

“SOMETHING OLD, SOMETHING NEW” – ASPECTS OF PERSONALITY RIGHTS IN THE UNITED STATES AND SOUTH AFRICA*

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SUMMARY

Advances in technology have made it possible for the least talented person to become an Internet sensation. This has created challenges related to personality or image rights, data protection, privacy, and the right to be forgotten. The position in the United States of America is dealt with first. Individuals can rely on either federal law or state law. Section 43(a) of the Lanham Act prohibits conduct that causes confusion or false representations or deception. The right to publicity is very prominent. The author Prosser divided the right to privacy by reference to four categories of tort: the intrusion of physical solitude; public disclosure of private facts; representations in a false light; and the appropriation of a person's name and appearance. Richards and Solove believe that the right to publicity is often combined with an individual's appearance or name. The difference between appropriation and the right to publicity is that the former is traditionally focused on the damage to a person's right to privacy, while the latter focuses on the person's right to make money from their image. In South Africa, Cornelius is of the opinion that the approach here is more advanced than in other countries as the right to dignity is protected by the right to identity. Exclusions from liability in America would include newsworthy information and parody. In South Africa, the exclusions are press privilege and parody. The legal position of social media service providers in the United States is such that a high degree of immunity is provided to networks by the Communications Decency Act. Section 230 of the Act was aimed at promoting the free exchange of information and ideas over the Internet and at the control of offensive material. The right to be forgotten occurs in both systems.

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1 INTRODUCTION

Advances in the field of technology have made it possible for the least talented of individuals to become Internet sensations. A quick snapshot of an unknown person could easily go viral. Fame used to be reserved for the few and favoured but has become accessible to all of us. This has resulted in challenges when addressing legal questions pertaining to the association of personality or image rights, data protection, privacy, and the right to be forgotten, as well as the subject of liability in cases involving the alleged infringement of the aforesaid rights.¹ Some perspectives on the issue are given from the United States (US) and South Africa (and, at times, the European Union (EU)).

2 BASIS OF PROTECTION

While the phrases “personality rights”, “image rights” and “publicity rights” are often used, their applications are varied.² The terms “right to publicity” and “personality rights” are also used interchangeably but have different applications across jurisdictions.³ The underlying rationale of these rights is the protection of the right of the individual to control his or her name, image, likeness or similar indicators, as well as to control the commercial use of a person’s identity.⁴

Publicity rights serve to protect an individual’s image and likeness from being commercially exploited without authorisation where fame is sought after.⁵ Publicity rights can also be extended to those who desire to protect their privacy and image from being shared publicly in an unauthorised manner, thus resulting in unintended and eschewed fame.⁶

2.1 The American approach

The legal system of the US consists of two parts – federal law and state law. Federal law applies to all 50 states, whereas state law applies to a specific state. Publicity rights are “an assignable property interest in a person’s image”,⁷ and their foundations are built on privacy and economic exploitation.⁸ In the US, individuals have the option of protecting and controlling the commercial use of their name, image, and/or likeness by

¹ Martínez and Meccinas “Old Wine in a New Bottle? Right of Publicity and Right to be Forgotten in the Internet Era” 2018 *Journal of Information Policy* 373.

² Martínez and Meccinas 2018 *Journal of Information Policy* 376.

³ Neethling “Personality Rights: A Comparative Overview” 2005 38 *Comparative and International Law Journal of Southern Africa* 220.

⁴ *Ibid.*

⁵ Gervais and Holmes “Fame, Property and Identity: The Scope and Purpose of the Right to Publicity” 2014 25 *Fordham Intellectual Property, Media and Entertainment Law Journal* 195.

⁶ *Ibid.*

⁷ Heise “Reclaiming the Right to Publicity in the Internet Age” 2018 *Charleston Law Review* 363.

⁸ *Ibid.*

means of either the federal law (in the form of the Lanham Act) or state-based publicity rights.⁹

2 1 1 *The Lanham Act of 1946*

Section 43(a) provides:

- “(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
- (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
 - (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,
- shall be liable in a civil action.”

Some celebrities have succeeded with false endorsement claims under the Lanham Act. However, state publicity rights have also been relied upon.¹⁰ One such example can be found in the case of *Waits v Frito-lay and Tracy Locke, Inc.*,¹¹ where Tom Waits successfully won a claim based on the action of false endorsement. The distinctive feature of his voice was used in a parody commercial for Salsa Rio Doritos.¹² The Ninth Circuit Court agreed with Waits that consumers were likely to be misled.¹³

2 1 2 *Publicity rights*

Publicity rights differ from those rights recognised in section 43(a) of the Lanham Act, and are applied differently from state to state.¹⁴ The right to publicity stems from the right to privacy and the right to exploit one’s own image.¹⁵ The recognition of the right to privacy can be traced back to the late 1800s; the first concept of such a right originated in an article published in the *Harvard Law Review* by Samuel D Warren and Louis D Brandeis JJ.¹⁶ The right was theorised as an infraction on human dignity through the public release of information that brings an individual’s reputation into disrepute.¹⁷ The right to privacy was first recognised judicially in *Pavesich v New*

⁹ *Ibid.*

¹⁰ For the requirements, see *Toth v 59 Murray Enterprises, Inc* 15 Civ. 8028 Southern District of New York (2019).

¹¹ 978 F.2d 1093 (1992).

¹² *Waits v Frito-Lay, Inc supra* 1106–1107.

¹³ *Waits v Frito-Lay, Inc supra* 1111.

¹⁴ Solomon “Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity” 2004 *Trademark Report* 1202 and 1205.

¹⁵ Heise 2018 *Charleston Law Review* 363.

¹⁶ Warren and Brandeis “The Right to Privacy” 1890 4 *Harvard Law Review* 205.

¹⁷ Warren and Brandeis 1890 *Harvard Law Review* 197.

