

DANCING ON THE GRAVE OF COPYRIGHT?

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*“[I]n the years to come, most human exchange will be virtual rather than physical, consisting not of stuff but the stuff of which dreams are made. Our future business will be conducted in a world made more of verbs than nouns.”*¹

—John Perry Barlow (1994)

INTRODUCTION: TOWARDS AN ECONOMY OF VERBS

John Perry Barlow would have wanted us dancing on the grave of copyright.² Indeed, he told us so. He predicted that the internet would render copyright’s legal fences obsolete. How can you contain information? Ideas are contagious. “Information wants to be free.”³ When produced in its ethereal form, information would be impossible to contain. Intellectual property is a “sinking ship,” and the lawyers preparing intellectual property for digitization are merely rearranging the deck chairs.⁴

Intellectual property law attached when the “word became flesh,”⁵ Barlow argued. A thought would become intellectual property when it entered a “physical object, whether book or widget.”⁶ Intellectual property grew up to protect things—books, machines, and later, records and movies. As the economy moved to focus on information powered by the internet, would intellectual property survive? Barlow predicted that

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¹ John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, 18 DUKE L. & TECH. REV. 8, 31 (2019).

² *See id.* at 14 (“While there is a certain grim fun to be had in it, dancing on the grave of copyright and patent will solve little, especially when so few are willing to admit that the occupant of this grave is even deceased and are trying to up by force what can no longer be upheld by popular consent.”).

³ *Id.* at 18.

⁴ To be more precise, Barlow believed that the lawyers were either (1) rearranging “deck chair[s],” (2) issuing “stern warnings” of disaster and punishment, or (3) maintaining a “glassy-eyed denial.” *Id.* at 9.

⁵ *Id.*

⁶ *Id.*

the rise of an “economy of verbs”—an economy focused on actions and experiences—would render intellectual property rights largely obsolete.⁷ The “tottering travesties of case law”⁸ used to protect earlier economic products would prove useless in the new world of services and experiences.

The quarter century since Barlow’s writing allows us to assess his prophecy. The economy moved in the very direction that Barlow anticipated—from an economy focused on the ownership of things to an economy based on services and experiences.⁹ In high-income countries, services now account for three-quarters of the gross domestic product.¹⁰

But intellectual property proved more resilient and adaptable than Barlow predicted. Intellectual property law both offered exceptions where necessary, while simultaneously expanding to cover new forms of creativity and activities. In this short essay, we argue that, for good or ill, intellectual property has reconfigured itself for an economy driven by information and experience.

But the evolution is hardly complete. New forms of expression keep testing the limits of intellectual property. Consider the blockbuster game Fortnite. Epic Games offers Fortnite game play for free—but users pay for virtual clothing or various “emotes”—dances that allow users to express themselves online during in-game play. Indeed, Fortnite players paid some \$2.4 billion in 2018 for the right to engage in such expressions—literally, to “emote.”¹¹ Internet entrepreneurs have figured out a way to commodify dancing itself. Barlow believed that the internet

⁷ *Id.* at 26 (“One existing model for the future conveyance of intellectual property is real time performance, a medium currently used only in theater, music, lectures, stand-up comedy and pedagogy.”). Barlow’s prediction came several years before the influential article by B. Joseph Pine II & James H. Gilmore, *Welcome to the Experience Economy*, HARV. BUS. REV. (Jul.–Aug., 1998), <https://hbr.org/1998/07/welcome-to-the-experience-economy>. Pine and Gilmore similarly depicted the new Experience Economy with show tickets on their book cover.

⁸ Barlow, *supra* note 1, at 24.

⁹ See generally Madhavi Sunder, *Intellectual Property in Experience*, 117 MICH. L. REV. 197 (2018) (describing rise of the Experience Economy).

¹⁰ Patricia Buckley & Rumki Majumdar, *The Services Powerhouse: Increasingly Vital to World Economic Growth*, DELOITTE (July 12, 2018), <https://www2.deloitte.com/insights/us/en/economy/issues-by-the-numbers/trade-in-services-economy-growth.html> (“In 2015, services’ value added accounted for 74 percent of GDP in high-income countries, up from 69 percent in 1997.”).

¹¹ Patrick Shanley, *‘Fortnite’ Earned \$2.4 Billion in 2018*, HOLLYWOOD REP. (Jan. 16, 2019), <https://www.hollywoodreporter.com/heat-vision/fortnite-earned-24-billion-2018-1176660>.

would liberate us from the commodifying forces of intellectual property—but rather, the internet brought commodification into previously intimate, sacred spaces. This essay considers IP in expressions of joy and shared meaning online in the form of emotes, GIFS, and memes: *the stuff of which dreams are made*. These aesthetic experiences bring playfulness and humanity to the internet. Are they the proper subject of intellectual property? Are such forms of cultural innovation and appropriation better addressed by ethics or law?

