

A COPY OF A COPY OF A COPY: INTERNET MIMESIS AND THE COPYRIGHTABILITY OF MEMES

ELENA ELMERINDA SCIALABBA[†]

ABSTRACT

Memes have become a staple of Internet culture. They provide a crucial form of cultural interchange by allowing billions to communicate and commiserate about all facets of life through the sharing of amusing and relatable phenomena. However, many memes are created from copyrighted images, making it unclear whether their use constitutes copyright infringement actionable by the original copyright owners. This Note considers memes in the context of U.S. copyright law and proposes that memes could be protected against copyright infringement by the fair use doctrine, which excuses infringement if the would-be infringer's use is socially desirable and aligned with the basic aims of copyright law. To illustrate this, this Note analyzes the "typical meme" through a thorough examination of the four statutory factors of fair use.

INTRODUCTION

In his 1976 book *The Selfish Gene*, evolutionary biologist and popular-science author Richard Dawkins introduced the term "meme."¹ Dawkins described the word "meme" as "a noun that conveys the idea of a unit of cultural transmission, or a unit of imitation."² He conceptualized memes as the "cultural parallel to biological genes," carrying information, being replicated and transmitted from one person to another through a form of Darwinian selection, and having the ability to evolve through random mutation, regardless of human fitness or survival.³ Although the controversial theory of memetics has generally

[†] Duke University School of Law, J.D. expected, May 2020; The University of North Carolina at Chapel Hill, B.S., May 2017.

¹ Olivia Solon, *Richard Dawkins on the Internet's Hijacking of the Word 'Meme'*, WIRED (June 20, 2013), <https://www.wired.co.uk/article/richard-dawkins-memes>.

² RICHARD DAWKINS, *THE SELFISH GENE* 192 (1976) (emphasis omitted).

³ Kara Rogers, *Meme: Cultural Concept*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/meme> (last visited Sept. 22, 2019).

been viewed as pseudoscience,⁴ “memes” have nevertheless persisted, if not quite in the way Dawkins originally predicted.

The Internet has successfully hijacked and reappropriated the use of the word “meme.”⁵ In fact, one could even say that the Internet actually created a meme of the original meme. Journalist Mike Godwin described a “meme” as an “idea that functions in a mind the same way a gene or virus functions in the body.”⁶ Internet memes “often take the form of pictures, videos, or other media containing cultural information” and are typically spread online through email, social media, and websites.⁷ Rather than randomly mutating and spreading as Dawkins’ theoretical memes did, Internet memes are deliberately replicated, altered, and transmitted.⁸ However, Dawkins’ initial suggestion that memes were “viruses of the mind”⁹ is not entirely off-base in the Internet context; similar to infectious biological viruses, the Internet memes that are most successful in being copied and transmitted are often those that become the most culturally prevalent.¹⁰

The staggering prevalence and virality of these Internet memes have created a variety of questions about how they fit into existing intellectual property regimes. In the U.S. specifically, there are a number of challenges in applying a centralized configuration of copyright to the Internet’s inherently decentralized content creation.¹¹ Consider the

⁴ See Mark A. Jordan, *What’s In A Meme?*, RICHARD DAWKINS FOUND. FOR REASON & SCI. (Feb. 4, 2014), <https://www.richarddawkins.net/2014/02/whats-in-a-meme/> (“Memetics, a field of study developed from the 80s onwards, is often accused of trespassing in fields such as psychology or sociology, attempting to replace well established and coherent analytical tools and models with half-baked and insufficiently scientific notions.”).

⁵ See Solon, *supra* note 1 (describing how memes have “since been reappropriated by the internet, with Grumpy Cat, Socially-Awkward Penguin and Overly-Attached Girlfriend spreading virally, leaping from IP address to IP address (and brain to brain) via a process which, in the broad sense, can be called imitation”).

⁶ See Mike Godwin, *Meme, Counter-meme*, WIRED (Oct. 1, 1994), <https://www.wired.com/1994/10/godwin-if-2/> (describing his take on memes, which is similar to, but also distinct from, Dawkins’ original definition).

⁷ Rogers, *supra* note 3.

⁸ *Id.*

⁹ Richard Dawkins, *Viruses of the Mind*, in DENNETT AND HIS CRITICS: DEMYSTIFYING MIND 13–27 (Bo Dahlbom ed., 1993).

¹⁰ Rogers, *supra* note 3.

¹¹ See, e.g., Lorelei Laird, *Do Memes Violate Copyright Law?*, ABA JOURNAL (Sept. 2016), http://www.abajournal.com/magazine/article/do_memes_violate_copyright_law;

“typical meme,” which usually consists of an image (copyrighted by its original creator) and whatever text, filter, or other editing is added to the image by the meme creator, usually for some humorous, satirical, critical, or other purpose or effect.¹² In this example, the meme can be seen as, in legal terms, a derivative work,¹³ the creation of which traditionally is only within the exclusive rights of the original copyright owner.¹⁴ However, “the rights of the copyright owner are not exhaustive or absolute.”¹⁵ The fair use doctrine might provide the meme creator with a defense against a claim of copyright infringement if she could demonstrate that her use of the copyrighted image was “fair” in light of the four prongs outlined in Section 107 of the Copyright Act.¹⁶ Moreover, it is unlikely that most image owners will go through the trouble and expense of pursuing copyright infringement claims against meme creators because often, memes provide image owners with free exposure that helps to foster recognition of their brand and indirectly promote their associated works and products.¹⁷

Vicky Ludas Orlofsky, *Memes, Fair Use, and Privacy*, OFF. FOR INTELL. FREEDOM AM. LIBR. ASS'N (Jan. 28, 2019), <https://www.oif.ala.org/oif/?p=16873>.