England Life Insurance Company.¹⁸ In this case, Paolo Pavesich claimed that New England Mutual Life Insurance Company (NEMLIC) had violated his privacy by using a picture of his likeness, without his consent, to advertise life insurance.¹⁹ Pavesich also claimed that the words used alongside the picture appeared to endorse NEMLIC's insurance.²⁰ The court held that the use of the image, without consent and for commercial gain, amounted to an invasion of Pavesich's privacy.²¹

The writer Prosser went on to develop the right to privacy by referring to four distinct torts: intrusion upon physical solitude; public disclosure of private facts; depiction in a false light; and appropriation of name and likeness.²² The basis of the appropriation of name and likeness sub-category was given context through an individual's claim of embarrassment or reputational harm.²³ The 1950s coincided with golden-age Hollywood when there were calls to develop the appropriation tort to consider the economic rights a person would have in his or her image, thereby placing the person in a position to bring a claim against an infringement of the said right.

Today's publicity rights stem from the appropriation tort.²⁴ Publicity rights gained official recognition in the US in the landmark case of *Haelan Laboratories v Topps Chewing Gum Inc*,²⁵ where Jerome Frank J conceived the term "publicity rights".²⁶ The case involved two manufacturers that produced gum and packaged baseball cards with their gum. Haelan Laboratories had exclusive contracts with several baseball players for the use of their images. However, these baseball players signed similar contracts with Topps.²⁷ Haelan then approached the Second Circuit Court with a claim for breach of contract.²⁸ The Second Circuit Court held that a person has an assignable right in his image and can give exclusive publishing rights in the "publicity value of his photograph".²⁹ The court went on to describe the essence of the right to publicity and stated that it was not about publicising information about a person that may be humiliating or offensive, but rather that there exists an economic aspect capable of being exploited.³⁰

The Second Circuit Court also recognised the commercial value of being a celebrity³¹ and held that baseball players could sell the exclusive right to

¹⁸ 122 Ga 190 50 SE 68 (1905).

¹⁹ Rice "The Right to Privacy" 1920 *University of Pennsylvania Law Review* 285.

²⁰ *Ibid*.

²¹ Rice 1920 *University of Pennsylvania Law Review* 286.

²² Prosser "Privacy" 1960 48 *California Law Review* 391.

²³ Heise 2018 *Charleston Law Review* 363.

²⁴ *Ibid*.

²⁵ 202 F.2d 866 (2d Cir 1953).

²⁶ Hylton "Baseball Cards and the Birth of the Right of Publicity: The Curious Case of *Haelan Laboratories v Topps Chewing Gum*" 2001 12 *Marquette Sports Law Review* 274.

²⁷ *Haelan Laboratories v Topps Chewing Gum Inc supra* 867.

²⁸ *Haelan Laboratories v Topps Chewing Gum Inc supra* 869.

²⁹ *Haelan Laboratories v Topps Chewing Gum Inc supra* 868.

³⁰ *Ibid*.

³¹ Johnson "Disentangling the Right of Publicity" 2017 111 *Northwestern University Law Review* 897.

the use of their images to third parties.³² This decision shifted publicity rights theory from the submission by Warren and Brandeis that infringement occurs only where a person's dignity is harmed, and recognised that such legal rights can be enforced based on their commercial viability.

Although an overlap exists between the right to publicity and the principles of trade marks, the former is not recognised under the law of trade marks.³³ The rationales behind the right to publicity and the law of trade marks respectively is important as they determine the proper demarcation of each right.³⁴ The protection of the consumer from deception is the basis of the law of trade marks. However, such protection serves merely as an incentive in the case of publicity rights.³⁵ In alleging infringement, the owner of a trade mark must prove that the use of the trade mark would confuse or be likely to confuse the consumer.³⁶ An individual claiming infringement of the right to his or her image and likeness has a right to his or her identity.³⁷ This rationale may be derived from the Lanham Act, as interpreted in the Third Restatement of Unfair Competition.³⁸ It can be said, then, that publicity rights protect the "commercial use of non-deceptive, non-private references of an individual".³⁹

With the rise in online fame, the right to privacy is constantly being challenged and opportunities for commercial gain are on the increase. Fame has now become a commodity that any individual can gain, whether or not it is desired. Therefore, publicity rights should be interpreted in such a manner that they benefit any individual who has a substantive commercial asset embodied in their identity.⁴⁰ This notion is supported by Armstrong who states that judges tend to expand their interpretation of *persona* to keep away from arbitrarily determining who may or may not rely on the right to publicity.⁴¹

Richards and Solove opine that the right to publicity is often combined with an individual's right not to have his or her name or likeness misappropriated.⁴² Causes of action based on each of these rights rely on the unauthorised use of another person's name or likeness for a commercial

³² *Haelan Laboratories v Topps Chewing Gum Inc supra* 867.

³³ Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 182.

³⁴ Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 183.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Restatement (Third) of Unfair Competition* s 46 1995. This Code deals with protection against the use of a mark in a confusing, false and deceptive way and to prevent people from being misled when purchasing goods that are seemingly endorsed by a particular celebrity or social media personality.

³⁹ Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 185.

⁴⁰ Schlegelmilch "Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America's Lead" 2016 *Gonzaga Law Review Online* 110.

⁴¹ Armstrong "The Reification of Celebrity: Persona as Property" 1991 51 *Louisiana Law Review* 466.

⁴² Richards and Solove "Prosser's Privacy Law: A Mixed Legacy" 2010 98 *California Law Review* 1888–1890.

purpose.⁴³ The difference between the right not to be misappropriated and the right to publicity is that the former is traditionally centred on the harm done to a person's privacy right, whereas the latter focuses on the harm done to a person's right to make money from the use of their likeness.⁴⁴ The courts have applied these legal principles interchangeably and this has caused confusion as to whether celebrities may claim for misappropriation owing to the relinquishment of their privacy as a result of achieving “celebrity status”, and whether the layman may rely on his or her right to publicity despite his or her image not being “profitable”.⁴⁵ It is therefore uncertain whether publicity rights protect individuals' economic interest in their image, their privacy, or both.⁴⁶

2 2 The South African approach

Personality rights in South Africa are protected under the common law of delict and by the Bill of Rights contained in chapter 2 of the Constitution.⁴⁷ The remedy where a personality interest has been affected is known as the *actio iniuriarum*. The *actio iniuriarum* protects a person's right to physical integrity, the right to a good name, and the right to *dignitas*.⁴⁸ *Dignitas* includes an individual's honour, privacy and identity.⁴⁹

