

# The Image Rights Over Social Media Profile: Whose Identity is it Anyway?

**Nomalanga Mashinini**

University of the Witwatersrand, Johannesburg, South Africa

[nomalanga.mashinini@wits.ac.za](mailto:nomalanga.mashinini@wits.ac.za)

**Abstract:** We live in an online identity age where employees use their creativity to make their profiles distinctive to attract clients and collaborators. Social media profiles give employees, businesses, and organisations commercial advantages in their respective markets. However, social media profiles can cause problems when employees leave organisations. It is in the interests of the employer to maintain relations with clients that are connected to an employee's profile. However, given that a social media profile is made up of personality attributes, the employee has a legal and social interest in the commercial value of their identity. This article critically assesses whether image rights can protect the social media profile as an attribute of a person's identity when the profile has been used in the course of employment. The article begins with a legal analysis that raises questions about the nature and value of a social media profile as an aspect of the right to identity under the South African law of delict. The paper concludes with recommendations on how image rights can protect the employees' interests over a social media profile even after their term of employment as their identity is inseparable from their person.

**Keywords:** image rights, employment, identity, commercial exploitation, social media

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## 1. Introduction

Social media profiles give businesses and organisations a commercial advantage. Salespersons, academics, legal practitioners, and many other professionals have used their social media profiles to attract clients through social media. To establish an online presence, individuals must create public profiles on social networking sites (SNSs). SNSs request personal information for the users' profiles. Some sites expect users to reveal their identity because personal data exchange has created commodification of information on SNSs (Roos 2012; Burns 2015). Self-presentation is one of the main components of SNSs (Eisenlauer 2013). People apply creativity and effort to ensure that their profiles are publicly presented in distinctive ways to attract followers (Eisenlauer 2013; Sloan and Quan-Haase 2017).

Social media profiles can cause problems in the workplace, particularly when employees leave organisations. Consider a consultancy firm that allows its employees to use their social media profiles to communicate and transact with clients. Most employment contracts do not address the ownership of the profile in the employment contract. Some firms do not initiate or financially support the creation and maintenance of their employees' social media profiles. This raises questions about who owns a social media profile between the employer and the employee, and what becomes of the profile and clients connected to that profile upon the termination of employment. Under such circumstances, both the employee and the organisation have an economic interest in the profile.

It is in the interests of the employer to maintain relations with clients connected to an employee's profile even after the employment relationship ends. Given that a social media profile comprises personality attributes, the employee has an interest in the commercial value of their identity, which they do not desire to part with when their employment ends.

This article raises questions about whether the right to identity, or image rights, can protect the social media profile as an attribute of a person's identity when the profile has been used in the scope of employment. The paper begins with an analysis of a social media profile. This study relies on social media policies and the South African common law of delict to make this determination. It then discusses the right to identity as a personality right in South Africa and the rules for infringement and remedies that apply to this right. The paper ends with concluding remarks on how the right to identity in South Africa can protect the employees' interests over a social media profile.

## 2. The social media profile

Social media users cannot participate in SNSs without creating a public or semi-public profile (Eisenlauer 2013; [2014] JOL 31479 (GSJ); Roos and Slabbert 2014; Pardo, Balliu and Schneider 2017). A profile typically consists of a username or handle; an avatar or profile picture; a wall picture; distinctive hashtags (Heyd and C Puschmann 2017); an individual's real name, surname, date of birth, location, education, professional experience; and the user's network of family, friends, colleagues and clients (Roos 2012; Eisenlauer 2013; [2014] JOL 31479 (GSJ); Roos and Slabbert 2014; Sadleir and De Beer 2014; Ghazinour and Ponchak 2017; McGrady 2019). Therefore,

the profiles found on SNSs represent multiple facets of people's online and offline identities (Eisenlauer 2013; Drucker and Gumpert (eds) 2013). When a profile is created, it is annotated on search engines using a unique link. This link redirects anyone who searches for a person's profile on a search engine to the SNS hosting that profile. Regardless of any changes in the names and photographs on the profile, the link remains the same.