¹² See Paul Gil, *Why Would You Ever Create an Internet Meme?*, LIFEWIRE, <https://www.liveabout.com/why-would-you-ever-create-an-internet-meme-2483710> (last updated Apr. 12, 2018) (listing reasons for making memes as including wanting to make a political statement, promote awareness of current events and issues, make money through advertising and syndication, spread pro- or anti-religion messages, and poke fun at your personal friends).

¹³ Rachel Brenke, *Do Memes Violate Copyright Law?*, THELAWTOG, <https://thelawtog.com/memes-violate-copyright-law/> (last visited Sept. 22, 2019).

¹⁴ See 17 U.S.C. § 106 (2018) (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . 2) to prepare derivative works based upon the copyrighted work.”).

¹⁵ Brenke, *supra* note 13.

¹⁶ See *id.* (stating that “fair use” is a defense to a claim of copyright infringement and outlining §107 of the Copyright Act); see also 17 U.S.C. § 107 (2018).

¹⁷ See Brenke, *supra* note 13 (“Even if it might actually violate copyright legally speaking, content owners may not press the issue because it helps ingratiate their brand into the culture to have their work copied all around the Internet.”) (citation omitted).

I. HOW MEMES CAN BE SITUATED IN THE U.S. COPYRIGHT
SCHEME

Ironically enough, memes are no joke. We are living in a time where the Internet cares more about memes than about Jesus;¹⁸ according to Google Trends, in 2016, people searched the term “memes” more than the term “Jesus,” unseating “Jesus” as the most searched term since 2011.¹⁹ Many young people treat memes as a form of cultural currency, through which we can commiserate about common frustrations, convey niche interests, express sociopolitical concerns, joke about ubiquitous phenomena, make insightful criticisms, market ourselves and our brands, and take solace in the fact that we’re not alone.²⁰ Memes provide a vehicle for group catharsis and serve as “social glue that bind[s] our generation together, whether the meme itself is just a bit of fun, or tackling a serious issue.”²¹ In light of all this, if we want to keep creating, enjoying, and sharing memes without fear, it is absolutely crucial to determine where memes fall within United States law.

First, it is important to delineate the sources of copyright law and the present status of the copyright system in the United States. The U.S. Constitution grants Congress the enumerated power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²² When the Constitution was created in the late eighteenth century, the word “science” could be equated more generally with “knowledge.”²³ Thus, the Constitution’s Copyright Clause conferred upon Congress the power to grant copyrights to authors whose

¹⁸ Kam Dhillon, *Here’s How Much Money You Can Make With Memes*, HIGHSNOBIETY (Apr. 20, 2017), <https://www.highsnobiety.com/2017/04/20/how-to-make-money-with-memes/>.

¹⁹ Madeline Farber, *The Internet Officially Cares More About Memes Than Jesus*, FORTUNE (Oct. 27, 2016), <http://fortune.com/2016/10/27/google-trends-memes-jesus/>.

²⁰ See Bharathi A Panicker, *The Importance of Memes for Twenty Somethings and Teens*, HER CAMPUS (Nov. 24, 2018, 10:59 PM), <https://www.hercampus.com/school/ashoka/importance-memes-twenty-somethings-and-teens> (stating that memes function as a “social glue” for many born in the 90’s or 00’s and that relatable memes provide great comfort in addressing daily struggles).

²¹ *Id.*

²² U.S. CONST. art. I, § 8, cl. 8.

²³ See *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) (citing EDWARD WALTERSCHIED, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125–26 (2002)).

writings enhance knowledge within society. Congress has utilized this power at various times throughout U.S. history to create a number of federal copyright acts.²⁴ U.S. copyright law can be found in chapters 1 through 8 and 10 through 12 of title 17 of the United States Code.²⁵

The Copyright Act of 1976 provides the basic framework for current copyright law.²⁶ It describes the “subject matter of works covered, exclusive rights, copyright term, copyright notice and copyright registration, copyright infringement, fair use and defenses and remedies to infringement.”²⁷ Section 102 defines copyrightable subject matter as subsisting in “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁸ Section 103 provides that “[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”²⁹

Notably, section 106 provides a copyright owner with “the exclusive rights to do and to authorize” any (1) reproduction of the copyrighted work in copies or phonorecords, (2) preparation of derivative works based upon the copyrighted work, (3) distribution of copies or phonorecords of the copyright work to the public by sale or transfer of ownership, (4) public performance of the copyrighted work, and (5) public display of the copyrighted work.³⁰ These rights give the author some control over “the fidelity with which her work is transmitted to others.”³¹ They also provide the incentive needed for copyright to effectively encourage the creation and publication of works of

²⁴ See *Copyright Timeline: A History of Copyright in the United States*, ASS’N RES. LIBR. [hereinafter *Copyright Timeline*], <https://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.XK5atZhKiUk> (last visited Sept. 22, 2019) (chronologically ordering and detailing every major copyright event in U.S. history, including all of Congress’ copyright-related legislation).

²⁵ *Copyright Law of the United States*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/title17/> (last visited Sept. 22, 2019).

²⁶ *Id.*

²⁷ *Copyright Timeline*, *supra* note 24.

²⁸ 17 U.S.C. § 102 (2018).

²⁹ 17 U.S.C. § 103 (2018).

³⁰ 17 U.S.C. § 106 (2018).

³¹ Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 351 (Dec. 2005).

authorship.³² Nonetheless, these exclusive rights are not without their limitations, which are contained in sections 107–12, 117, 119, and 121–22.³³ Section 107, which describes fair use as a limitation on section 106’s exclusive rights and its four determinative factors,³⁴ will be discussed extensively in Part II.