2 2 1 Personality rights

It seems that South Africa protects image rights under the umbrella of personality rights, but it has been said that the lack of a clear point of departure indicates that the law needs to be developed in this area of law.⁵⁰ There have been instances where the law has been adapted to accommodate publicity rights without adopting foreign principles,⁵¹ and a definition of publicity rights has been given in a South African context. Michau states that publicity rights involve “the control and associated benefit that an individual, especially a celebrity, derives from the exploitation of the commercial value embodied in his name, photograph, statue, display, and other personality traits”.⁵² In South Africa, the unauthorised use of a person's photograph in an advertisement was first considered as a ground to institute the *actio iniuriarum* in the case of *O'Keefe v Argus Printing & Publishing Co Ltd*.⁵³ This case was the first to recognise the right of identity as a

⁴³ *Ibid.*

⁴⁴ Messenger “Rethinking the Right of Publicity in the Context of Social Media” 2018 24 *Widener Law Review* 261.

⁴⁵ Richards and Solove 2010 *California Law Review* 1890.

⁴⁶ Messenger 2018 *Widener Law Review* 261.

⁴⁷ Constitution of the Republic of South Africa, 1996.

⁴⁸ Michau “Publicity Rights” 1994 2 *Juta's Business Law* 186.

⁴⁹ *Ibid.*

⁵⁰ Van der Merwe, Geyer, Kelbrick, Klopper, Koornhof, Pistorius, Sutherland, Tong and Van der Spuy *Law of Intellectual Property in South Africa* (2016) 43.

⁵¹ *Ibid.*

⁵² Michau 1994 *Juta's Business Law* 187.

⁵³ 1954 (3) SA 244 (C).

protectable interest that is violated where advertising involves the unauthorised use of a person's image for commercial purposes.

The Supreme Court of Appeal in *Grütter v Lombard*⁵⁴ recognised that a person's right to identity is infringed when a part of that identity is used without consent and for commercial exploitation.⁵⁵ The court had to determine whether the use of the appellant's name, even though he no longer was a part of the firm, was permissible. Nugent J held that the right to privacy is a part of a person's personality and must be protected as part of their personality.⁵⁶ Another aspect that the court had to determine was whether a person's identity is a protectable right.⁵⁷ Nugent J relied on the principles laid out in *O'Keefe* where it was held that the publication of a person's name and likeness for commercial purposes without consent could constitute an infringement of the person's dignity,⁵⁸ as such publication does not reflect the true representation of the individual.⁵⁹ The infringement, therefore, is based on the illegitimate use of the person's name, a misrepresentation that the person endorses a particular product or service, and the violation of their human dignity.⁶⁰ With regard to the use of a person's identity for commercial gain, the plaintiff's claim would be founded on the violation of his or her right to association and commercial exploitation.⁶¹

In *Wells v Atoll Media (Pty) Ltd*,⁶² the photograph of a minor was used in a surfing magazine, which was then displayed on television for an advertisement of the magazine.⁶³ This caused a commotion in the minor's community and offensive remarks were made about her on online platforms and in text messages.⁶⁴ The judgment restated the position in *Grütter v Lombard*⁶⁵ that the unauthorised use of a person's image constitutes an unjustifiable invasion of privacy,⁶⁶ and where the image is published in a magazine, it evidently is for commercial gain and violates the plaintiff's rights to a good name, privacy and identity.⁶⁷ In the earlier case of *Kumalo v Cycle Lab*,⁶⁸ former Miss Soweto and Miss Black South Africa title holder, Basetsana Kumalo, instituted proceedings against a bicycle retailer. The plaintiff's picture had been taken without her consent and the shop used the image in its shop and advertisements.⁶⁹ The court in *Kumalo v Cycle Lab*

⁵⁴ 2007 (4) SA 89 SCA.

⁵⁵ 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 *PER* 194.

⁵⁶ *Grütter v Lombard supra* par 12.

⁵⁷ *Grütter v Lombard supra* par 8.

⁵⁸ *Grütter v Lombard supra* par 11.

⁵⁹ Cornelius 2011 *PER* 195.

⁶⁰ Cornelius 2011 *PER* 196; Neethling *Persoonlikheidsreg* (1998) 44.

⁶¹ Cornelius 2011 *PER* 196.

⁶² (Unreported 11961/2006) [2009] ZAWCHC 173 (2009-11-09) 2011.

⁶³ *Wells v Atoll Media (Pty) Ltd supra* par 1–6.

⁶⁴ *Wells v Atoll Media (Pty) Ltd supra* par 9.

⁶⁵ *Grütter v Lombard supra*.

⁶⁶ *Grütter v Lombard supra* par 48.

⁶⁷ *Grütter v Lombard supra* par 49.

⁶⁸ (31871/2008) [2011] ZAGPJHC 56 (2011-06-17).

⁶⁹ *Kumalo v Cycle Lab supra* par 3–4.

restated that the unauthorised use of someone’s image in a manner that falsely misrepresents the endorsement of a product or service for commercial gain constitutes an infringement of the plaintiff’s personality rights, particularly his or her right to identity and privacy.⁷⁰

2 2 2 *The actio iniuriarum*

The South African law concerning personality rights is based on the *actio iniuriarum* of Roman law.⁷¹ The *actio iniuriarum* recognises that persons can claim for infringements to their *corpus*,⁷² *fama*⁷³ and *dignitas*.⁷⁴ The right to dignity is entrenched in the Bill of Rights⁷⁵ and lies at the heart of Roman and Roman-Dutch personality law.⁷⁶

Cornelius submits that the *actio iniuriarum* is wide enough to cover any transgression against a person’s dignity and/or commercial exploitation with respect to the individual’s public image and persona,⁷⁷ and argues that applying the current law to any new developments in society would provide sufficient protection.⁷⁸ This was further echoed in *Khumalo v Holomisa*⁷⁹ where it was stated that defamation actions in respect of someone’s public image⁸⁰ are protected by constitutional provisions, specifically freedom of expression and dignity.⁸¹ The Constitutional Court emphasised the importance of dignity in *Harksen v Lane*.⁸²

Cornelius further opines that the South African approach is more advanced than other legal systems because the right to identity is protected under the right to dignity.⁸³ Despite the lack of a concrete determination from the court in *Grütter* on whether an individual has a patrimonial interest in his or her identity that is worth protecting, enough indication exists in the common law that patrimonial damages can be awarded where personality rights have been infringed.⁸⁴ The South African approach does not consider fame to be a requirement, but fame may affect the quantum of damages awarded.⁸⁵

⁷⁰ *Kumalo v Cycle Lab supra* par 22–23.