I. FROM GOODS TO A GOOD TIME:
INTELLECTUAL PROPERTY IN EXPERIENCE

Barlow was right about where the economy would go. He was wrong that intellectual property would not follow. A quarter century on, the Economy of Verbs is here.¹² As *The Economist* puts it, in today's economy, "goods and services are no longer enough."¹³ Today's consumers are made happier through "'experiences' over commodities, pastimes over knick-knacks, doing over having."¹⁴ The move from nouns to verbs in fantasy properties exemplifies this shift in the nature of both consumption and entertainment. From *Star Wars* to *Harry Potter*, fans do not just want to watch or read about their favorite characters—they want to *be* them. They don the robes of Gryffindor, flick their wands, and drink the butterbeer. The owners of fantasy properties understand this, expanding their offerings from light sabers in 1977 to the *Galaxy's Edge*, Disney's new "100% immersive" *Star Wars*-inspired resort opening in 2019.¹⁵

Cyberspace and new technologies have enabled "whole new genres of experience, such as interactive games, Internet chat rooms and multi-player games, motion-based simulators, and virtual reality."¹⁶ Experiencing the *Galaxy's Edge* will no doubt require that you wear a radio frequency identification (RFID) chip, transmitting your identity and precise location to sensors throughout the park, allowing computers

¹² This section is adapted from Sunder, *Intellectual Property in Experience*, *supra* note 9.

¹³ *Economics Discovers Its Feelings*, *ECONOMIST* (Dec. 19, 2006), <http://www.economist.com/node/8401269>.

¹⁴ *Id.*

¹⁵ Jennifer Fickley-Baker, *Plans Unveiled for Star Wars-Inspired Themed Resort at Walt Disney World*, *DISNEY PARKS BLOG* (July 15, 2017), <https://disneyparks.disney.go.com/blog/2017/07/plans-unveiled-for-star-wars-inspired-themed-resort-at-walt-disney-world/> (quoting Bob Chapek, Chairman of Walt Disney Parks & Resorts).

¹⁶ Pine & Gilmore, *supra* note 7.

to monitor and inform local engagements with you. Facial recognition will empower many of these experiences. The move toward “simulated lived experience in cyberspace”¹⁷ places renewed emphasis on performance. “In cyberspace . . . one goes from watching the screen to going behind the screen and becoming the performance.” Cyberspace theorist Randall Walser describes the move thusly: “print and radio tell; stage and film show; cyberspace embodies.”¹⁸

Barlow correctly predicted how “interactivity . . . will be a billable commodity.”¹⁹ But while performers would sell tickets to an authentic experience, they could not commodify it and protect it as intellectual property, or so Barlow thought. “The protections which we will develop will rely far more on ethics and technology than on law,” he surmised.²⁰

Intellectual property, however, has not only survived the doom of the information economy—it has thrived. Today, intellectual property has fully evolved *from goods to a good time*. As consumer researchers have become savvier about how to package and market the human need for fantasy, play, imagination, and haptic experience, areas of thought and expression once free as the air we breathe are increasingly becoming commodified and metered fare, regulated by licenses and royalties, requiring permission and payment.

Increasingly, owners of cultural properties are issuing cease-and-desist demands to third parties and offering their own official pay-to-play options. Amazon.com launched Kindle Worlds, a forum to write and sell fan fiction based on specific licensed media properties.²¹ YouTube algorithms to protect copyright are wreaking havoc on *Game of Thrones* fan theory sites, where fans use video clips from the popular HBO series to discuss everything from character development to symbolism in *The World of Ice and Fire*.²² The Tolkien estate shut down an unlicensed Lord of the Rings summer camp.²³ Disney filed a trademark suit against

¹⁷ JEREMY RIFKIN, *THE AGE OF ACCESS* 170 (2001).

¹⁸ *Id.*

¹⁹ Barlow, *supra* note 1, at 27.

²⁰ Barlow, *supra* note 1, at 30.

²¹ After five years, Kindle Worlds has just been retired. See *Kindle Worlds*, AMAZON, <https://kindleworlds.amazon.com/worldsAmazon> (last visited Jan. 13, 2018).

²² Chris Mills, *HBO is Abusing Copyright to take ‘Game of Thrones’ Fan Videos Off YouTube*, BOY GENIUS REP. (May 10, 2016), <http://bgr.com/2016/05/10/game-of-thrones-youtube-theories-hbo/>.

²³ Mike Masnick, *Tolkien Estate Strikes Again: Forces Summer Camp to Change Name*, TECHDIRT (Apr. 20, 2011, 11:40 AM), <https://www>

a game maker for creating a mobile version of the fictional card game from the Star Wars universe, “Sabacc,” in which Han Solo famously won the Millennium Falcon from Lando Calrissian.²⁴ Netflix sent a cease-and-desist letter to the owners of a pop-up bar in Chicago based on its popular new television series, *Stranger Things*, with the quip, “We love our fans more than anything, but you should know the Demogorgon is not always as forgiving.”²⁵ The Cartoon Network prevented fans from opening an unauthorized Rick and Morty themed pop-up bar in Washington, DC, claiming the move “wasn’t polite and aimed at profiting off of Rick and Morty fans.”²⁶ Fans responded that the bar would have been a labor of love and that the company was denying fans the freedom to “geek out.”²⁷

The economy of verbs is now fully delimited by intellectual property. The full pantheon of intellectual property rights—copyrights, trademarks, utility patents and design patents—are marshalled to create exclusive rights in look and feel, aura, and aesthetic experience.²⁸ Ever-expanding merchandising rights, based on copyright’s derivative work right and trademarks’ prevention of sponsorship and endorsement confusion, have propelled the commodification of experiences to go beyond the enclosure of speech into the enclosure of cultural practices. The result is that copyright and trademarks have crept into some of the most intimate spaces of human thought and action: our fantasy lives. Intellectual property laws seek to govern who we imagine ourselves to be and to commodify every endorphin of glee when we hear a reference to our favorite characters or stories. This enclosure has serious implications for humanity. As Yale psychologist Paul Bloom observes, American

.techdirt.com/articles/20110419/01104713954/tolkien-estatestrikes-again-forces-summer-camp-to-change-name.shtml.