Copyright protection arises the moment a work is created,³⁵ without the need for any formalities. However, registration with the U.S. Copyright Office (the body responsible for “administering a complex and dynamic set of laws, which include registration, the recordation of title and licenses, a number of statutory licensing provisions, and other aspects of the 1976 Copyright Act and the 1998 Digital Millennium Copyright Act”)³⁶ is a “relatively simple process that can be done online, and offers statutory benefits to the copyright holder.”³⁷ All it requires is the filing of an application, the payment of a fee, and the deposit of copies of the copyrighted work with the Copyright Office.³⁸ Copyright registration is a “pre-condition to filing suit for infringement and obtaining statutory damages and attorney’s fees for all works.”³⁹ Owners of a registered copyright that is infringed can be awarded a “sum of not less than \$750 or more than \$30,000” for each infringement.⁴⁰

Second, it is integral to discuss what constitutes a meme. Some suggest that “meme” can refer to any internet phenomenon or viral sensation, while others use “meme” to refer to a “more specific subset of internet behavior that involves pasting captions onto other people’s photos.”⁴¹ Meme websites, such as Know Your Meme,⁴² often feature

³² *See id.* at 360 (“A common way of thinking about copyright is that copyright encourages the creation and publication of works of authorship, by providing an incentive in the form of exclusive rights.”).

³³ 17 U.S.C. §§ 107–12, 117, 119, 121–22 (2018).

³⁴ 17 U.S.C. § 107.

³⁵ 17 U.S.C. § 302(a) (2018).

³⁶ *Overview of the Copyright Office*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/> (last visited Sept. 22, 2019).

³⁷ Maya Fe Holzhauer, *Copyright and Social Media: What Does It Meme?*, NE. U. L. REV. EXTRA LEGAL (May 13, 2018), <http://nulawreview.org/extralegalrecent/copyright-and-social-media-what-does-it-meme>.

³⁸ *Id.* (citing 17 U.S.C. § 408 (2018)).

³⁹ *Id.*

⁴⁰ *Id.* (citing 17 U.S.C. § 504(c)(1) (2018)).

⁴¹ Stacy M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 389 (2018).

memes of both persuasions, displaying “basic caption manipulation as well as viral sensations with more complicated histories.”⁴³ Memes can consist of image macros, reaction GIFs, hashtags, and videos.⁴⁴ They feature everything from movie stills⁴⁵ to scantron tests,⁴⁶ from cartoons⁴⁷ to unflattering images of politicians,⁴⁸ from fake text messages⁴⁹ to cropped pornography.⁵⁰ Sometimes, they are even metatextual, such that they reference or poke fun at other famous meme scenes or concepts.⁵¹ Although memes can be “virtually anything,”⁵² this paper will focus predominantly on visual memes, namely those featuring an image with juxtaposed text, which develop over time through derivative authors who mutate the original meme, usually by editing or filtering the original image and adding juxtaposed text.

Third, although visual memes have created some impassioned legal discourse, direct legal precedent on the matter is lacking,⁵³ and

⁴² See generally KNOW YOUR MEME, <http://knowyourmeme.com> (last visited Sept. 22, 2019).

⁴³ Lantagne, *supra* note 41, at 389.

⁴⁴ Angela Watercutter & Emma Grey Ellis, *The WIRED Guide to Memes*, WIRED (Apr. 1, 2018), <https://www.wired.com/story/guide-memes/>.

⁴⁵ DangerNoodle, *Thanos Design Suggestion*, MARVEL CONTEST OF CHAMPIONS (Apr. 1, 2018, 11:07 PM), <https://forums.playcontestofchampions.com/en/discussion/59931/thanos-design-suggestion>.

⁴⁶ Ygrene (@Ygrene), TWITTER (Mar. 21, 2019, 1:19 PM), https://twitter.com/Ygrene/status/1108825548904714242?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1108825548904714242&ref_url=https%3A%2F%2Fmashable.com%2Farticle%2Ftwitter-filling-in-a-scantron-meme%2F.

⁴⁷ CraveOnline, *Mr. Krabs Memes Are So Relatable*, MANDATORY (May 14, 2017), <https://www.mandatory.com/fun/1310499-mr-krabs-memes-are-so-relatable>.

⁴⁸ HappyToast, FACEBOOK (Sept. 30, 2016, 11:29 AM), <https://www.facebook.com/HappyToastArts/posts/today-i-have-mostly-been-photoshopping-donald-trump-pulling-coloured-flags-out-o/1085787778143652/>.

⁴⁹ Memebase, *Awww*, CHEEZBURGER, <https://cheezburger.com/9184562944/awww> (last visited Sept. 22, 2019).

⁵⁰ *25 Porn Memes You're Only Allowed to Laugh at if You're Over 18*, TEXTS FROM LAST NIGHT, <https://tfln.co/funny-porn-memes-2/> (last visited Sept. 22, 2019).

⁵¹ armanez, *One Does Not Simply Walk into Mordor*, IMGUR (Sept. 5, 2017, 3:37 PM), <https://imgur.com/gallery/r0EQG>.

⁵² Lantagne, *supra* note 41, at 389.

⁵³ *Id.* at 394.

what little legal understanding that does exist is complicated.⁵⁴ In fact, some even believe that “[t]he flourishing of meme culture seems to exist in direct opposition to the tradition of copyright law.”⁵⁵ In light of that interpretation, what keeps meme creators and users from constantly infringing the copyrights of the original image owners? How can we continue to generate, enjoy, and share the meme content we love without falling victim to copyright’s strict liability penalties? What will save all of meme-kind? Ultimately, the answer to those questions may stem from the same system that put memes in jeopardy in the first place: copyright.