⁷¹ Burchell “The Legal Protection of Privacy in South Africa: A Transplantable Hybrid” 2009 13 *Electronic Journal of Comparative Law* 3.

⁷² S 12(2) of the Constitution of the Republic of South Africa, 1996.

⁷³ S 10 of the Constitution of the Republic of South Africa, 1996.

⁷⁴ *Ibid.*

⁷⁵ Ch 2 of the Constitution of the Republic of South Africa, 1996.

⁷⁶ Burchell “Beyond the Glass Bead Game: Human Dignity in the Law of Delict” 1988 4 *South African Journal of Human Rights* 1.

⁷⁷ Cornelius “Image Rights in South Africa” 2008 *The International Sports Law Journal* <https://www.thefreelibrary.com/Image+rights+in+South+Africa.-a0212546227> (accessed 2020-11-10).

⁷⁸ Cornelius <https://www.thefreelibrary.com/Image+rights+in+South+Africa.-a0212546227>.

⁷⁹ 2002 (5) SA 401 (CC).

⁸⁰ *Khumalo v Holomisa supra* par 4 and 17.

⁸¹ Burchell 2009 *EJCL* 5.

⁸² 1998 (1) SA 300 (CC).

⁸³ Cornelius 2008 *The International Sports Law Journal* 74.

⁸⁴ *Ibid.*

⁸⁵ Cornelius 2008 *The International Sports Law Journal* 75.

2 3 Other remedies

It is possible to register a person's name or likeness as a trade mark.⁸⁶ The Code of the Advertising Regulatory Board, which specifically deals with social media, could also be relevant.⁸⁷

2 4 Conclusion

This section has highlighted that a standard of protection exists, but none of the instances above has been considered in the context of social media. However, had these cases found their way into social media in circumstances where someone has posted another individual's image as that person's own (for instance, on Instagram), and uses it for commercial benefit without consent and an element of misrepresentation is present, it can be deduced that such circumstances would found a claim of infringement against the publisher.

3 LIMITATIONS TO PUBLICITY RIGHTS

Publicity rights do not exist in a vacuum and stand in direct conflict with other rights – for example, where an image of an individual is used satirically or where the information conveyed is newsworthy. This section discusses how the right to control and exploit the commercial use of one's image is limited in the US and South Africa.

3 1 The American approach

Tensions exist between the right to publicity and the First Amendment. A balance must be struck between a person's exclusive right to exploit the commercial value of his or her own image, and freedom of speech.⁸⁸ The Supreme Court attempted to address this conflict in *Zacchini v Scripps-Howard Broadcasting Co.*⁸⁹ In this case, Zacchini filed a suit against a reporter who recorded his cannonball act and publicised it.⁹⁰ The court held that although the broadcasting network would be liable for appropriating someone's name, performance or likeness, it has the privilege to report on matters that are of public interest even if doing so encroaches on the individual's publicity rights, unless the infringement causes injury to the individual or was for private use.⁹¹ The court had to determine whether an exception existed with regard to the First Amendment. The court held that the broadcast of the entire performance negatively impacted the commercial interest he gained from performing his act⁹² and, as a result, the

⁸⁶ See Trade Marks Act 194 of 1993.

⁸⁷ Code of Advertising Practice Appendix K.

⁸⁸ Georgescu "Two Tests Unite to Resolve the Tensions Between the First Amendment and the Right to Publicity" 2014 83 *Fordham Law Review* 917.

⁸⁹ 433 US 562 (1977).

⁹⁰ *Zacchini v Scripps-Howard Broadcasting Co supra* par 563–564.

⁹¹ *Zacchini v Scripps-Howard Broadcasting Co supra* par 565–569.

⁹² *Zacchini v Scripps-Howard Broadcasting Co supra* par 575–576.

broadcasting company was ordered to pay for Zacchini’s performance.⁹³ The court further decided that protecting a performer’s economic interest incentivises creativity, which in turn advances the First Amendment freedom-of-speech provision.⁹⁴

The case was the first to attempt to obtain a balance between the right to freedom of speech, and publicity rights. The judgment given was specifically tailored to the facts of the case, primarily focusing on the broadcasting of a performance and not the appropriation of a person’s name. In doing so, the *Zacchini* case did not set a precedent for other courts to follow with regard to the balance to be struck when the rights to a person’s name and freedom of speech are in conflict.⁹⁵

3 1 1 Commercial versus expressive use

American courts have a duty to balance conflicting interests and must determine if the use of a personality’s likeness is protectable under the First Amendment and whether such use is expressive or commercial.⁹⁶ Expressive use occurs where a person conveys a message or idea through creative means.⁹⁷ Commercial use, on the other hand, occurs where the use of the expression is motivated by its economic value.⁹⁸ The First Amendment will only protect commercial expression when it is not believed to amount to an endorsement and when the expression is performed or published lawfully.⁹⁹

Some commentators are of the opinion that commercial speech carries with it expressive constituents.¹⁰⁰ In *Hoepker v Kruger*,¹⁰¹ the plaintiff – a German photographer – took a picture of Charlotte Dabney in 1960.¹⁰² The defendant, Barbara Kruger, years later created a collage that included the plaintiff’s photograph of Dabney.¹⁰³ This collage was sold to the Museum of Contemporary Art in California. Dabney filed a suit of infringement of her privacy.¹⁰⁴ The court found that the model’s right to privacy had not been violated.¹⁰⁵

⁹³ *Zacchini v Scripps-Howard Broadcasting Co supra* par 578.

⁹⁴ *Zacchini v Scripps-Howard Broadcasting Co supra* par 575–576.

⁹⁵ Georgescu 2014 *Fordham Law Review* 926.