²⁴ Ashley Cullins, *Hollywood Docket: ‘Star Wars’ Sabacc Game Sparks Another Lawsuit*, HOLLYWOOD REP. (May 4, 2018), <https://www.hollywoodreporter.com/thr-esq/hollywood-docket-star-wars-sabacc-game-sparks-lawsuit-1108386>.

²⁵ John Lynch, *Netflix Asked a ‘Stranger Things’ Pop-Up Bar to Shut Down with this Humorous Cease-and-Desist Letter*, BUS. INSIDER (Sept. 19, 2017), <http://www.businessinsider.com/netflix-stranger-things-pop-up-bar-funny-cease-anddesist-letter-2017-9>.

²⁶ Jessica Sidman, *Rick and Morty-Themed Bar Shut Down After Threats from Turner Broadcasting*, WASHINGTONIAN (Aug. 18, 2018), <https://www.washingtonian.com/2018/08/18/rick-and-morty-themed-bar-shut-down-after-threats-from-turner-broadcasting/>.

²⁷ *Id.*

²⁸ Peter Lee & Madhavi Sunder, *The Law of Look and Feel*, 90 S. CAL. L. REV. 529, 529 (2017).

adults spend on average four minutes a day on sex and over four hours a day in imaginary worlds.²⁹

The demands to cease such activity follow the old, refuted logic: “If value, then right.” Rochelle Dreyfuss first offered this pithy formulation, but the logic had been repudiated much earlier. Felix Cohen explained the circularity that this approach rests upon: “The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of fact, the economic value of a sales device depends upon the extent to which it will be legally protected.”³⁰

In recent writing, one of us (Sunder) has repudiated this expansion of rights, decrying the threat to fundamentally human activity, such as the ability to play, imagine, learn with others, and to reference the cultural works that shape our lives and societies.³¹ Unlike Barlow, the critique does not turn on the form in which information is conveyed—that is, bottles or no bottles, in Barlow’s parlance. Rather, the critique is premised on the nature of art itself. Perhaps the most influential theorist of aesthetic experience is John Dewey. Dewey argued that aesthetic progress ought to be measured not by the creation of artistic works, but by the extent of human engagement and participation with cultural works.³² Dewey’s insights are all the more poignant today in the wake of DIY (do-it-yourself), the Maker Movement, and User Generated Content (UGC) enabled by new technologies and the Internet. Kenneth Arrow’s theory of “learning by doing” and Michael Polanyi’s account of tacit knowledge, which reveals how scientific knowledge must be experimented within labs with mentors and colleagues, are also gaining new purchase in copyright scholarship and in the digital context, as we increasingly recognize that cultural knowledge, too, must be actively experienced, repeated, held, touched, tasted, and practiced with others to be fully known and enjoyed. Performance theory, which describes the development of individual agency through physical “embodiment” in the cultural worlds we love, also has important lessons for crafting limits on property rights in experience, especially in cyberspace, where embodiment is the primary mode of experience and play.

²⁹ PAUL BLOOM, HOW PLEASURE WORKS: THE NEW SCIENCE OF WHY WE LIKE WHAT WE LIKE 155 (2010).

³⁰ Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935).

³¹ Sunder, *supra* note 9.

³² See generally JOHN DEWEY, ART AS EXPERIENCE (1934).

II. ONCE MORE, WITH FEELING: COPYRIGHTING EMOTES

Now, copyright and trademark are poised to dive further into the realms of imagination and experience. Instead of dancing on the grave of copyright, we consider copyrighting dance itself.

Today, dancing online is sold as a commodity, to the tune of literally billions of dollars. As mentioned earlier, Epic Games offers its blockbuster videogame Fortnite for free. Players fight to the death in a battle royale (the concept itself borrowed from an earlier Japanese manga and movie). The game's explosive popularity stems not just from the exciting competition, but the inclusion of aesthetic elements of joy and style in the form of avatar skins and "emotes."³³ Emotes are literally in-game expressions: "After a kill, players can dance . . . , adding a fillip of humor and split-second grace to the victory."³⁴ The sale of emotes and skins made Epic over \$2 billion in profits in 2018 alone.³⁵

Emotes often borrow popular dance moves—typically, without licensing. Recently, a number of individuals who created the original dance moves have sued Epic. Alfonso Ribeiro, a star of the television show "The Fresh Prince of Bel-Air," sued Epic Games appropriating his signature "Carlton dance." The rappers 2 Milly and BlocboyJB have also sued Epic on similar grounds for the "Milly Rock" and "Shoot" dances, respectively. The lawsuits argue that Epic's unauthorized use of the artists' dance moves violates their intellectual property rights, including copyright, trademark, and right of publicity.³⁶