Different SNSs request similar information for the users' profiles, which helps users to maintain the same representation of their personalities throughout the different networks. Some sites expect users to reveal their identity because personal data exchange has created commodification of information on SNSs (Roos 2012; Burns 2015). Meanwhile, other sites openly encourage users to provide pseudonyms for their accounts (Eisenlauer 2013). Certain social media profiles of ordinary people can attract many likes and follows due to their distinctiveness. These personalities are often called social media celebrities or influencers (Allen 2012). Businesses have even paid social media influencers to market their brands by displaying their trademarks and logos in their social media posts. This shows that the social media identity has economic and commercial value (Mashinini 2021).

The information that users provide online allows them to carefully determine the social aspects that make up their personalities (Eisenlauer 2013; Mangan and Gillies 2017). Social media users derive pleasure and income from sharing content with their networks. Users interact by either initiating a post or commenting on another user's post, and in turn, convert their followers into clients. The content that individuals publish on their profiles, as well as the comments they make on other people's posts equally contribute to their self-presentation and commercial use and exploitation (Eisenlauer 2013). A user's profile is public but the extent to which the world can access each profile depends on the network's policy and the privacy settings chosen by the user (Eisenlauer 2013; Roos and Slabbert 2014; Senthil, Saravanakumar and Deepa 2016; Heravi, Mubarak and Choo 2018; McGrady 2019; Schwartz-Chassidim 2020). As such, these online profiles are an extension of people's actual personalities that ought to be legally protected. Their distinctiveness could be one point of consideration that expose the legally protectable interests that exist in the social media profile. After all, the presentation of 'the self' is viewed as one of the main components of SNSs. Despite the evolution of social media, the law of personality in South Africa has not been developed to explicitly recognise the social media profile as an object of personality rights, and specifically of the right to identity.

### **2.1 The nature of a social media profile**

The legal nature of a social media profile is not precise (Mangan and Gillies 2017). Social media profiles are not explicitly classified as legal objects under South African law. If the social media profile is a legal object, it would probably find protection under immaterial property rights or personality rights. Immaterial property rights can be copyright or trademarks (Mangan and Gillies 2017). However, the proposition that a social media profile is a brand or literary and artistic work falls outside of the scope of this paper. Instead, this study is about a social media profile as an object of personality rights. The object of personality rights is human personality and the attributes of their identities (Neethling, Potgieter and Roos 2019). We now live in a world where even an avatar has become an increasingly important component of identity. Therefore, this research aims to discover whether the social media profile can bear personality rights, specifically the right to identity (Neethling, Potgieter and Roos 2019). First, an analysis of the value of a social media profile is laid out to reveal the commercial aspects thereof.

### **2.2 The commercial value of the social media profile**

The answer to whether a social media profile has value is found through understanding when an individual interest becomes a legal object. On the one hand, the interest must provide some use or value to the individual. But the interest must have some measure of distinctiveness, definiteness and independence to allow disposal and enjoyment (Neethling, Potgieter and Roos 2019).

Ordinary people incidentally become social media influencers in the employment or careers that they form part of. They start by gaining likes and followers and eventually receive recognition as leaders in their fields (Heravi, Mubarak and Choo 2018). The appearance of a profile helps to gain more followers. More followers provide the possibility that the users' content will be liked and shared by a vast audience. This produces a lot of data that makes up the whole person's image or personality. Social media profiles have also become one of the most common ways of ensuring sustenance through entrepreneurship and vocation. (Matyka et al, 2013). Therefore, there are clear personality interests in the social media profile, and sometimes, individuals have a patrimonial interest in their social media profiles, especially those who use their social media profiles to advance their careers even as influencers in their disciplines and fields.

Statistical information on a profile can determine how much of an audience that person can influence and attract to their platform. Advertisers have noticed the advantages of sponsoring social media influencers and paying them for publicly testing and reviewing their products using videos and pictures uploaded on their profiles. The number of views likes, and shares that a user can generate per post is an indicator of their reputation and estimated audience. It seems social media profiles are operating much like television channels that offer some screen time to advertisers in exchange for money. This reveals that organisations indirectly derive monetary gain from social media profiles. These indicators are an essential aspect that makes up the economic value of the social media profile.