⁹⁶ *Doe v TCI Cablevision* 110 S.W.3d 363 2003 373.

⁹⁷ Georgescu 2014 *Fordham Law Review* 918.

⁹⁸ Georgescu 2014 *Fordham Law Review* 919.

⁹⁹ *Ibid.*

¹⁰⁰ Georgescu 2014 *Fordham Law Review* 920.

¹⁰¹ 200 F Supp 2d 340 (SDNY 2002).

¹⁰² *Hoepker v Kruger supra* 342.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Hoepker v Kruger supra* 347–348.

3 1 2 *Newsworthiness doctrine*

In *Fraleley v Facebook, Inc.*,¹⁰⁶ the plaintiffs brought a claim against Facebook for the use of their image and likeness in “Sponsored Stories” stating that the use violated their right to publicity.¹⁰⁷ The plaintiffs argued that, to their Facebook friends, they were celebrities and the use of their images by Facebook without their consent deprived them of their economic value.¹⁰⁸ Facebook argued that the stories were newsworthy and although the plaintiffs are public figures to their friends, “expressions of consumer opinion are generally newsworthy”.¹⁰⁹ The court ruled in favour of the plaintiffs and denied Facebook’s motion to dismiss.¹¹⁰

The court redefined what it means to be a celebrity as the plaintiffs were described as public figures among their online friends, suggesting that to a certain degree, everyone is a celebrity and can control the commercial value of their image, especially in instances where the individual has a substantial following on a social media platform or is considered a peer-to-peer influencer.¹¹¹ The court’s decision paves the way for the future interpretation of the right to publicity insofar as it applies to activity on social media sites.¹¹²

3 1 3 *Parody and jest*

Non-commercial speech receives the highest level of constitutional protection in the US, and thus the courts have historically ruled in favour of satirical speech.¹¹³ In *White v Samsung Electronics America, Inc.*,¹¹⁴ Samsung featured a robot that resembled Vanna White, an American television personality famous for hosting the show “Wheel of Fortune”.¹¹⁵ The majority decision stated that advertising relying on the image of a celebrity must evoke the celebrity’s identity in order for the humour to be understood, and secondly, where works of parody rely on the identity of a famous person, the First Amendment will overrule a right-to-publicity claim.¹¹⁶ It is submitted that there is still a need for development to ensure that each right is neither underprotected nor overprotected, while ensuring that individuals remain incentivised to create artistic works.

¹⁰⁶ 830 F Supp 2d 785 (2011).

¹⁰⁷ *Fraleley v Facebook supra* 790.

¹⁰⁸ *Fraleley v Facebook supra* 792.

¹⁰⁹ *Fraleley v Facebook supra* 804–805.

¹¹⁰ *Fraleley v Facebook supra* 812.

¹¹¹ *Ibid.*

¹¹² Koehler “*Fraleley v Facebook: The Right of Publicity in Online Social Networks*” 2013 28 *Berkeley Technology Law Journal* 1000.

¹¹³ Grady, McKelvey and Clement “A New Twist for the Home Run Guys: An Analysis of the Right of Publicity Versus Parody” 2005 15 *Journal of Legal Aspects of Sport* 283.

¹¹⁴ 971 F 2d 1395 (9th Cir 1992).

¹¹⁵ *White v Samsung Electronics America supra* 1396.

¹¹⁶ *White v Samsung Electronics America supra* 1401.

3 2 The South African approach

When regard is had to personality rights (including the rights to image, identity, dignity and freedom of association), a balance must be struck between third parties' rights to freedom of expression, and freedom of the media.¹¹⁷ The otherwise unlawful use of a person's image may be justified on certain grounds where the violation can be considered lawful.

The grounds of media privilege and jest could constitute a defence.¹¹⁸

3 2 1 *Media privilege*

News broadcasters used to be the primary sources of public information, but wider Internet access and social media have made it possible for anyone to serve as a source of newsworthy content that is in the public interest. If a defendant can prove that allegedly defamatory statements can be supported by evidence of the truth of the statements, he or she can escape liability for defamation.¹¹⁹ This principle was established in *Times Media Ltd v Niselow*.¹²⁰ The *boni mores* test is used to determine what would qualify as being in the interests of the public. The type of allegation and reliability of the source is also important in considering the necessity and justification for the allegation made.¹²¹

In *National Media Limited v Bogoshi*, it was held that strict liability for media defendants should not exist because the publication of defamatory statements could, in the circumstances, be reasonable and therefore not unlawful.¹²² The case also distinguished between media and non-media defendants. The rule for non-media defendants would not be applied to the media as, unlike non-media defendants, media defendants could not evade liability by proving that they had not intended to defame. Media defendants would have to prove that they were not negligent in defaming.¹²³ The term “media defendant” was explained in *NM v Smith*¹²⁴ where it was stated that the defendant must have some professionalism obtained through a code of conduct or editorial code; the defendant must gain commercial value from sharing the information; and the information must be disseminated to a large audience and routinely.¹²⁵

It is submitted that in the context of social media, the differentiation between media and non-media persons should fall away, and that liability should carry the same consequences when defamatory statements are published online. Social media is uniquely characterised by the speed at which information is communicated. Information should be regulated based

¹¹⁷ Cornelius 2008 *The International Sports Law Journal* 197.

¹¹⁸ Cornelius 2008 *The International Sports Law Journal* 198.

¹¹⁹ *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

¹²⁰ [2005] 1 All SA 567 (SCA).

¹²¹ *National Media Ltd v Bogoshi supra* par 11, 23 and 30.

¹²² *National Media Ltd v Bogoshi supra* par 19–21.

¹²³ *National Media Ltd v Bogoshi supra* par 12.

¹²⁴ 2007 (5) SA 250.

¹²⁵ *National Media Ltd v Bogoshi supra* par 98–99.

on what is said, not how it is disseminated – that is, not on whether dissemination is through print or online publication.

3.2.2 Parody and humour

Social media interactions thrive on shared feelings and emotions in reaction to common scenarios to create engagement with other social media users, thus forming a community. To this end, we live in the age of the “meme”, which is a concept or idea that spreads virally from one person to the next via the Internet. Memes could be anything from an image, video, or email, but the most common memes involve a person or animal coupled with a witty caption.¹²⁶ These are widely shared as they are a source of humour and relatability among Internet users.

