, causing injury to their dignity. It is unpersuasive to argue that the provision was created with the intention of providing protection for a person whose images are used to create a catfish account. Consequently, whether the Cybercrimes Act is capable of protecting a victim of catfishing depends on the reason behind the creation of an account. If the catfish creator meant to cause harm to the victim, over and above using their image without consent, then the Cybercrimes Act might be useful.

Since South African courts have not yet had the opportunity to decide a matter concerning the scope of section 8's application, it is the author's opinion that section 8 of the Cybercrimes Act may be useful to a third party who is misled by a catfish account, rather than to the victim whose image has been misappropriated and falsified. The provision would not provide a

¹¹⁹ Burchell *Principles of Criminal Law* 749.

¹²⁰ In the matter *R v Seabe* 1927 AD 28 33, the court acknowledged that deceit resulting in dishonour or damage to reputation could be considered criminal fraud.

¹²¹ Burchell *Principles of Criminal Law* 749.

¹²² S 1 of 19 of 2020.

¹²³ Note that social media platforms are available on mobile smart phones as a result of the Wireless Application Protocol, defined in s1 of the Electronic Communications and Transactions Act 25 of 2002 as an international standard developed by a company incorporated under the laws of the United Kingdom to enable applications that use wireless communication including access to the internet.

¹²⁴ Carr and Hayes "Social Media: Defining, Developing and Diving" 2015 23 *Atlantic Journal of Communication* 46 49–50.

¹²⁵ S 5(2)(a)(b) and (e) of 19 of 2020.

¹²⁶ S 6(2)(a) of 19 of 2020.

¹²⁷ Snyman *Criminal Law* 524.

remedy for the person whose identity has been infringed because this provision is concerned with harm resulting from acting on a misrepresentation. Also, catfishing is not always carried out with the sole intention of defrauding other social media users. Instead, there are various reasons for catfishing, such as seeking a romantic partner, jest or making friends. Often the person whose images are used is not the target of the deceit.

5 US INTERVENTIONS AGAINST CATFISHING

Owing to the Internet's borderless nature, catfishing is a problem for Internet users globally. The legal issues posed by catfishing are recognised in the US, and US citizens have approached the courts for recourse.¹²⁸ Several US states have passed legislation in response to online impersonation or to address online impersonation through common-law rules.¹²⁹ Some states deem catfishing or impersonation a criminal offence,¹³⁰ while others view it as a civil wrong.¹³¹ Since 2020, US Congress has been considering the "Social Media Fraud Mitigation Bill".¹³² The proposed statute, dedicated to addressing conduct such as catfishing, prohibits people from creating and using fake social media accounts or profiles and from sending fraudulent emails and other electronic messages.¹³³ Since the US does not address catfishing federally, this article considers existing legal interventions addressing catfishing in the states of Oklahoma and California.

The law in the US states of California and Oklahoma has advanced enough to address online impersonation and catfishing. Beyond the common-law right of privacy protections, both states' legislatures have enacted statutory provisions that address online impersonation or catfishing. California's statutory protection is found in Cal. Penal Code §528.5, while Oklahoma's catfishing statute is found in OK. ST. T 12 §1450.

5.1 Statutory protections in the USA

Oklahoma is the only US state to enact a statute dedicated to catfishing.¹³⁴ Section 1450B provides that knowingly using features of another person's

¹²⁸ See for instance, *Zimmerman v Board of Trustees of Ball State University supra*; *Matot v CH 975 F Supp 2d 1191 (D Or 2013)* and *Kenneth C Griffin, Citadel LLC v Riley Barnes 2017 WL 6447802*.

¹²⁹ Reznik 2013 *Touro Law Review* 457; Derzakarian 2017 *Loyola of Los Angeles Law Review* 742; Kambellari 2017 *The University of Illinois Timely Tech* 1–2.

¹³⁰ For example, in California, online impersonation is a criminal offence (Cal. Penal Code §528.5(a)). See also Oklahoma OK ST T 12 §1450, Texas (Tex. Penal Code § 33.07) and New York (N Y Penal Law §190.25(4)).