The first round of the legal battle royale went to the corporation. The U.S. Copyright Office denied registration on Ribeiro's dance moves known as "The Carlton Dance," characterizing it as "simple routine" "not registrable as a choreographic work."³⁷ The U.S. Copyright Office's

³³ Sarah L. Kaufman, *The Dances in 'Fortnite' Have Become Nearly as Contagious as the Game*, WASH. POST (Sept. 10, 2018), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/09/10/the-dances-in-fortnite-have-become-nearly-as-contagious-as-the-game/?utm_term=.79f417466135 (arguing that aesthetics in the form of skins and emotes allow players to create personal style, making the game both more fun and immensely profitable).

³⁴ *Id.*

³⁵ Shanley, *supra* note 11.

³⁶ Elizabeth A. Harris, *A Real-World Battle Over Dancing Avatars: Did Fortnite Steal the Floss?*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/arts/fortnite-floss-dance-lawsuits.html>.

³⁷ Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss at 12, *Ribeiro v. Take-Two Interactive Software*, 2:18-cv-10417 (filed Feb. 13, 2019) [hereinafter *Motion to Dismiss*].

longstanding position is that social dances are not copyrightable³⁸ and that individual dance steps are un-copyrightable ideas that must remain in the public domain as “the building blocks of choreographic expression.”³⁹ A recent Supreme Court decision adds a further stumbling block for the plaintiffs: they cannot file a copyright lawsuit without a copyright registration.⁴⁰

While there are important questions about copyrightability, there is also a racial dimension to the conflict. Some of the artists complaining of theft are African-American. When Epic offered its first in-game concert, it invited a white electronic musician, Marshmello, to perform, partnering with him to offer a “branded” (and likely duly licensed) Emote.⁴¹ “Meanwhile black artists must resort to lawsuits to even be acknowledged,” bemoans cultural critic Yusef Cole, saying that it is not simply Fortnite’s failure to share profits with black creators, but its erasure of the dances’ authorship that is the true offense. “To recognize someone’s contribution to culture is to lend that person, and their community some measure of power.”⁴²

The law has not thus far not offered support for copyright in the popular dance moves of the “Milly Rock,” the “Carlton Dance,” or “Shoot.” The dances are renamed and repackaged for predominantly white audiences,⁴³ the serial numbers connecting them to black creators and their communities rifled off. There are reasons to worry about the

³⁸ See U.S. COPYRIGHT OFF., CIRCULAR 52 COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 1 (2017) (“Choreography and pantomimes consisting of ordinary motor activities, social dances, commonplace movements or gestures, or athletic movements may lack a sufficient amount of authorship to qualify for copyright protection.”).

³⁹ See *Motion to Dismiss*, *supra* note 37, at 10.

⁴⁰ See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.Com, L.L.C.*, 139 S. Ct. 881, 886 (2019) (providing certain exceptions).

⁴¹ Yusef Cole, *Fortnite’s Appropriation Issue Isn’t About Copyright Law, It’s About Ethics*, WAYPOINT (Feb. 11, 2019),

https://waypoint.vice.com/en_us/article/a3bkgj/fortnite-fortnight-black-appropriation-dance-emote (describing long history of social dancing first developed by black performers “on dance floors and sidewalks, rather than on stages and in studios” being “plagued by appropriation and unoriginality”).

⁴² *Id.*

⁴³ *Id.* (“[W]hen these dances are turned into to Emotes, their connections with poverty and racism are elided and they are reduced to nothing more than a funny dance, cut off and erased, made vanilla and palatable. This is not simply bad luck, it is the latest in a long trend of omission. . . . Shoot becomes Hype, Milly Rock becomes Swipe It. Blackness becomes a grey area, becomes bundles of mocap data, and is made ultimately invisible.”).

extension of copyright to a very limited set of dance steps, but, given the context of a wealthy corporation further enriching itself based on the creativity of others, there seems little occasion for a victory dance.

III. CAN HAS CHEEZBURGER?: THE LAW OF MEMES AND GIFS

“Information wants to be free.” This is perhaps the best-known slogan of the information age. John Perry Barlow credited “this elegant statement of the obvious” to Stewart Brand. Barlow recognized that the statement implied agency in information,⁴⁴ an idea that science and technology studies scholars would find familiar. Barlow explicitly borrowed biologist Richard Dawkins’ concept of a meme—in Barlow’s words, “self-replicating patterns of information that propagate themselves across the ecologies of mind . . .”⁴⁵

Barlow was not content with mere replication, but also evolution: information would not only propagate, it would “evolve constantly into forms which will be more perfectly adapted to their surroundings[,]” he wrote.⁴⁶ Barlow wrote:

Digital information, unconstrained by packaging, is a continuing process more like the metamorphosing tales of prehistory than anything which will fit in shrink wrap. From the Neolithic to Gutenberg, information was passed on, mouth to ear, changing with every re-telling (or re-singing). The stories which once shaped our sense of the world didn’t have authoritative versions. They adapted to each culture in which they found themselves being told.⁴⁷

Everything old was new again.