In *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*, the case was mainly concerned with balancing freedom of expression with protecting a trade mark.¹²⁷ Sachs J said that blocking free speech could be more detrimental than positive to big companies because if “parody does not prickle, it does not work”.¹²⁸ The test to determine whether a defamatory statement is made in jest and not intended to be defamatory would be whether the reasonable man would interpret it as a joke, thereby escaping *animus iniuriandi*.¹²⁹ The scope of protection in South Africa is that the unauthorised use of a person’s identity will be permitted in cases of public interest, newsworthiness and jest.

The number of likes and followers has become the new advertising market, so that big brands target social media accounts to promote and sell products on their pages in order to reach larger target groups that relate with the social media account holder; the account holder’s reputation thus becomes a commodity. The likelihood of criticism increases as a person’s social media presence grows. A prominent figure on social media is likely to want to avoid the possibility of having his or her reputation tainted and “#cancelled” on various social platforms. “Cancel culture” can operate as a backlash to a person saying or doing something controversial on social media and can transform a brand or person into a pariah.¹³⁰ In order to avoid third-party infringement on social media, it has been suggested that persons should control their brands and make their social media accounts private, and should regulate who has access to their social media pages because a “public” account affords a degree of fame, thereby limiting what is deemed private.

¹²⁶ Dykes “Internet Meme Meaning and Definition” 2020 <https://www.webopedia.com/definitions/internet-meme/> (accessed 2020-10-16).

¹²⁷ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC) par 1.

¹²⁸ *Laugh It Off Promotions supra* par 76.

¹²⁹ *Laugh It Off Promotions supra* par 77.

¹³⁰ Brito “Cancel Culture Seems to Have Started as an Internet Joke. Now it’s Anything But” (2020) <https://www.cbsnews.com/news/cancel-culture-internet-joke-anything-but/> (accessed 2020-08-30).

4 THE LEGAL POSITION OF SOCIAL NETWORK SITES

The nature and scope of the Internet must be considered when it comes to the protection of publicity rights and personality rights. From Twitter to WhatsApp, Instagram to Snapchat, all these platforms create opportunities for violations of personality rights to occur. Internet service providers (ISPs) offer their customers access to the Internet,¹³¹ but ISPs also filter the content that is offered on the Internet. Although social network sites have better access to users, it is not suggested that they be held liable where infringement of personality or publicity rights takes place or is alleged.¹³² ISPs are major role players in regulating what content makes its way to the public through the Internet and, finally, onto social media. In some cases, anonymous third parties post content making use of the likeness and image of someone else, using so-called “ghost accounts”. This begs the question whether ISPs should be held liable for infringing content that makes its way to the public.

Legislation has not been developed to regulate social network sites, even though there have been numerous instances where third parties on social media platforms have infringed on the personality or publicity rights of a public figure. This section discusses the protection of personality and publicity rights on social media in the US and South Africa.

4.1 Scope of the Internet and social media

Social media platforms are categorised based on their functions as follows: content-oriented such as Instagram; entertainment or virtual world experiences such as YouTube; and relationship-oriented functions such as personal blogs, Instagram and Twitter.¹³³ Social media platforms are divided into commercial and non-commercial platforms. Non-commercial platforms owe a certain loyalty to their users, and depend on donations to maintain their presence.¹³⁴ Social media platforms can be recognised as a means of communication for journalistic communications or influencing the public’s purchasing behaviour.¹³⁵ Commercial media platforms use models such as subscription fees and advertising. Advertisements are adapted according to what a user is attracted to, based on the information provided in the user’s profile.¹³⁶

A number of risks are posed by social media platforms. For example, information and opinions may be abused. Information used and shared among users could also have detrimental effects on celebrities and ordinary

¹³¹ Monaghan “Social Networking Website Liability for the Illegal Action of Its Users” 2011 21 *Seton Hall Journal of Sports and Entertainment* 1.

¹³² *Ibid.*

¹³³ Swiss Federal Council *Legal Basis for Social Media: Report of the Federal Council in Fulfilment of the Amherd Postulate 11.3912 of 29 September 2011* (2013) 8.

¹³⁴ Swiss Federal Council 9.

¹³⁵ Swiss Federal Council 7.

¹³⁶ *Ibid.*

individuals.¹³⁷ What is more, software on social media platforms usually regulates and limits the control that users have over their personal information. Some of the information used reveals personal information of the user and permits third parties to access a user's personal information without the need for prior consent.¹³⁸

4.2 The American approach

A substantial degree of immunity is given to social network sites through the Communications Decency Act.¹³⁹ This Act was enacted in 1996 under the Telecommunications Act.¹⁴⁰ Section 230 of the Act was meant to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material. The Communications Decency Act went further to state that interactive computer services would not be held liable as publishers of the unauthorised information.¹⁴¹ In *Zeran v America Online Inc*, it was stated that a publisher is a person or entity that exercises editorial control by attempting to screen content.¹⁴² In *Religious Technology Center v Netcom On-Line Communication*, it was held that the operator of a computer bulletin board system was not liable for the storage of copyright-protected work on its computer that had been uploaded by an infringing third party and shared with users of the system.¹⁴³

In *Cubby Inc v CompuServe Inc*, a claim against CompuServe for defamatory comments posted by a user on its forum was brought to court.¹⁴⁴ The court held that CompuServe was a distributor and not a publisher and that the lack of involvement equated to non-liability. In *Stratton Oakmont v Prodigy Services Co*, Prodigy, a bulletin board system, was sued for defamatory comments posted on its bulletin.¹⁴⁵ The court held that Prodigy was liable as a publisher and not as a distributor of content.

As a result of this decision, ISPs are more inclined to refrain from screening online content to avoid being viewed as publishers.¹⁴⁶ For immunity to succeed under section 230(c)(1) of the Telecommunications Act, the following criteria must be met: the defendant must be a provider or user of the interactive computer service; the ISP must not be identified as the publisher of the information; and the information must emanate from a third party. It is submitted that legislation must be clarified in terms of the scope section 230. Social network sites must screen more strictly, and content requirements must be set that prevent the use and exploitation of another's

¹³⁷ Swiss Federal Council 15.