¹³¹ Reznik 2013 *Touro Law Review* 456. States such as Washington (Wash. Rev. Code Ann. § 4.24.790 (West)) and Wyoming (Wyo. Stat. Ann. § 6-3-902 (West)) are examples of states where impersonation is a civil wrong.

¹³² H R 6587 Social Media Fraud Mitigation Bill of 2020.

¹³³ 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 2021-08-21).

¹³⁴ Derzakarian 2017 *Loyola of Los Angeles Law Review* 745.

identity through social media without consent in order to harm, intimidate, threaten or defraud them will attract civil liability for online impersonation.¹³⁵ The protected facets of identity include name, voice, signature, and photograph or likeness. “Photograph” includes moving and still images.¹³⁶ Section 1450B clearly captures catfishing in its meaning because it highlights the various reasons that a person’s identity may be used in connection with a fake social media profile, and the lack of consent in the use of the person’s identity. It is the author’s opinion that this provision was drafted with an understanding of the nature of catfishing, and of the fact that a catfish will go as far as using another person’s images and video content to make the fake account appear accurate.

Section 528.5(a) in California’s penal code criminalises online impersonation.¹³⁷ However, although online impersonation is a criminal offence, the statute also provides civil recourse against impersonation perpetrated on social media and using other Internet-based tools.¹³⁸ Liability attaches when a person knowingly, and without consent, credibly impersonates another person on a website or through electronic means. Included in the definition of “electronic means” is creating a social media account or profile in another person’s name. In addition, in terms of section 528.5(b), “credible impersonation” occurs when another person reasonably believes that the defendant is the person who was impersonated. This provision is wide enough to include catfishing since catfishing involves creating a social media profile using an existing person’s picture to give the impression that the account belongs to the person in the picture.¹³⁹ Moreover, other social media users will reasonably believe that the catfish account is a real account. In the case of *In Re Rolando S*,¹⁴⁰ the court noted that section 528.5 could also be contravened by posting comments on a website posing as another person.¹⁴¹

5.2 Common-law protections

US states do not recognise a right to identity. Instead, states protect the features of a person’s identity through privacy torts and the right of publicity.¹⁴² Tort law is the US equivalent of the South African law of delict. However, tort law varies from state to state.¹⁴³ The right of privacy gives rise

¹³⁵ OK ST T 12 §1450B.

¹³⁶ OK ST T 12 §1450A (1).

¹³⁷ Cal. Penal Code §528.5 (a).

¹³⁸ Cal. Penal Code §528.5; Santi 2019 *Southern Illinois University Law Journal* 88.

¹³⁹ According to Derzakarian (2017 *Loyola of Los Angeles Law Review* 753–75), using the picture of a person who exists offline satisfies the requirement of “actual person” in §528.5 (a). However, Hartney (2018 *Minnesota Journal of Law Science and Technology* 286) disagrees and holds that this provision would only be helpful if an actual person, in the sense of using their image and name, is impersonated.

¹⁴⁰ 197 Cal App 4th 936 (Cal App 5 Dist 2011).

¹⁴¹ *In re Rolando S* 945 fn 6.

¹⁴² Skosana *The Right to Privacy and Identity on Social Networking Sites: A Comparative Legal Perspective* (LLM Thesis, University of Pretoria) 2016 89.

¹⁴³ *Haag v Cuyahoga County* 619 F Supp 262 276–277 (D C Ohio 1985); Witt and Tani *Torts* 2022 1.

to privacy torts,¹⁴⁴ which entitle a plaintiff to a claim for damages for the harm caused by another, and to compel the wrongdoer to stop the harmful conduct.¹⁴⁵

There are four privacy torts found in the common law or statutes. The four invasions of privacy torts are: (1) publication or disclosure of private facts, (2) unreasonable intrusion into a person's seclusion or solitude or his private affairs, (3) publicity that places a person in a false light, and (4) appropriation of a person's name or likeness for one's advantage.¹⁴⁶ The torts can be found in §625 of the Restatement of Torts (the Restatement).¹⁴⁷