As Barlow predicted, the internet would explode with replicating and evolving memes. From grumpy cat to doge, memes often serve to entertain and to inform, and often both. Sites like

⁴⁴ See Barlow, *supra* note 1, at 18 (noting that slogan “information wants to be free” “recognizes . . . the fact that [information] might be capable of possessing something like a ‘desire’ in the first place”).

⁴⁵ *Id.* In a subsequent article describing “Godwin’s Law of Nazi Analogies,” Mike Godwin would describe a “meme” as “an idea that functions in a mind the same way a gene or virus functions in the body.” Mike Godwin, *Meme, Counter-Meme*, WIRED (Oct. 1, 1994), <https://www.wired.com/1994/10/godwin-if-2/>. For a fuller discussion of memes, see Angela Watercutter & Emma Grey Ellis, *The WIRED Guide to Memes*, WIRED (Apr. 1, 2018), <https://www.wired.com/story/guide-memes/>.

⁴⁶ Barlow, *supra* note 1, at 19.

⁴⁷ *Id.*

ICanHas.Cheezeburger.com (named after an original nonsensical meme) collect such memes.⁴⁸ Usually, the meme borrows an image or set of video stills and adds a caption that removes the image from its original context and deploys it in a way that the original image creator would not have anticipated. Websites and apps offer the ability to write one's own captions to popular memes, tailoring them to one's own politics or viewpoints.⁴⁹ One popular meme takes a clip from a 2004 German film to add different captions to a scene where Hitler learns that the Nazis have lost Berlin.⁵⁰

But memes were not the only new vocabulary of the internet: emojis and GIFs also emerged as a form of expression. Eric Goldman writes that emojis offer “a powerful and efficient way to express ourselves.”⁵¹ He observes, “The right emoji can convey emotional valence, cultural jokes, or other valuable information to a message.”⁵² Most importantly, emojis “make communicating fun.”⁵³

Where memes seem to have developed independently without need for a particular corporate sponsor, GIFs and emojis needed technological encoding to function across platforms. GIFs emerged only when a corporation sponsored a file format that allowed compressing graphical information so that it could be shared widely without burdening limited communications resources. CompuServe invented the “Graphic Interchange Format” in 1987 as a means of bringing “a little color and movement to the Web.”⁵⁴

⁴⁸ See, e.g., I CAN HAS CHEEZBURGER?, <https://icanhas.cheezburger.com/> (last visited Mar. 27, 2019).

⁴⁹ See, e.g., MEME CREATOR, <https://www.memecreator.org/> (last visited May 16, 2019) (collecting popular memes and permitting users to generate new captions for them).

⁵⁰ See Aaron Schwabach, *Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 BUFF. INTELL. PROP. J. 1, 2 (2012) (“[P]arodies, posted on YouTube and elsewhere, using clips from the 2004 German film *Der Untergang* (released in the US as *Downfall*), particularly the climactic rant scene after Hitler (played by Bruno Ganz) learns that Felix Steiner has not mobilized troops to break the Soviet assault on Berlin—meaning that the Nazis have lost the war.” (footnote omitted)).

⁵¹ Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1228 (2018).

⁵² *Id.*

⁵³ *Id.* at 1229.

⁵⁴ Alex Williams, *Fresh From the Internet's Attic*, N.Y. TIMES (Feb. 13, 2013), http://www.nytimes.com/2013/02/14/fashion/common-on-early-internet-gif-files-make-comeback.html?_r=0.

Since that time, GIFs have become a means to invoke cultural references to express an idea with a flourish. As Arwa Haider notes, “In an age of 24/7 information, where there’s pressure to stand out, and a general expectation that we should react to news in real time, we need to say something as quickly and emphatically as possible—so we say it with gifs.”⁵⁵ Where memes are often used to originate and promote ideas, even complicated ones, GIFs are often used to express a response. Haider explains: GIFs “embody a range of expressions that have become everyday patter, thanks to social media: the ‘eye roll’, the ‘facepalm’, the ‘mic drop’. These are potent little shots of melodrama; gifs are inherently camp.”⁵⁶

This does not mean that GIFs are free of problematic aspects. Some have noted that non-black users often use GIFs featuring black figures to express themselves—that black people are deployed to perform the emotional labor “as a kind of modern minstrelsy, . . . reinforc[ing] racist caricatures.”⁵⁷ This works by exploiting our culture’s racist association of “black people with excessive behaviors”⁵⁸—the kind of dramatic gesture often found in GIFs. Not only is the usage of GIFs distributed unequally, the types of available GIFs also exhibit disparities. Because there are few Latino, Asian American, and Native American celebrities in Western media, there seem to be few GIFs featuring these races. A quick perusal of GIF repository Giphy.com will attest to this absence.⁵⁹ This may reduce the reinforcement of racist caricatures, but it also compels non-white and non-black individuals to utilize folks who don’t look like them to express themselves, furthering a sense of invisibility in contemporary culture.