¹³⁸ Swiss Federal Council 18.

¹³⁹ 47 USC 1996.

¹⁴⁰ *Ibid.*

¹⁴¹ S 230 of the Telecommunications Act.

¹⁴² *Zeran v America Online Inc* 129 F 3d 327 (4th Cir 1997) 330.

¹⁴³ *Religious Technology Center v Netcom On-Line Communication* 907 F Supp 1361 (ND Cal 1995) 1368.

¹⁴⁴ *Cubby, Inc v CompuServe, Inc* 776 F Supp 135 (SDNY 1991) 140.

¹⁴⁵ *Stratton Oakmont v Prodigy Services Co* 1995 WL 323710 (NY Sup Ct 1995) par 1–82.

¹⁴⁶ Monaghan 2011 *Seton Hall Journal of Sports and Entertainment* 4.

image or likeness, but without limiting the constitutionally recognised free-speech provision conferred by the First Amendment. US courts have not addressed the application and effect of section 230 in relation to publicity rights.¹⁴⁷

A further remedy that must be considered are the safe harbour provisions contained in section 512 of the Digital Millennium Copyright Act,¹⁴⁸ in terms of which a service provider shall not be liable for monetary relief, and other damages, for transmitting, routing or providing connections for material through a system or network, as further described.

4 3 The South African approach

Social media has become the primary source for information and expression,¹⁴⁹ with particular reference to entertainment, political activism and public opinion. However, owing to its unpredictable nature, social media harbours risks such as online defamation. “Trolling” on social media, especially involving public figures, often occurs. The growing number of defamation cases indicates that social media is not well regulated in South Africa and is in need of development. Anonymity on social media remains an ongoing issue worldwide, as it encourages uninhibited speech.¹⁵⁰ In *Rath v Rees*,¹⁵¹ the court had to determine whether an Anton Piller application would be effective in obtaining the identity of an anonymous poster of defamatory content. To retrieve such information, it is necessary for ISPs to assist in identifying the user.¹⁵² Rath sought the Anton Piller order as he believed it would assist in identifying the person making defamatory statements as well as to preserve the data identified by the ISP.¹⁵³ The court held that such an order would be granted only in exceptional circumstances as it infringes on the other party’s privacy.¹⁵⁴

No further case law exists on the topic in South African law. Nel suggests that the provisions of sections 7 and 50 of the Promotion of Access to Information Act¹⁵⁵ (PAIA) incentivise ISPs to assist in identifying publishers of defamatory information to avoid finding themselves as joint publishers of the defamatory content.¹⁵⁶ The liability of ISPs is limited through section 2(1) of the Electronic Communications and Transactions Act¹⁵⁷ (ECTA), which states that its purpose is “to enable and facilitate electronic communications and transactions in the public interest”. This provision limits liability because an ISP is not responsible for the activities of its users and the main duty of

¹⁴⁷ See for e.g., *Perfect 10, Inc v CC Bill LLC* 488 F 3d 1102 (9th Cir 2007).

¹⁴⁸ USC 17.

¹⁴⁹ Swiss Federal Council 14.

¹⁵⁰ Nel “*Rath v Rees* 2006 CLR 429 (C): An Anton Piller Order Challenged on the Grounds That Its Execution Will Infringe the Right to Privacy” 2009 *De Jure* 341.

¹⁵¹ 2006 CLR 429 (C).

¹⁵² Nel 2009 *De Jure* 341.

¹⁵³ Nel 2009 *De Jure* 344.

¹⁵⁴ *Rath v supra* par 34–35.

¹⁵⁵ 2 of 2000.

¹⁵⁶ Nel 2009 *De Jure* 350.

¹⁵⁷ 25 of 2002.

ISPs is to grant access to users in terms of the ECTA, regardless of whether or not the identity of the wrongdoer can be ascertained.¹⁵⁸

Section 78 of ECTA provides that ISPs have no obligation to monitor data that they transmit or store, nor do they have actively to seek facts or circumstances that indicate unlawful activity. However, section 78(2) provides that, in terms of section 14, the Minister can prescribe procedures for service providers to inform the competent public authorities of illegal activities, and to communicate to the authorities, at their request, information enabling the identification of recipients of their services.

From the definitions provided by the Act, liability can be evaded by ISPs if they fall under the definitions that give protection from third-person liability. Sections 73 to 76 of ECTA provide express exemptions from liability for ISPs. Exemptions apply differently depending on the purpose the ISP serves in the digital sphere. ECTA distinguishes four situations where an ISP can escape liability – namely, when the ISP’s role constitutes a conduit, system caching, hosting and linking. For an ISP to escape liability, it must adhere to further provisions of the Act in that it must be a member of the representative body that enforces a code of conduct¹⁵⁹ and have adopted and implemented the code of conduct.¹⁶⁰

South Africa addresses online defamation cases by applying existing defamation-law principles.¹⁶¹ In *Isparta v Richter*, the court awarded damages for defamatory statements made on Facebook where the defendant “tagged” the second defendant in a post about the plaintiff.¹⁶² The court held that the statements made individually and collectively by the first and second defendant involved the plaintiff and, therefore, all the statements were defamatory.¹⁶³ The court reiterated the trite principle that when attention is drawn to a defamatory statement, confirmed or repeated by another, both parties will be held liable for its publication.¹⁶⁴ More recently, in *Manuel v Economic Freedom Fighters*,¹⁶⁵ the court applied existing defamation-law principles to a case of online defamation. Mbuyiseni Mdlazi and Julius Malema of the Economic Freedom Fighters (EFF) had made defamatory statements on Twitter about former Minister of Finance Trevor Manuel, attacking his good name and reputation.¹⁶⁶ The case formulated guidelines on how to apply existing common-law principles to defamatory statements made on social media. Courts must consider the following when deliberating who is responsible for the defamatory statements on social media:

¹⁵⁸ Skosana *The Right to Privacy and Identity on Social Network Sites: A Comparative Legal Perspective* (LLM dissertation, UNISA) 2016 76.

¹⁵⁹ S 71 of 25 of 2002.