Personal branding has become a major tool for social media users. Tagging is the main drive used to spread engagement. For instance, an organisation can tag its employees to make a post more visible to friends and connections that are in the employees' networks. Tags connect people easily as they create a form of affiliation and bond between two or more people. The challenge comes in when tagging creates a false impression that a social media user agrees with or is affiliated with a product, group, page, or brand they are not affiliated with. For example, when an employee leaves the organisation, no affiliation exists anymore between the employer and employee but people who see the tag at a later stage may still be influenced to take an interest in the organisation. The employee whose identity intrigues a potential client thus provides value to the organisation, which also reveals a legitimate interest that is protectable through personality rights.

### **3. The right to identity over the social media profile**

#### **3.1 Grounds for recognition**

It is unknown whether a South African court would give a remedy to a person who claims identity infringement on the grounds of unlawful appropriation of their social media profile. The law of personality has not been developed to explicitly recognise the social media profile as an object of personality rights, and specifically of the right to identity. The social media profile has no direct formal legal protection in South Africa. Nevertheless, there is legal protection in various jurisdictions provided for image rights through common law torts, delicts, statutes, and social media policies.

This section discusses whether a social media profile creates a new distinct part of a person's identity which must be legally recognised as part of their personality, and thus an object of image rights protection. Admittedly, it is impossible to use SNSs without creating social media profile that comprises the *indicia* of identity. The *indicia* that make up a person's identity include aspects of personality such as name, likeness, photos, life history, character, creditworthiness, voice, physical appearance, and handwriting (Neethling, Potgieter and Roos 2019; Louw 2007; Neethling 2009; Cornelius 2011; Neethling, Potgieter and Roos 2015). The recognition of image rights on social media can be advanced to the profile based on the components that are objects of this right. The social media profile is analogous to a person's identity as it identifies and distinguishes them from all other users on SNSs (Neethling, Potgieter and Roos 2019).

Every personal interest originates from the reality that a particular individual interest factually exists (Neethling, Potgieter and Roos 2019). The social media profile is an object of the right to identity that factually exists, but the legal recognition of the factual interest bestows protection over that interest by providing a right to protect it (Neethling, Potgieter and Roos 2019). Without recognition, people's profiles, or parts thereof, are used in various ways that can amount to commercial exploitation, appropriation, misrepresentation, or falsification of their identity. This conduct may amount to a form of aggression against a person's dignity. Therefore, as people's identities develop online, so must the recognition thereof develop. It is arguable that the use of a person's social media profile, be it by a previous employer, or current or prospective one, amounts to a misappropriation of identity (*Grütter v Lombard* par 13).

Employers, much like marketers, are often challenged because they want to use people's images to attract those who relate to that image to buy their goods and services. This trend has been seen on social media, but it is known even in offline instances (For instance, see *Grütter v Lombard* where an attorney claimed the removal of his name from the premises of a colleague's business with whom he was previously associated). With a social media profile, one may see that using a person's profile to gain profit, or mere fixation to gather clients could amount to an indirect intention to violate identity.

The employer operates on the basis that the social media profile created by the employee holds commercial value and attracts social media traffic to provide commercial gains for their business. Thus, the use of the profile without consent could amount to an indirect intention to violate the employee's identity. The employer would be aware that to publish a post that takes advantage of their employee's profile, that social media profile would

have to be appropriated or subjected to individual or mass publication through tagging, reposting, and sharing. Nonetheless, it should be noted that using a person's photograph to gain a commercial advantage can attract delictual liability without the social media profile being recognised as an *indicium* of identity (Neethling, Potgieter and Roos 2019; Louw 2007; Neethling 2009; Cornelius 2011; Neethling, Potgieter and Visser 2015).

### **3.2 Regulated conduct and grounds of justification**

The right to identity protects a person from the degradation, humiliation, and insult against their person through the misappropriation, falsification, and commercial exploitation of their identity features. The duplication of these features on social media may also be misappropriated. For instance, a university poster that uses the deans' images in a poster and tags their social media profiles without their consent amounts to misappropriation. Such an instance can be justified in the employment relationship under responsibilities that deans may have towards their schools.