Unlike emojis, which are designed for public use, GIFs and memes rely on copyrighted works—almost invariably without the permission of the copyright holders. These devices often borrow stills from broadcast video or movies. They often focus on particularly striking moments, a pose or gesture within a larger scene. So why haven’t GIFs and memes succumbed to a wave of copyright infringement claims?

For his part, John Perry Barlow did not believe that sharing memes was illegal. He tweeted this point:

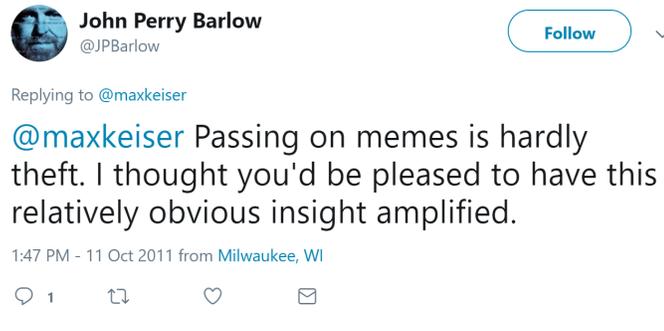
⁵⁵ Arwa Haider, *How the GIF Won the Internet*, BBC (Aug. 29, 2017), <http://www.bbc.com/culture/story/20170825-how-the-gif-won-the-internet>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Lauren Michelle Jackson, *We Need to Talk About Digital Blackface in Reaction GIFs*, TEEN VOGUE (Aug. 2, 2017), <https://www.teenvogue.com/story/digital-blackface-reaction-gifs>.

⁵⁹ See GIPHY, <https://giphy.com> (last visited Mar. 27, 2019).



Not only is sharing a meme unlikely to constitute copyright infringement (the sharing is implicitly licensed), the meme itself is likely to qualify as a fair use of the underlying copyrighted work.

Yet, we have not seen a deluge of litigation challenging these uses, even when the copyright owners are Hollywood studios with a history of asserting their intellectual property claims against infringement. Indeed, we can identify no case bringing a copyright infringement or other legal claim against either a GIF or a meme. This is because most GIFs and memes are likely protected as fair use, thereby protected from copyright infringement claims.

GIFs and memes are likely protected as fair use largely because users make a transformative use of the original work. GIFs and memes take an original gesture and allow others to utilize it to communicate their own emotions or thoughts. Transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”⁶¹ This is true even though most memes do not take aim at the original work but employ it for critical analysis of contemporary phenomena. Copyright law clearly privileges critique and parody that makes fun of the original work, but the most popular uses of GIFs and memes do not fall squarely into that realm. Because of the highly transformative nature of GIFs and memes, however, we believe that most GIFs and memes would find legal protection from copyright infringement claims as fair use.

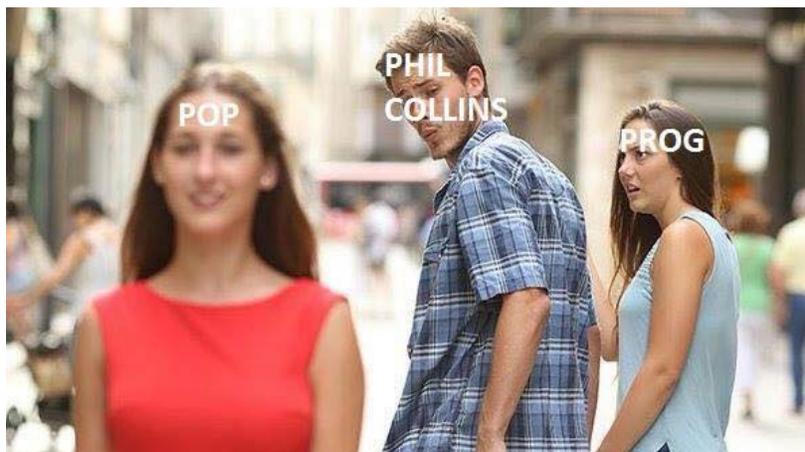
Take the American Chopper meme. In its most common format, it consists in a set of five stills from a Discovery Channel reality

⁶⁰ John Perry Barlow (@JPBarlow), TWITTER (Oct. 11, 2011, 10:47 AM), <https://twitter.com/JPBarlow/status/123816905608929281>.

⁶¹ *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994).

television show that depicted tensions between a father and son.⁶² Fingers are pointed, and, in the fourth panel, a chair gets thrown—all of which makes for a dramatic backdrop to an otherwise pointy-headed, back-and-forth intellectual argument. Meme creators offer captions that offer point and counterpoint on a variety of subjects. As one writer notes, “What makes American Chopper truly unique in the meme world is that it gives equal weight to both sides of an argument.”⁶³ The original television show and memes based on these five stills are worlds apart. They discuss different subjects in a different form for a different purpose.

Another popular meme, the Distracted Boyfriend meme, uses the original photo and repurposes it entirely as social commentary. The meme borrowed stock photos showing three individuals engaged in a complicated relationship, but captions allow each of the individuals to become a stand-in for another person or concept. The Distracted Boyfriend meme seems to have originated in a Turkish Facebook group, deployed to comment on musician Phil Collins’ move from progressive rock to pop.⁶⁴



⁶² See Opheli Garcia Lawler, *The Star of the 'American Chopper' Meme Didn't Know What a Meme Was*, VICE (Apr. 12, 2018), https://www.vice.com/en_us/article/7xddj4/the-star-of-the-american-chopper-meme-didnt-know-what-a-meme-was.