¹⁶⁰ S 72 of 25 of 2002.

¹⁶¹ Iyer “An Analytical Look Into the Concept of Online Defamation In South Africa” 2018 32 *Speculum Juris* 126.

¹⁶² *Isparta v Richter* 2013 6 SA 529 (GP) par 12.

¹⁶³ *Isparta v Richter supra* par 28.

¹⁶⁴ Roos and Slabbert “Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)” 2015 17(6) *Potchefstroom Electronic Law Journal* 2855.

¹⁶⁵ [2019] ZAGPJHC 157.

¹⁶⁶ *Manuel v Economic Freedom Fighters supra* par 3.

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- (i) The ordinary social media user must be part of the platform and online community where the statements were made, must follow the publisher on the social media platform, and must show shared interests with the publisher;¹⁶⁷
 - (ii) Application of the “repetition rule” should not impair freedom of expression. The context of a defamatory statement shared by others must be considered in relation to the support of the initial statement, without assuming that all users who share the statement are liable for defamation;¹⁶⁸
 - (iii) The reasonable publication defence is extended to all members of the public who would want to rely on it, and the principles of reasonableness will apply regardless of whether the defamation took place online or offline, the nature of the information, the reliability of the source, the steps taken to verify the information and whether the other party was offered the right to reply;¹⁶⁹
 - (iv) The court must consider the seriousness of the defamatory statement, the nature of the statement, the extent of the publication, and the reputation, character and conduct of the parties;¹⁷⁰ and
 - (v) The respondents must publish a statement on all social media platforms, retracting and apologising for the allegations made.¹⁷¹

5 THE RIGHT TO BE FORGOTTEN

The right to be forgotten, also known as the “right to erasure”, originates from the case of *Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González*.¹⁷² The right to be forgotten entitles an individual to the removal of personal data from the Internet to prevent Internet users from searching and tracking them.¹⁷³ It must be noted that the right to be forgotten is not the same as the right to privacy as it involves the removal of content that was previously known, and then subsequently not allowing third parties further access to the content.¹⁷⁴ The US does not recognise a right to be forgotten because of its constitutional entrenchment of the rights to free speech and freedom of the press.¹⁷⁵ In South Africa, section 24(1)(a) of the Protection of Personal Information Act,¹⁷⁶ for instance, provides for the deletion of personal data.

¹⁶⁷ *Manuel v Economic Freedom Fighters supra* par 49.

¹⁶⁸ *Manuel v Economic Freedom Fighters supra* par 63–65.

¹⁶⁹ *Manuel v Economic Freedom Fighters supra* par 61–68.

¹⁷⁰ *Manuel v Economic Freedom Fighters supra* par 69.

¹⁷¹ *Manuel v Economic Freedom Fighters supra* par 72 sub-par 4.

¹⁷² (Case C-131/12) Judgment of the Court (Grand Chamber) 13 May 2014.

¹⁷³ Bennet “The ‘Right to be Forgotten’: Reconciling EU and US perspectives” 2012 *Berkeley Journal of International Law* 162.

¹⁷⁴ Bennet 2012 *Berkeley Journal of International Law* 163.

¹⁷⁵ Bennet 2012 *Berkeley Journal of International Law* 165.

¹⁷⁶ 4 of 2013.

6 CONCLUSION

It was noted that the US has responded to the infringement of publicity and personality rights by developing a patchwork of legal principles to protect such rights – a decision that has led to arbitrary application across states. In South Africa, the *actio iniuriarum* rests on the same principles as the American tort. The application of the common law in South Africa has made it amenable to the protection of personality rights – more pertinently, the rights to identity and privacy in the age of social media. Although the economic impact of the exploitation of personality rights is not overtly addressed, it may be deduced that it would be a factor when determining the likelihood of success of the action.¹⁷⁷ To this end, Cornelius correctly states that South Africa has a very advanced system compared to others as it includes non-economic harm.¹⁷⁸

With respect to the limitation of publicity rights, it can be seen that the approach is generally similar in the jurisdictions discussed. A constant balance needs to be struck where competing rights are at play and no right can enjoy pre-eminence over others. It is apparent that the right to freedom of expression will limit the right to publicity in certain circumstances. The Internet is a medium of escapism, creativity, relatability and information on current affairs as evinced by the myriad memes and GIFs¹⁷⁹ that are found on various digital platforms. The imposition of publicity rights must always be determined in a reasonable manner so as to maintain the micro-society the Internet creates, allowing people from all over the world to interact with content relevant to them.

It is observed that significant immunity is provided to social network sites and ISPs, which has contributed to the rise of online defamation cases. Anonymous users pose major risks, and modification of ISP liability is therefore imperative.¹⁸⁰ It is not the rate at which information is passed on that provides justification for added protection, but rather characteristics such as low-entry account-registration barriers, the long shelf-life of posted content, and the wide reach of social media platforms.¹⁸¹ The right to publicity continues to be tested where online use of celebrities' images¹⁸² affects their right to privacy as well as their desire to monetise their identities.¹⁸³

In conclusion, it is evident that a legal tug of war exists regarding publicity rights because, arguably, they are designed to protect certain interests without the flexibility of adapting to the realities of life. The Internet is

¹⁷⁷ Cornelius 2008 *The International Sports Law Journal* 75.

¹⁷⁸ *Ibid.*

¹⁷⁹ Graphics Interchange Format (bitmap image format).

¹⁸⁰ Adeyemi "Liability and Exemptions of Internet Service Providers (ISPs): Assessing the EU Electronic Commerce Legal Regime" 2018 *SSRN Electronic Journal* 18–19.

¹⁸¹ Carter "Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions" 2005 21 *Santa Clara High Technology Law Journal* 292.

¹⁸² Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 183.

¹⁸³ Messenger 2018 *Widener Law Review* 262.

borderless and yet image rights are treated as being territorial in nature. Many have access to the Internet and legislators have insisted on applying the law differently instead of creating a uniform, international standard governing Internet and social media interactions. Therefore, the question arises as to whether existing laws should be adapted and interpreted broadly, or altogether rewritten. It is submitted that whichever path is taken, the effect of the laws should be anticipatory and not reactive.