II. HOW COPYRIGHT’S FAIR USE DOCTRINE CAN LIKELY PROTECT MOST MEMES

The protection of copyright law has never been absolute.⁵⁶ In reality, there are many circumstances in which the use of a copyrighted work is acceptable without permission from the original copyright holder.⁵⁷ The doctrine of fair use, which originated from the common law and later became codified into a statutory doctrine,⁵⁸ provides one such limitation on a copyright holder’s exclusive rights. Section 107 of the 1976 Copyright Act states that “[t]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”⁵⁹ The section also outlines four factors of analysis for fair use.⁶⁰ Essentially, those factors comprise the fair use defense, which

⁵⁴ *See id.* (“The abbreviated legal record dealing with memes, however, illustrates the number of different interests clashing over the use of visual memes. It also illustrates how a lack of acknowledgement of the spectrum of meme usage has led to scattershot legal understanding of how memes are functioning on the internet.”).

⁵⁵ *Id.* at 395.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 239 n.14 (2013).

⁵⁹ 17 U.S.C. § 107 (2018). The use of the phrase “such as” suggests that the list provided is not exhaustive, and one can infer what else might constitute a fair use by both considering the listed uses and applying the given four factors.

⁶⁰ *See id.* (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3)

“negates an otherwise proper finding of copyright infringement on the grounds that the would-be infringer’s use of the work is socially desirable and aligned with the basic aims of copyright law.”⁶¹

Generally, memes are created from already-copyrighted works without the permission of the copyright holder.⁶² Given this, copyright holders could hypothetically sue meme creators for copyright infringement. However, it is possible that most meme creators would be able to assert the fair use defense, which entails the consideration of (at least) the four factors laid out in Section 107.⁶³ Nonetheless, the application of these factors is not necessarily straightforward; “the individual facts of the use in question are paramount, as they indicate which factors will be relevant and thus shape the outcome.”⁶⁴ Although this section will provide general predictions for how each factor would be reviewed in the case of the typical meme,⁶⁵ making these predictions at a theoretical level is most assuredly not an exact science. Given that “the market for decentralized content is still so nebulous and unestablished,” it is extremely difficult to predict what a court might do.⁶⁶ In order to forecast how courts might address the hypothetical copyright infringement lawsuit against a meme creator, it’s necessary to thoroughly review each factor because “[t]he ultimate determination of whether a use is fair requires a case-by-case analysis in which the four factors are to be ‘weighed together in light of the purposes of copyright.’”⁶⁷

The first fair use factor is the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁶⁸ In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court adopted an analysis for the first factor that asks whether

the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”)

⁶¹ Patel, *supra* note 58, at 236.

⁶² See Holzhauer, *supra* note 37 (“Meme creators are usually not the copyright owners in the underlying work.”).

⁶³ 17 U.S.C. § 107.

⁶⁴ Patel, *supra* note 58, at 247–48.

⁶⁵ See text accompanying note 12.

⁶⁶ Colleen McCroskey, *Copyright for Meme-Makers*, PUBLIC KNOWLEDGE (Aug. 6, 2018), <https://www.publicknowledge.org/blog/copyright-for-meme-makers/>.

⁶⁷ *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 21 (1st Cir. 2000) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

⁶⁸ 17 U.S.C. § 107.

the secondary use is “transformative.”⁶⁹ A work is “transformative” if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁷⁰ Although parody is one form of transformative use, transformativeness is not limited to parody.⁷¹ Courts have held that nonparodic, creative reworkings can be transformative if the secondary work uses the original work’s copyrightable expression as “raw material” which is “transformed in the creation of new information, new aesthetics, new insights, and understandings.”⁷² A determination of fair use is more likely “if the defendant’s use is noncommercial, educational, scientific, or historical,” even though that alone is not dispositive.⁷³

Some courts consider good faith to be part of the first factor’s analysis. For instance, the Ninth Circuit applies “the general rule that a party claiming fair use must act in a manner generally compatible with principles of good faith and fair dealing,”⁷⁴ and the U.S. Court of Appeals for the Federal Circuit states that “one who acts in bad faith should be barred from invoking the equitable defense of fair use.”⁷⁵ The consideration of good faith goes back to the Supreme Court’s assertion in *Harper & Row Publishers, Inc. v. Nation Enterprises* that “[f]air use presupposes ‘good faith’ and ‘fair dealing.’”⁷⁶ A court undertaking a good faith analysis as part of its larger fair use analysis might consider whether the secondary user intentionally copied the copyrighted work, while knowing that a license was required to use the copyright owner’s

⁶⁹ *Copyright Law – Fair Use – Second Circuit Holds that Appropriation Artwork Need Not Comment on the Original to Be Transformative. – Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), 127 HARV. L. REV. 1228, 1228 (Feb. 2014).

⁷⁰ *Campbell*, 510 U.S. at 579.

⁷¹ *Id.* at 583 (“It is this joinder of reference and ridicule that marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.”).

⁷² *Blanch v. Koons*, 467 F.3d 244, 251–52 (2d Cir. 2006).

⁷³ See Richard Stim, *Fair Use: The Four Factors Courts Consider in a Copyright Infringement Case*, NOLO, <https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html> (last visited Sept. 22, 2019) (“However, an educational or scientific use that is for commercial purposes may not be excused by the fair use doctrine. . . . Similarly, the fact that a use is not for profit will not necessarily excuse infringement.”).

⁷⁴ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164 n.8 (9th Cir. 2007) (citing *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 562–63 (1985)).

⁷⁵ *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1202 (Fed. Cir. 2018).