This article focuses only on the tort relating to publicity that place a person in a false light, and on the appropriation of name or likeness tort because these are the US equivalents of the falsification and misappropriation infringements of identity.¹⁴⁸ The misappropriation tort is sometimes called the right-of-publicity tort and has been codified in statute.¹⁴⁹ A person's identity facets are protected under the right of publicity or the right of privacy. The right of publicity arose from the privacy torts. Privacy and publicity are interconnected legal concepts that protect the features of a person's identity.¹⁵⁰ These are two sides of the same coin. On the one hand, privacy describes the degree of seclusion from the public and a right to privacy protects a person's right to control the publication of personal information.¹⁵¹ On the other hand, publicity describes a person's degree of public exposure and a right to publicity protects their control over the use of their identity features.¹⁵²

5 2 1 *False-light tort*

The false-light invasion-of-privacy tort is triggered by exposing an individual to false publicity.¹⁵³ In other words, publishing facets of a person's identity,

¹⁴⁴ See 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 Warren and Brandeis "The Right to Privacy" 1890 4 *Harvard Law Review* 193.

¹⁴⁵ Witt and Tani *Torts* 2.

¹⁴⁶ Nathan "Let There Be False Light: Resisting the Growing Trend Against an Important Tort" 2002 *Minnesota Law Review* 713; 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* 100; Meltz 2015 *Fordham Law Review* 3436; Messenger "Rethinking the Right of Publicity in the Context of Social Media" 2018 *Widener Law Review* 260; and Heise "Reclaiming the Right of Publicity in the Internet Age" 2018 *Charleston Law Review* 364.

¹⁴⁷ The American Law Institute *The Restatement of the Law, Second, Torts* (1977) https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm (accessed 2021-07-18).

¹⁴⁸ Neethling *et al Neethling on Personality Rights* 352. In the Restatement, these are dealt with under §625E and 625C respectively.

¹⁴⁹ For example, in California it is recorded in the California Civil Code §3344 and in Oklahoma it is codified in OK ST T 12 §1449.

¹⁵⁰ Greer "International Personality Rights and Holographic Portrayals" 2017 27 *Indiana International and Comparative Law Review* 247.

¹⁵¹ *U S Dept of Justice v Reporters Committee for Freedom of Press* 489 U S 749 763 (1989).

¹⁵² Sharman 2006 *Rutgers Law Journal* 991.

¹⁵³ Nathan 2002 *Minnesota Law Review* 715.

and placing them in a false light, attracts liability for the invasion of privacy.¹⁵⁴ Liability under this tort requires proof that the wrongdoer knew of, or had reckless disregard for, the publication's false nature and the impression they created regarding the plaintiff.¹⁵⁵

It must be noted that this tort does not rely on publishing private facts. Instead, publicity involves communicating false information about a person.¹⁵⁶ The false-light tort is a sufficient remedy for catfishing because a catfish creator not only appropriates a person's image but also falsely portrays them as the victim through a fake social-media profile. In essence, they expose a victim to publicity that portrays them in an inaccurate light. In California and Oklahoma, a person can only find protection under the false-light tort if a person of ordinary sensibilities would regard the impression created as highly offensive.¹⁵⁷

5 2 2 *Misappropriation tort*

The misappropriation tort protects a person's interest in having exclusive use of their own identity. A person's privacy is invaded if a facet of their identity has been used without authority for the benefit of the wrongdoer. The statutory right of publicity broadens the interests protected under the misappropriation tort.¹⁵⁸ Although the enactment of publicity statutes contributed to the impression that modern-day publicity is wholly removed from privacy,¹⁵⁹ this view is inaccurate because publicity statutes expand the scope of privacy.¹⁶⁰ The statutory publicity tort and the common-law misappropriation tort protect a person against the unauthorised use of their identity.¹⁶¹

A person from California or Oklahoma may succeed in a claim for the invasion of their privacy by misappropriation without needing to prove an

¹⁵⁴ §625E of the *Restatement of the Law, Second, Torts* (1977).

¹⁵⁵ The American Law Institute inserted a cautionary note that there was no legal position regarding negligent publication that places a person in a false light.

¹⁵⁶ *The Restatement of the Law, Second, Torts* (1977) §625D, Comment (a).

¹⁵⁷ *Grogan v Kokh LLC* 1030; *Flores v Von Kleist* 1259; Derzakarian 2017 *Loyola of Los Angeles Law Review* 758.