However, it is questionable whether these profiles can still be tagged once the deans are no longer affiliated with their faculties. In the latter context, *prima facie*, falsification arises in the eyes of those who are unaware of a terminated employment relationship. Falsification is the creation of a false impression that a relationship exists between the two parties or that the persons in a publication agreed to appear therein (*Kumalo v Cycle Lab* par 17). In the employer's defence, the context within which the publication was created is grounds for justification, but the justification can only stand if it is reasonable. Should a publication that affiliates the organisation and employee remain published within a reasonable time after the employee's departure, there would be no violation of the right to identity. It would only be reasonable to hold an employer liable for falsification in instances where the latter tags a person's profile even after a reasonable time has lapsed and no existing employer-employee relationship can be proven.

Furthermore, the use of a social media profile may be commercial exploitation. None of the courts in South Africa decisively addressed what commercial exploitation or gain means. There is room for interpretation that the followers, number of likes and interactions on social media are a form of gain, although the monetary nature of those gains is not immediately realised (Mashinini 2021). If this view is adopted, it creates a basis to hold employers liable when they use their employees' profiles for marketing without their consent or beyond the scope of their consent. In turn, this recognition can deter employers from using their employees' profiles to draw attention to their businesses. As such, the profile on social media requires protection because it is an extension of the employee's personality which they depart with upon termination of employment. Any part of their personality and being that was distinct and attractive for business is unique to them and not open to anyone to perpetually exploit. These days social media profiles of ordinary people can attract many likes and followers due to their distinctiveness. Thus, the social media profile has an economic and commercial value that is worthy of legal protection (Neethling, Potgieter and Roos; Adrian 2020).

## **4. The need for development**

The right to identity is not explicitly recognised in the Constitution, but it is protected under the right to dignity (s10 of the Constitution of the Republic of South Africa, 1996; Neethling, Potgieter and Roos 2019). Consequently, the right to identity ought to be developed to give force to the right to dignity as a constitutional right and value. Public policy considerations also call for developing identity in line with the Constitution, since people use their personalities to generate an income and to market goods. This is the realisation of people's right to trade (s22 of the Constitution of the Republic of South Africa, 1996). If the right to identity over a social media profile is based on dignity, the courts should find no challenge in legally and reasonably concluding that such a profile can be the object of individual rights of personality such as privacy, identity, and dignity.

As illustrated in paragraphs 2.2 and 3.1, there is a non-legal and legal entitlement over social media profiles which ought to be recognised in South African law. This notion is already gaining limited and indirect recognition in the USA (*Eagle v Morgan and Others* Civ. No. 11-4303 (E.D. Pa. Mar. 12, 2013)). In the *Eagle* case, Dr Linda Eagle, the plaintiff, was a doctoral graduate in communications, business and psychology from Temple University. Together with With Clifford Brody, Dr Eagle founded a company, Edcomm Inc (Edcomm) which is a banking education company that provides services online and in person to the banking community. Dr Eagle was well-known and published in the banking industry publications, quoted in newspapers and magazines, and presented at industry conferences around the world. In 2010, a company named SISCOM purchased all the outstanding common shares of Edcomm. Edcomm began using LinkedIn as a sales and marketing tool in 2009. Edcomm began urging but did not require, its employees to create LinkedIn accounts and developed policies to cover online content. It provided guidelines for employees who wanted to maintain LinkedIn accounts. Eagle created her LinkedIn account using her Edcomm email address. However, Edcomm never paid

for the account and neither did the company subsidise its maintenance. According to the LinkedIn user agreement, the account belonged to Eagle and she was individually bound thereto. In 2011, Eagle and two others were involuntarily dismissed from Edcomm, by the head, Haitham Saeed. Thereafter, Edcomm allegedly used Dr Eagle's LinkedIn account to her economic detriment.