⁷⁶ *Harper*, 471 U.S. at 562 (citation omitted).

work (indicating bad faith).⁷⁷ It also might consider whether the secondary user gave attribution to the copyright owner when re-utilizing the work (indicating good faith). However, while bad faith may weigh against fair use, “a copyist’s good faith cannot weigh in favor of fair use”⁷⁸; it can merely be used to rebut evidence of bad faith.

In the context of the typical meme, the first factor would probably weigh in favor of a finding of fair use. At their core, most memes are transformative. They allow for cultural advancement by creating “a system of explaining events by reducing them to a simple and well-known joke.”⁷⁹ Through “fast dissemination, imitation, and mutation,” memes are able to “become cultural phenomena that are recognizable not because of the underlying work, but because of the meme itself.”⁸⁰ This is relevant because some courts have stated that the first factor relies upon “how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”⁸¹ Moreover, “even making an exact copy of a [copyrighted] work may be transformative so long as the copy serves a different function than the original work.”⁸² Most memes differ drastically in form, feel, and function from the copyrighted works they rely upon,⁸³ so they put images “in a new context to serve a different purpose.”⁸⁴

Second, although there are a number of meme creators, advertisers, and businesses that use memes for commercial purposes, the majority of memes on the Internet are made by individual users merely seeking to entertain, critique, or spark discussion.⁸⁵ Moreover, “the more

⁷⁷ *Oracle*, 886 F.3d at 1203.

⁷⁸ *Id.*

⁷⁹ Patel, *supra* note 58, at 252.

⁸⁰ *Id.*

⁸¹ *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013).

⁸² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

⁸³ See Marion Provencher Langlois, *Making Sense of Memes: Where They Came From and Why We Keep Clicking Them*, 6 INQUIRIES J. (2014) (“Generality, ambiguity and the superposition of different meanings give substance to a meme. They can be found in the conflict between what is being said and what is being portrayed by the image, and they can also exist in the dissonance between the original context of the image and how the image ended up being used as a meme.”).

⁸⁴ *Perfect 10*, 508 F.3d at 1165.

⁸⁵ See Travis Crabtree, *Do You Even Meme Bro? The Law of Internet Memes*, EMEDIA LAW INSIDER, <https://www.emedialaw.com/do-you-even-meme-bro-the-law-of-internet-memes/> (last visited Sept. 22, 2019) (“Because most memes

transformative the new work, the less will be the significance of other factors like commercialism, that may weigh against a finding of fair use.”⁸⁶ Thus, even if a meme was made for commercial purposes, the first factor can still weigh in favor of a finding of fair use if the secondary use was highly transformative. A court is unlikely to find such use to be infringing because it furthers the “goal of copyright, to promote science and the arts”⁸⁷ and enables cultural interchange by providing an “avenue for building on the original work,” thereby expanding “public discourse and knowledge.”⁸⁸

If the meme were being litigated in a court which applies a good faith analysis in the first factor, it would be important to learn about how, why, and with what attribution (if any) the meme was created. If the meme’s creator had a good faith belief that the elements of the original work which she used were “free to use,” then that might indicate good faith.⁸⁹ While “the innocent intent of the defendant constitutes no defense to liability,” it could help a meme creator rebut claims of bad faith.⁹⁰ Moreover, if she included attribution to the copyright owner, then that will be viewed “more favorably than plagiarized use,” because most of the uses “the law favors” (i.e. education, research, commentary, etc.) “require attribution.”⁹¹ While it is possible to plagiarize a copyright-protected work and still have it be ruled a fair use, “if you’re trying to build a solid fair use argument, one of the best things you can do is attribute correctly.”⁹² Although some memes are made with “innocent intent” and attribution to the copyright owner is sometimes included, this additional good faith consideration might pose a real problem for meme creators in courts which require it as a component in the first fair use factor. However, under the traditional analysis (without accounting for a good faith component), the first factor probably still weighs in favor of a finding of fair use for the typical meme.

are meant to be parodies or include critical comments in a non-commercialized way, fair use will likely save the day.”).

⁸⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁸⁷ *Id.*

⁸⁸ Patel, *supra* note 58, at 244.

⁸⁹ *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1203 (Fed. Cir. 2018).

⁹⁰ *Id.*

⁹¹ Jonathan Bailey, *Plagiarism, Attribution, and Fair Use*, PLAGIARISM TODAY (Nov. 16, 2017), <https://www.plagiarismtoday.com/2017/11/16/plagiarism-attribution-and-fair-use/>.

⁹² *Id.*

The second factor in the fair use analysis is the “nature of the copyrighted work.”⁹³ Generally, a court will consider whether the copied work is of a factual or creative nature, with the law normally recognizing “a greater need to disseminate factual works than works of fiction or fantasy.”⁹⁴ A judge is more likely to hold something is fair use if material is copied “from a factual work, such as a biography, than from a fictional work, such as a romance novel or horror movie.”⁹⁵ Essentially, “copying from informational works such as scholarly, scientific, or news journals encourages the free spread of ideas and encourages the creation of new scientific or educational works, all of which benefit the public.”⁹⁶ Additionally, a court will consider whether the original work is published or unpublished.⁹⁷ In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court stated that the “unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use.”⁹⁸

As applied to the typical meme, the second fair use factor could be problematic for meme creators. Much would depend upon the source from which the meme derives. On one hand, if the original work details current events, “the nature of the work—informing the public about societal happenings—would provide a strong reason to find fair use.”⁹⁹ On the other hand, “courts would be less inclined to excuse infringement of an artistic work, such as a photographic portrait.”¹⁰⁰ Unfortunately, it is common for memes to derive from highly artistic and commercial copyrighted works, such as movie, music video, or television show stills.¹⁰¹ However, this does not necessarily spell disaster for memes of this variety. Some courts have attempted to discern between types of photographs,¹⁰² arguing that even if an original photograph is more artistic in nature, if it was used to indicate something factual, then the

⁹³ 17 U.S.C. § 107 (2018).