¹⁵⁸ In California, the California Civil Code §3344 entrenches statutory misappropriation. According to this provision, the right of publicity protects a person's name, likeness, voice, signature and image from unauthorised use for advertising on products or merchandise or services and goods. In Oklahoma, the equivalent provision is found in OK ST T 12 §1449 (A), which similarly provides that using a facet of a person's identity to sell, or advertise products, services, merchandise or goods without consent attracts civil liability.

¹⁵⁹ Koehler "Fraley v. Facebook": The Right of Publicity in Online Social Networks" 2013 28 *Berkeley Technology Law Journal* 963 968.

¹⁶⁰ Koehler 2013 *Berkeley Technology Law Journal* 971–972. In the case *Brill v Walt Disney Co* 246 P 3d 1099 1102. (Okla. Civ.App.Div. 3, 2010), the Oklahoman court held that, under the common-law publicity claim, only a person's name and likeness was protected against appropriation, whereas the statutory publicity claim provided recourse to people who have had their name, likeness, signature, voice and photographs appropriated for a commercial purpose.

¹⁶¹ Messenger 2018 *Widener Law Review* 261.

intention to advertise.¹⁶² The recognition of mere misappropriation is useful in the case of catfishing because catfishing does not always involve commercial gain. However, a catfish creator may derive another benefit from using the victim's image without consent, and if the victim can prove that benefit to the court, they are likely to succeed in their claim.

6 SOUTH AFRICAN AND US LAW SIMILARITIES AND DIFFERENCES

South African law does not expressly criminalise catfishing or online impersonation. Whether section 8 of the Cybercrimes Act can be construed as applying to catfishing, and can protect a victim who has had their identity features misused, remains to be seen. South African statutes leave victims of catfishing without a civil or criminal remedy, while US victims in California and Oklahoma are able to turn to statutory provisions. Despite the glaring differences in the statutory position, there are similarities in the common-law remedies available to victims in both South Africa and the two US states.

South African common law recognises that using a person's identity to place them in a false light is an infringement of their identity; this is similar to the position in the US where exposing a person to publicity that places them in a false light is an invasion of their privacy. The difference between the South African and US causes of action, however, is that the South African common law only requires that the use of a person's identity must have placed them in a false light. There is no requirement for insult. The US position is similar to the position expressed in *Kidson v SA Associated Newspaper Ltd*,¹⁶³ where the court found that using a married nurse's image in an article portraying her as seeking companionship was insulting.¹⁶⁴ However, years later in *Kumalo v Cycle Lab (Pty) Ltd*, the court expressed the view that the impression created by using another person's image without consent did not have to be degrading, humiliating, or insulting to found a valid claim.¹⁶⁵ Merely using the plaintiff's image in an advertisement to generate a false impression was in itself offensive, thus illustrating that portraying a person in a false light was a sufficient cause of action. Therefore, the effect of creating a catfish account with another person's images does not have to be offensive or degrading for the victim to have a claim. It can be concluded that the unauthorised use of their image and association of their image with a fake account online would be sufficient grounds for action.

The two US states also recognise a misappropriation of name or likeness as a cause of action at common law and in statute. The US states have a statutory claim to supplement the common law and which extends the protection afforded by the common-law tort. The common-law tort allows victims to bring a claim even in the absence of a commercial benefit,

¹⁶² *Fairfield v American Photocopy Equipment Company* 291 P 2d 194 (Cal 1955); *Bates v Cast* 316 P 3d 246, 253 (Okla Civ App Div 1, 2013); Derzakarian 2017 *Loyola of Los Angeles Law Review* 756–757.

¹⁶³ 1957 (3) SA 461 (W).

¹⁶⁴ *Kidson v SA Associated Newspapers Ltd* *supra* 467G–468A.

¹⁶⁵ *Kumalo v Cycle Lab* *supra* par 31.

whereas the statutory claim applies only to identified commercial activities. In contrast, South African common law only recognises the infringement of identity by misappropriation for commercial gain, requiring a victim to show that the defendant misappropriated their identity features for commercial advantage. The commercial gain requirement poses a challenge in catfishing because that is not always the intention behind catfishing. In the instances where catfishing is used to defraud other users, then this would be a useful remedy. However, where no commercial gain arose, it would be difficult for a victim to rely on this remedy.