⁶³ David Britton, *What the American Chopper Meme Taught Us in 2018*, DAILY DOT (Dec. 17, 2018), <https://www.dailydot.com/unclick/american-chopper-argument-2018-meme/>.

⁶⁴ See Tiffany Kelly, *Why 'Distracted Boyfriend' is the Meme of 2017*, DAILY DOT (last updated Dec. 30, 2017), <https://www.dailydot.com/unclick/distracted-boyfriend-meme-2017/>.

David Britton observes, “If you use Distracted Boyfriend, you’re commenting on how you’re ignoring something you should be paying attention to in favor of something you find more captivating.”⁶⁵ The meme also reveals how readily susceptible to repurposing memes often are: as Tiffany Kelly notes, “The distracted boyfriend meme is a modern version of a caption contest. Who is the distracted boyfriend? Who is the woman distracting the boyfriend? Who is the offended girlfriend? Just fill in the blanks!”⁶⁶ The Distracted Boyfriend meme also shows how memes cross global boundaries of culture.

Even businesses now deploy GIFs and memes.⁶⁷ But the fact that their use is inevitably commercial does not necessarily defeat their fair use claim. The courts have upheld a variety of commercial acts as fair use. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that a rap group’s parody of a song could constitute fair use despite its commercial purpose: “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁶⁸

A meme may be protected even if the people depicted in the meme object to its politics. The Seventh Circuit held that a T-shirt using a significantly modified photo of a Wisconsin mayor to criticize that mayor was fair use because the copyright holder did not claim the modified version reduced demand for the mayor’s photograph and because it significantly modified the original.⁶⁹

Of course, borrowing from popular broadcast properties can violate copyright. When a company published a book of trivia questions about the television show *Seinfeld*, including many instances of actual dialogue from the show, the studio sued and won, prevailing over a defense of fair use.⁷⁰ A number of factors contributed to the court’s ruling that the trivia book did not constitute fair use. The trivia book had “slight to non-existent” transformative purpose.⁷¹ Furthermore, the

⁶⁵ Britton, *supra* note 63.

⁶⁶ Kelly, *supra* note 64.

⁶⁷ See Diana Bradley, *5 Brands Insert Themselves into the Viral ‘Distracted Boyfriend’ Stock Picture*, PRWEEK (Aug. 30, 2017), <https://www.prweek.com/article/1443244/5-brands-insert-themselves-viral-distracted-boyfriend-stock-picture> (displaying various company versions of the “Distracted Boyfriend” meme).

⁶⁸ *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994).

⁶⁹ *Kienitz v. Sconnie Nation L.L.C.*, 766 F.3d 756, 759 (7th Cir. 2014).

⁷⁰ *Castle Rock Entm’t Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 135 (2d Cir. 1998).

⁷¹ *Id.* at 142.

defendant's trivia book would be "likely to fill a market niche that Castle Rock would in general develop."⁷² These factors distinguish this case from the facts typical in the creation of GIFs and memes.

IV. LAW OR ETHICS?

There are certainly reasons to think that copyright and other forms of intellectual property are not the right weapons in battles over cultural appropriation. For starters, too many property rights in bits and memes will stifle innovation and the further development of culture. For this reason, Barlow seemed to think intellectual property was "OP," or overpowered—too high-powered and absolute to regulate a field as dynamic as culture. Barlow suggested that ethics, not law, were more suitable to assess privileges and obligations where, as here, Epic Games is making billions off the backs of predominantly black creators whose dances and style bring immense cultural and economic value to the game.

More recently the eminent philosopher Kwame Anthony Appiah has staked a claim in the cultural appropriation wars. "[W]hen an American pop star makes a mint from riffing on Mbaqanga music from South Africa, you can wonder if the rich American gave the much poorer Africans who taught it to him their fair share of the proceeds," Appiah contemplates.⁷³ "If he didn't, the problem is not cultural theft but exploitation. People who parse such transgressions in terms of ownership have accepted a commercial system that is alien to the traditions they aim to protect."⁷⁴ Appiah concludes that "[d]isrespect and exploitation are worthy targets of our disapproval, but the idea of cultural appropriation is ripe for the wastebasket. . . . The rhetoric of ownership is alluring and potent, but when we're describing the quicksilver complexities of culture, it just isn't appropriate."⁷⁵

It is understandable that Appiah, a scholar of identity, does not see property as a nimble enough tool for regulating cultural production and dissemination in a complex and unequal society on fair terms. But that is precisely the task of modern property and intellectual property law! In truth, the criticism of the property claims of black creators of

⁷² *Id.* at 145.

⁷³ Kwame Anthony Appiah, *Cultural Borrowing Is Great; The Problem Is Disrespect*, WALL STREET J. (Aug. 30, 2018), <https://www.wsj.com/articles/cultural-borrowing-is-great-the-problem-is-disrespect-1535639194?mod=e2fb&fbclid=IwAR2THbjvXRmRuZgTmFeU8irPXD75jcu7HwN8TWC7uT5RondNUj00O1kjkk>.