⁹⁴ *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 563 (1985).

⁹⁵ *Stim*, *supra* note 73.

⁹⁶ *Id.*

⁹⁷ *Harper*, 471 U.S. at 551.

⁹⁸ *Id.* at 540.

⁹⁹ *Patel*, *supra* note 58, at 245.

¹⁰⁰ *Id.*

¹⁰¹ Kevin P. Sullivan, *13 Movies That Inspired Hilarious Internet Memes*, MTV (Oct. 4, 2014), <http://www.mtv.com/news/1955911/movie-inspired-memes/>.

¹⁰² *See Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (acknowledging that “[the copyright holder’s] pictures could be categorized as either factual or creative”).

secondary work would be more deserving of a fair use finding.¹⁰³ Thus, a work with a core that “concerns the artist’s individual expression” is more likely to be protected against copyright infringement than a work with a core based on facts.¹⁰⁴ However, because most memes derive from artistic sources that were created for commercial use and then actually used to indicate something artistic, rather than factual, the second factor would probably weigh in favor of the copyright holder and against a finding of fair use.

The third factor in the fair use analysis is the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁰⁵ When considering this factor, courts consider whether “the ‘quantity and value of the materials used’ . . . are reasonable in relation to the purpose of the copying.”¹⁰⁶ This requires an assessment of the “persuasiveness of a [secondary user’s] justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use.”¹⁰⁷ Ultimately, consideration of the third factor entails (1) “a quantitative analysis of how much of the infringing work is from the original copyrighted work” and (2) “a qualitative analysis as to the value of the excise to the original copyrighted work.”¹⁰⁸ If the secondary work uses a portion that constitutes the “heart of the [original copyrighted work],” it is likely that portion is of high value (i.e. substantial) to the original work, even if it does not make up a large part of the original work.¹⁰⁹ In general, the less a secondary work utilizes material from a copyrighted work, “the more likely it is to be considered fair.”¹¹⁰

How the third factor applies to memes again depends largely on the source of the copyrighted material that the meme incorporates. In the

¹⁰³ See Patel, *supra* note 58, at 245–46 (discussing *Nunez*, 235 F.3d at 23).

¹⁰⁴ *Id.*

¹⁰⁵ 17 U.S.C. § 107 (2018).

¹⁰⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (quoting Justice Story’s words in *Folsom v. Marsh*, 9 F.Cas. 342 (No. 4,901) (CCD Mass. 1841)).

¹⁰⁷ *Id.* at 586–87.

¹⁰⁸ Patel, *supra* note 58, at 246.

¹⁰⁹ See *Campbell*, 510 U.S. at 587 (“In *Harper & Row*, for example, the Nation had taken only some 300 words out of President Ford’s memoirs, but we signaled the significance of the quotations in finding them to amount to ‘the heart of the book,’ the part most likely to be newsworthy and important in licensing serialization.”).

¹¹⁰ McCroskey, *supra* note 66.

case of the typical meme (as this paper defines it), the meme creator captures an image or a still from a movie, music video, or television show. Accordingly, such a meme would utilize only a small portion of the original work, taking merely “a single joke and a still frame from the original work.”¹¹¹ Thus, in this circumstance, the third factor would likely weigh in favor of the meme creator. That may hold true even if the small portion used in the meme constitutes the “heart” of the original work because courts seem willing to overlook such copying in certain scenarios, especially those in which the secondary user’s work is viewed as transformative under the first factor.¹¹²

When a meme is based on just a photograph or other single-frame visual artwork, the third factor may instead weigh in favor of the original copyright holder.¹¹³ In this instance, it will be much easier for the copyright holder to demonstrate that the portion used by the meme creator was a large amount in relation to the copyrighted work as a whole. Moreover, the copyright holder will more easily be able to argue that the portion used is substantial or even the “heart” of the copyrighted work. However, even if a meme uses a large amount of substantial material from a copyrighted work or copies it completely, there is a possibility that the use will be considered fair,¹¹⁴ especially if the meme is noncommercial or nonprofit in nature.¹¹⁵

The fourth factor is the “effect of the use upon the potential market for or value of the copyrighted work.”¹¹⁶ According to the U.S. Supreme Court, “[t]his last factor is undoubtedly the most single important element of fair use.”¹¹⁷ Its analysis is inextricably linked with the first factor’s analysis; “although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.”¹¹⁸ By contrast, “[a]

¹¹¹ Patel, *supra* note 58, at 252.

¹¹² See *Campbell*, 510 U.S. at 586–87 (“[W]e recognize that the extent of permissible copying varies with the purpose and character of the use.”).

¹¹³ Patel, *supra* note 58, at 252.

¹¹⁴ Stim, *supra* note 73.

¹¹⁵ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449–55 (1984) (determining that the reproduction of an entire work “does not have its ordinary effect of militating against a finding of fair use” as to the home videotaping of television programs because such “time-shifting” was a “noncommercial, nonprofit activity”).

¹¹⁶ 17 U.S.C. § 107 (2018).

¹¹⁷ *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 566 (1985).