7 THE ADEQUACY OF THE SOUTH AFRICAN RIGHT TO IDENTITY

Although California and Oklahoma protect the facets of a person's identity through common-law privacy laws, both states offer statutory protections in online impersonation provisions. California criminalises online impersonation,¹⁶⁶ and Oklahoma holds a person who impersonates another through social media liable for damages through its Catfishing Liability Act.¹⁶⁷ Unlike the statutory impersonation provisions of the two US states, the South African Cybercrimes Act does not explicitly encompass online impersonation such as catfishing that involves using one facet of a person's identity in connection with fictitious personal information. In other words, the statute, in its current form and in the absence of an interpretation from a court, does not extend protection to the use of a person's images in the creation of fake social media profiles. In this regard, the states of California and Oklahoma protect identity adequately because they have enacted statutory provisions that encompass impersonation such as catfishing online.

The US states of California and Oklahoma also protect facets of identity through the common-law right of privacy or the statutory right to publicity.¹⁶⁸ At common law, two privacy torts apply to catfishing: the false-light tort and the misappropriation tort.¹⁶⁹ These torts are similar to the infringements of the South African right to identity. Victims of catfishing in South Africa have common-law remedies to redress the harm resulting from the interference with their right to identity. The infringement of the right to identity would enable a victim of catfishing to seek damages through the *actio iniuriarum* against the catfish creator for the unauthorised use of their images and the falsification of their identity. Moreover, a victim can seek an interdict against the catfish creator to stop them from using their image in this harmful manner.

The US states acknowledge that sometimes the facets of a person's identity may not be used in connection with a commercial purpose; and that there may be another non-patrimonial benefit derived from impersonating a person online. In the author's opinion, this recognition of mere

¹⁶⁶ Cal Penal Code §528.5 (a).

¹⁶⁷ OK ST T 12 §1450B.

¹⁶⁸ In Oklahoma OK ST T 12 §1449A, in California Cal Civ Code §3344; Skosana *The Right to Privacy and Identity on Social Networking Sites* 89.

¹⁶⁹ Heise 2018 *Charleston Law Review* 364; Messenger 2018 *Widener Law Review* 260.

misappropriation is a vital feature in addressing catfishing and vindicating catfishing victims because catfishing is not always driven by commercial benefit. Social media users sometimes perform acts or participate in conduct without justification because no consequences will flow from their actions. Catfishing is an example of behaviour that is frowned upon and committed without cognisance of its implications on the person whose images are used to create the profile.

Although the law does not concern itself with trivialities and people are expected not to be overly sensitive, one would expect that social media users would also act as sensibly and reasonably online as they would offline. Catfishing is a form of impersonation that occurs online. That the impersonation takes place online does not change the fact that it is unacceptable. Moreover, the rules and convictions that a person lives by offline do not cease to exist online. Therefore, if the unauthorised use of a person's image and falsification of their identity harms their dignity and disturbs their right to identity offline, then catfishing would have the same effect despite it occurring online. It has negative implications for a person's personality and can negatively affect their reputation since a catfish's conduct will be attached to them.

8 CONCLUSION

Some parallels can be drawn between the South African right to identity and the US privacy torts and statutory publicity claims.¹⁷⁰ The US states protect identity features under privacy but the rise of publicity rights has expanded the scope of the common-law protection afforded to a person's identity features. The states of California and Oklahoma have civil and criminal remedies for online impersonation and catfishing, which is adequate remedial action given the variety of harms that may result from catfishing. Moreover, the two US states also offer explicit protection against catfishing and online impersonation, which is different from the position in South Africa where there is uncertainty about whether existing statutory enactments can be interpreted to apply to catfishing victims. Moreover, the South African Cybercrimes Act does not protect a person's identity features as defined in the common-law right to identity. There is uncertainty whether this statute can be useful to a person who seeks reparation for the unauthorised use of their image to create a catfish account. Therefore, to remedy an injury to their identity, South African victims of catfishing may seek damages through the common-law *actio iniuriarum*, or seek an interdict against the catfish creator.

¹⁷⁰ *O'Keeffe v Argus Printing and Publishing Co supra* 249B–C; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 386H; *Grütter v Lombard supra* par 7.