⁷⁴ *Id.*

⁷⁵ *Id.*

popular social dances can be applied to most intellectual property claims. Copyright protects works as mundane as calendars, coupons and competition cards, kitsch from ashtrays to lamps,⁷⁶ and useful articles such as the stripes and chevrons on cheerleading uniforms.⁷⁷ Copyright protects The Macarena and has Girl Scouts running scared to perform the social dance sans paying royalties for the music.⁷⁸ But copyright draws a line at popular dance moves created by African American artists?⁷⁹ In truth, very little in the way of copyright doctrine supports the Copyright Office Circular recommendations. Copyright protection requires a very low bar of originality⁸⁰ and self-consciously refuses to discriminate between high and low art.⁸¹ We must confront the reality that our copyright law is rife with inconsistencies, as best, and racial and cultural biases, at worst.

And then there is the question that if we are to regulate by ethics, whose ethics? Barlow imagined Cyberspace as an opportunity to return to the Western frontier (dubbing it, with Mitch Kapoor, the “electronic frontier”) where community norms, not law from above, would regulate modes of life.⁸² “Having come from a place where people leave their keys in their cars and don’t even have keys to their houses, I remain convinced that the best obstacle to crime is a society with its ethics

⁷⁶ See *Mazer v. Stein*, 347 U.S. 201, 221 (1954) (opening the door to copyright in everyday useful articles, from silverware to ashtrays).

⁷⁷ See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1012 (2017) (“The [colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms] are therefore separable from the uniforms and eligible for copyright protection.”).

⁷⁸ Backlash from one California Girl Scout troupe’s performance of a “silent Macarena” for fear of copyright reprisals spurred Congress to pass the Fairness in Music Licensing Act of 1998, which increased the number of bars and restaurants exempt from royalties. See Fairness in Musical Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C. (2012)).

⁷⁹ Cole, *supra* note 41.

⁸⁰ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991) (“The standard of originality is low, but it does exist.”).

⁸¹ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (articulating the now famous “non-discrimination principle” in copyright law, warning that judges are not suited to evaluate the artist or aesthetic merit of art).

⁸² Barlow, *supra* note 1, at 24 (romantically yearning for the early frontier days when “order was established according to an unwritten Code of the West which had the fluidity of etiquette rather than the rigidity of law. Ethics were more important than rules. Understandings were preferred over laws, which were, in any event, largely unenforceable”).

intact,” Barlow mused.⁸³ But Barlow’s “ethics” derive from a homogeneous, well-to-do community—or one that forcefully created homogeneity by routing out Native Americans, Mexican Americans and other non-whites from the settlers’ “frontier.” Can black or indigenous creators rely on frontier “ethics”? Should we allow conflicts over contested resources to be determined by the ethics of those in power in Cyberspace—the “brogrammers” of Silicon Valley?

We must always be attendant to the ethical implications of law. But our ethical inquiry should start by asking, how does law affect real people on the ground, including the weakest and the poorest? How does our diversity affect our sense of trust in “community norms”? Our discussions of the future role of intellectual property laws—in cyberspace and real space—need to account for historical and ongoing racial, class, and gender exploitation in the production and dissemination of culture.⁸⁴ Miley Cyrus twerking at the Video Music Awards (VMAs) in 2013 caused international outrage. As one critic memorably put it, “the effect was not of a homage but of a minstrel show, with a young wealthy woman from the [S]outh doing a garish imitation of black music and reducing black dancers to background fodder and black women to exaggerated sex objects.”⁸⁵ What are the implications of an intellectual property law that would allow for the appropriation of the creative works of black bodies and minds through the erasure of the human authorship embedded in those works? Intellectual property is a tool for power, and that includes the ability to name a resource as property or public domain. We must confront the violence of the law, which is not neutral, but beset by implicit racial, cultural, gendered and class biases.

Memes, like genes, travel and evolve. They are the building blocks of culture, just as genes are the building blocks of life. At the same time, we must be ever cognizant of the social context in which culture is produced. Cultural production and the laws that regulate it are deeply imbricated in the construction of society and economy, including the creation and maintenance of colonial power and unequal distributions

⁸³ *Id.*

⁸⁴ See, e.g., KYRA D. GAUNT, *THE GAMES BLACK GIRLS PLAY: LEARNING THE ROPES FROM DOUBLE-DUTCH TO HIP-HOP* 94–97 (2006) (recounting how everyday musical games of black girls becomes a bedrock inspiration of “black popular music making” in popular male centered hip-hop, including Nelly’s “Down, Down Baby”).

⁸⁵ Hadley Freeman, *Miley Cyrus’s Twerking Routine was Cultural Appropriation at its Worst*, *GUARDIAN* (Aug. 27, 2013), <https://www.theguardian.com/commentisfree/2013/aug/27/miley-cyrus-twerking-cultural-appropriation>.

of wealth and knowledge. This truth should not lead us to throw up our hands, letting ethics but not law play a role in the difficult questions of our time. To the contrary, intellectual property law must confront its own role in apportioning respect, power, and wealth in our worlds, and be resolved to do better.

CONCLUSION IN FORM OF MEME