¹¹⁸ *Sony*, 464 U.S. at 451.

challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.”¹¹⁹ There is no requirement to demonstrate “actual present harm” or even to show “with certainty that future harm will result”; instead, “[w]hat is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.”¹²⁰ However, “[t]he cognizable harm is market substitution, not any harm from criticism.”¹²¹ In essence, “a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.”¹²²

Although the fact that a work is commercial in the first factor creates a presumption of market harm in the fourth factor,¹²³ that presumption is not irrebuttable. Most importantly, a secondary user could rebut that presumption by showing that her use was transformative because when “the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”¹²⁴ This especially holds true for secondary uses that are critical in nature; due to the fact that the “market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop” and that creators of imaginative works are unlikely to “license critical reviews or lampoons of their own productions,” such uses are removed “from the very notion of a potential licensing market.”¹²⁵

In all likelihood, the fourth factor in the fair use analysis will be the most important factor in a court’s consideration of whether a typical meme constitutes copyright infringement.¹²⁶ However, given the fourth factor’s established link to the first factor, it is also often likely that the fourth factor will favor a finding of fair use for meme creators.¹²⁷ First, as mentioned earlier, the typical meme is noncommercial.¹²⁸ Given that, it would be up to the copyright holder to demonstrate that there either is

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 570 (1994).

¹²² *Sony*, 464 U.S. at 450.

¹²³ *Id.* at 451.

¹²⁴ *Campbell*, 510 U.S. at 591.

¹²⁵ *Id.* at 592.

¹²⁶ McCroskey, *supra* note 66.

¹²⁷ Patel, *supra* note 58, at 254–55.

¹²⁸ Crabtree, *supra* note 85.

or could be harm to the value of or potential market for the copyrighted work.¹²⁹ This task would be challenging because the harm would have to stem from the secondary use's market substitution of the original work, not from any criticism.¹³⁰ By and large, harm would be very difficult to prove because most memes are either criticizing or providing commentary on the original work (representing a derivative use which a copyright owner is unlikely to ever exploit) or merely using the original work as a vehicle for a completely new idea or concept (constituting a derivative use that is highly unlikely to serve as a market substitute for the original work). Under such circumstances, the fourth factor would likely weigh in favor of a finding of fair use.

Second, even if a meme is found to be commercial and, thus, market harm is presumed in the fourth factor, the meme's creator could negate the presumption by showcasing that her meme is transformative,¹³¹ especially if it happens to be parodying or critiquing the original work. This strategy might also be effective in the rare case where a copyright holder could demonstrate that a "preponderance of the evidence that some meaningful likelihood of future harm exists" from a noncommercial meme. In either situation, a demonstration of transformativeness would serve to make market substitution much less certain,¹³² thereby rebalancing the fourth factor or, at most, giving a slight edge to the copyright holder.

Finally, the fourth factor's consideration is "intended to strike a balance between the benefit that the public will derive if the use is permitted and the personal gain that the copyright owner will receive if the use is denied."¹³³ Although some copyright owners could benefit significantly if courts allowed them to retain their rights to copyrighted works and barred secondary users from creating memes from them, there is no doubt that millions of netizens would lose a great deal of creative content and enjoyment from such a regime if it were applied to the typical meme. It must be acknowledged that "thanks to the Internet, a group of delocalized, decentralized people can have a shared, collective experience of images when 100 years ago the same phenomenon would have been limited."¹³⁴ Even though "each being creating memes is an

¹²⁹ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

¹³⁰ *Campbell*, 510 U.S. at 570.

¹³¹ *Id.* at 591.

¹³² *Id.*

¹³³ Stim, *supra* note 73.

¹³⁴ Langlois, *supra* note 83.

individual, irreproducible, being, that shares his or her ideas, personal experiences, jokes, and (even if only in restricted forms) vision of the world,”¹³⁵ the perpetuation of this “shared collective language” is entirely predicated upon the “delocalized” members of that collective having “a common lexicon of the image, a set of shared rules on how memes work.”¹³⁶ Thus, memes provide a crucial form of cultural interchange that would not be possible unless some infringement were allowed and excused by fair use or some other carveout in copyright law.

Considering all of the four fair use factors together, with the first, third, and fourth most likely weighing in favor of a finding of fair use and the second likely weighing against it, it seems probable that most memes would be considered fair uses in the eyes of copyright law. Take the “You Tried” meme, for example.¹³⁷ It features the image of a gold star with the words “You Tried” in the center.¹³⁸ The first factor probably weighs in favor of a finding of fair use; this meme is probably transformative because it subverts and humorizes the implied congratulatory message that accompanies the original image of an ordinary gold star. Moreover, it was created for non-commercial purposes to sarcastically applaud someone else’s failed attempt to do something, which is radically different from the image’s original purpose. Assuming that a court would consider the original clip art image to be more creative than factual because it required some discretion in choice of color, composition, etc., the second factor might weigh against a finding of fair use. However, the third factor would probably weigh in favor of fair use because even though the meme utilizes the entirety of the original image, it is transformative in its subversive commentary, and it is noncommercial in nature. Finally, in all likelihood, the fourth factor would weigh in favor of fair use because it would be extremely difficult for the copyright holder to show that there was or could be harm to the value of or potential market for their work; it seems highly improbable that a sarcastic gold star could serve as a market substitute for a sincere one. Overall, it is likely that the “You Tried” meme would be considered fair use.

Harder cases involving memes might include those that feature famous people or characters (who might have rights of publicity or other potential future uses), those that display bad faith

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *You Tried*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/you-tried> (last visited Sept. 22, 2019).

¹³⁸ *Id.*

usurpations of commercial gains (where a creator intentionally and unfairly profits off a copyrighted work), and those that seriously harm the brand or public perception of the original copyright owner (where an image is taken and wholly corrupted, causing great damage).