Edcomm had not adopted a policy to inform employees that their LinkedIn accounts were the property of the company. Dr Eagle's password for her LinkedIn account was granted, by her, to some employees for them to respond to certain queries through her account during her term of office at Edcomm. However, when she left the company, some employees who remained at Edcomm accessed the account and changed the password, gaining full control of the account. Thereafter, the account depicted the name, picture, education and experience of a new employee, Sandi Morgan, the defendant. Some information relating to Dr Eagle had not been deleted from the account. During this period, a Google or LinkedIn search for "Linda Eagle" would redirect to Dr Eagle's account, which now bore the name, picture, and credentials of Sandi Morgan. Dr Eagle claimed damages of \$248 000 based on eleven causes of action, including unauthorised use of a name under Title 42 of the Pennsylvania Consolidated Statutes (Pa.C.S), and misappropriation of publicity.

The court had to establish whether Morgan and Edcomm has misappropriated Dr Eagle's publicity and used her name in contravention of the Pa.C.S. Buckwalter J held that the plaintiff sufficiently proved the elements of her claim and gave ample testimony that the name Dr Linda Eagle has commercial value due to her investment of time and effort in developing her reputation in the banking education industry. She also proved that the defendant had used her name without her consent for commercial and advertising purposes because anyone who would search her name on Google or LinkedIn would be unwillingly redirected to the defendant's profile and affiliated with Edcomm, despite Dr Eagle no longer being at Edcomm. Thus, the court held that Edcomm obtained commercial benefits from using Dr Eagle's name to promote the services of its business. This revealed improper use of her name and violated the Pa.C.S.

Turning to misappropriation of publicity, Buckwalter J held that Pennsylvania recognises a right of publicity which grants a person the exclusive entitlement to control the commercial value of his or her name or likeness to prevent others from exploiting it without permission. The right protects against commercial loss caused by the appropriation of a name or likeness. The court further distinguished the right of publicity from that of privacy. The court laid out that invasion of privacy by the appropriation of name or likeness is a personal right created to protect privacy, while publicity more closely resembles a property right created to protect commercial value. The court found that the defendant had committed a tort of misappropriation of publicity because the plaintiff maintained an exclusive right to control the commercial value of her name and to prevent others from using it. By using the plaintiff's password to enter her LinkedIn account, changing the password and blocking her out and then altering the account to reflect Morgan's details instead of simply creating a new LinkedIn account for Morgan, Edcomm effectively deprived Dr Eagle of the commercial benefit of her name. Edcomm appropriated promotional benefits for itself in a tortious way by appropriating Dr Eagle's name for commercial use.

This judgment shows how valuable the social media profile is, especially when used to generate profit and reputation. The profile is inextricably linked to a person's identity, as illustrated by Eagle's case above. Online identity is just as important in the modern world as your offline personality. The social media profile is inextricably linked to personality and cannot be excluded from the attributes of one's identity, making it an object of image rights.

South African courts could rely on the *Eagle* case to adjudicate similar matters. Section 39(1)(a) of the Constitution requires the courts to consider foreign law when applying the Bill of Rights (s39(1)(c) of the Constitution of the Republic of South Africa, 1996). This is typically the approach in cases dealing with social media and image rights, to inform the courts' decisions since little attention has been given to these areas of law in South Africa (s39(3) of the Constitution of the Republic of South Africa, 1996; *Grütter v Lombard*). Looking at the common law regulation of the right identity, it is arguably unconstitutional for any employment policy or agreement to deprive employees of their profiles. The social media profile comprises almost all the elements of a person's identity features, and is thus, inseparable from that person.

## 5. Conclusion

In a social media world where verification services are available at a fee, it may well be time to clear up the question, who is the owner of the social media profile that is used in the course of employment? Identity is inextricably linked to one's personality. It is part of a person that cannot be severed from their being.

Employment contracts that attempt to regulate the position using contractual terms may have to face a legality issue regarding such clauses. Only the development of legal rules can limit exploitation in this context but the societal behaviours that have led to this commercialisation of social media profiles will continue to evolve, and as such, the law must also evolve.

## Acknowledgements

This work is based on the research supported wholly / in part by the WITS Chancellor's Female Academic Leaders Fellowship. Chancellor's Fellows acknowledge that opinions, findings, conclusions, or recommendations expressed in any publication generated by the FALF supported research are that of the author(s), and that FALF accepts no liability whatsoever in this regard.

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