III. WHY MEMES ARE IMPROBABLE TARGETS OF LITIGATION

Although it is conceivable that there could be litigation over memes (especially from copyright owners who regularly and aggressively assert their copyright claims against perceived infringers), it does not seem to have happened yet. While this may be due in part to the protection provided to memes by the fair use doctrine, it may also be attributed to two other factors: (1) the ways in which memes can benefit image owners and (2) the logistical obstacles that image owners may face when filing copyright suits.

The first possible reason that copyright holders have not besieged memes with copyright infringement claims is that memes can, and often do, directly and indirectly benefit them.¹³⁹ Internet memes can successfully be used to market brands, products, and services through “a form of viral and guerilla marketing” known as “memetic marketing.”¹⁴⁰ When people view Internet memes related to certain companies and goods, “it creates a ‘buzz’ about their product that may not necessarily be conveyed in traditional marketing tactics.”¹⁴¹ Recognizing this effect, digital design, advertising, and marketing professionals have attempted to harness

¹³⁹ See, e.g., Brenna Houck, *America Loved White Claw So Much, It's Running Out*, EATER (Sept. 6, 2019), <https://www.eater.com/2019/9/6/20853351/america-is-experiencing-a-white-claw-shortage> (“A representative for the brand tells CNN that the U.S. is experiencing a White Claw shortage thanks to the many, many memes that drove the season’s insatiable thirst for the fizzy alcoholic beverage. . . . Sales of White Claw make up roughly 50 percent of the hard seltzer market and grew by over 283 percent in July 2019 over the previous year.”).

¹⁴⁰ *Internet Memes – Love Them or Hate Them, They Can Serve a Purpose*, ASHWORTH CREATIVE (June 1, 2014) [hereinafter *Internet Memes*], <https://www.ashworthcreative.com/blog/2014/06/internet-memes-love-hate-can-serve-purpose/>.

¹⁴¹ *Id.*

and capitalize on the power of memes.¹⁴² In fact, they even recommend the use of memes for advertising purposes to other Internet users.¹⁴³ Thus, in large part, copyright owners likely haven't sued meme creators, meme generator websites, or meme sharing platforms because memes can "serve a promotional purpose," which ultimately enriches the copyright owners.¹⁴⁴

In particular, attribution can help to appease copyright owners and insulate meme creators from litigation. When secondary users properly attribute original copyright owners, it lets "original creators continue to receive recognition for their creative works, even when their content is shared by downstream users."¹⁴⁵ This recognition often enables the copyright owner to keep developing "larger bases of followers and, accordingly, larger incomes."¹⁴⁶ In that way, attribution ultimately promotes copyright's goal of incentivizing creation, especially that of transformative works, by giving original copyright owners "recognition yet also allow[ing] others to use the post to create new material."¹⁴⁷

The second possible reason that memes are not heavily litigated is logistical. Although copyright protection arises upon the creation of a work without the need for any formalities, such as registration,¹⁴⁸ registration of a copyright with the U.S. Copyright Office is required before any "civil action for infringement of the copyright of any United States work" can be instituted.¹⁴⁹ This

¹⁴² Aidan Cole, *More Than A Trend: Meme Marketing Is Here To Stay*, FORBES (July 19, 2018),

<https://www.forbes.com/sites/forbesagencycouncil/2018/07/19/more-than-a-trend-meme-marketing-is-here-to-stay/#5e642abe2487>.

¹⁴³ See *Internet Memes*, *supra* note 140 ("So the next time you hit a mental block and can't seem to come up with a creative ad, try piggybacking off of a popular meme! The possibilities are endless.").

¹⁴⁴ Brenke, *supra* note 13.

¹⁴⁵ Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038, 1075 (2017).

¹⁴⁶ *Id.*

¹⁴⁷ Catherine J. Cameron, *Reinvigorating U.S. Copyright With Attribution: How Courts Can Help Define the Fair Use Exception to Copyright by Considering the Economic Aspects of Attribution*, 2 BERKELEY J. ENT. & SPORTS L. 130, 149 (2013).

¹⁴⁸ 17 U.S.C. § 302(a) (2018).

¹⁴⁹ 17 U.S.C. § 411(b) (2018).

likely poses a problem for casual social media users who quickly take pictures and upload them to various web platforms without taking the time to register them with the Copyright Office.¹⁵⁰ Moreover, given the instantaneity that technology allows us and the short lifecycle of memes, a meme based on a copyrighted work might “rise and fall in popularity before a copyright holder has even considered registering for copyright protection.”¹⁵¹ Thus, unless a copyright holder has already registered her copyrighted work with the Copyright Office, “it may not be financially feasible or practical to pursue a claim of copyright infringement.”¹⁵²

CONCLUSION

Richard Dawkins originally coined the term “meme” to refer to the cultural parallel to biological genes, but, within a few decades, his word has come to describe “a uniquely contemporary class of object—a benign virus of the digital age, mutating and spreading via all those it persuades to laugh out loud along its path.”¹⁵³ At first glance, memes may seem inane and meaningless; however, they actually serve as an important form of cultural currency, allowing people to share ideas, jokes, critiques, and commentary on a variety of topics. Although memes do pose some issues in the context of U.S. copyright law, it is likely that most memes would be protected by fair use because they are transformative, not-for-profit, and not able to be substituted for the original work. In addition, it is unlikely that copyright owners will file suit against meme creators because memes have the potential to serve as indirect advertising and publicity platforms for copyright owners. Moreover, the meme landscape poses logistical obstacles that make copyright infringement lawsuits difficult to pursue, thereby further lessening the likelihood that copyright owners will sue meme creators.

¹⁵⁰ Holzhauser, *supra* note 37.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Tom Chatfield, *Cute Cats, Memes, and Understanding the Internet*, BBC (Feb. 23, 2012), <https://www.bbc.com/future/article/20120222-cats-memes-and-internet-schemes>.