

June 2020

The Problem of Modern Monetization of Memes: How Copyright Law Can Give Protection to Meme Creators

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Recommended Citation

Mark Marciszewski, *The Problem of Modern Monetization of Memes: How Copyright Law Can Give Protection to Meme Creators*, 9 Pace. Intell. Prop. Sports & Ent. L.F. 61 (2020).
Available at: <https://digitalcommons.pace.edu/pipself/vol9/iss1/3>

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The Problem of Modern Monetization of Memes: How Copyright Law Can Give Protection to Meme Creators

Abstract

Some legal questions answered in this article on the horizon for the courts and lawyers is how should courts apply copyright law to popular media made by small scale creators and shared on the internet, otherwise known as "memes."

Part II of this article will focus on validity of potential copyright protection in internet memes. It will start by describing the increased monetization surrounding memes and how this monetization calls for greater interest for meme creators to protect their work. It will then describe the merits of individual copyright interests in internet memes.

Part III of this article will focus on how memes have existed without copyright lawsuits from content creators: principally, that internet memes constitute fair use. This section will use an example meme to weigh all four statutory factors of fair use to support the argument that internet memes are highly transformative and do not impact the market of the original copyrighted work.

Part IV of this article will outline how public policy favors copyright protection of memes since copyright protection would not stifle creativity or new meme creations. First, copyright protection of memes would not disrupt the current "meme culture" of sharing memes because social media platforms, the major platform and vehicle for meme creation and sharing, have negated many copyright concerns through their terms of use policies. Next, it will explain how the Digital Media Copyright Act's safe harbor rule protects social media platforms from being secondarily liable for potential copyright infringements involving meme appropriation. Finally, it will explain how other aspects of copyright law, like independent creation, the idea/expression dichotomy, and the fair use doctrine, will prevent meme creators from "weaponizing" their copyright interests in their memes.

Keywords

Modern, Monetization, Memes, internet, humor, copyright, law, protection, creators, public, policy, Facebook, Twitter, Instagram, Reddit, culture

Cover Page Footnote

J.D., University of Virginia School of Law, 2020; B.S. Psychology, magna cum laude, University of Central Florida, 2017. Mark would like to thank University of Virginia School of Law Professor A. Sprighley Ryan for her guidance and support. He would also like to thank the editorial board of the Pace Intellectual Property, Sports & Entertainment Law Forum for their work in bringing this article to publication.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. COPYRIGHT INTERESTS IN INTERNET MEMES
 - a. The Problem of the Monetization of Memes
 - b. The Validity of Copyright Protection for Internet Memes
 - i. *Fixation*
 - ii. *Originality*
- III. INTERNET MEMES ARE NONINFRINGING WORKS
 - a. Internet Memes and Fair Use
 - i. *Purpose and Character of the Use*
 - ii. *Nature of the Copyrighted Work*
 - iii. *Amount and Substantiality of the Portion Used*
 - iv. *Effect of the Use Upon the Potential Market*
 - v. *Balancing the Factors*
- IV. PUBLIC POLICY FAVORS COPYRIGHT INTERESTS IN INTERNET MEMES
 - a. Protecting “Meme Culture” with Social Media Platforms’ Terms of Service
 - i. *Reddit*
 - ii. *Twitter*
 - iii. *Instagram*
 - iv. *Facebook*
 - b. The DMCA Protects Social Media Platforms from Secondary Liability
 - c. Copyright Law Will Help Protect and Promote New Meme Creators
 - i. *Independent Creation*
 - ii. *The Idea/Expression Dichotomy*
 - iii. *The Fair Use Doctrine*
- V. CONCLUSION

I. INTRODUCTION

Federal courts have often been presented with the unique challenges the internet has on the interpretation of copyright law. These challenges have ranged from the increase in ease and prevalence of copyright piracy on the internet¹ to courts struggling with defining how the internet affects the definition of distribution² or the length of the statute of limitations.³ One legal question on the horizon for the courts and lawyers is how should courts apply copyright law to “internet memes.”

“Internet memes” (or simply just “memes”) are a popular piece of media that spreads from person to person via the internet, often as mimicry or for humorous purposes. These memes usually take the form of an image, GIF (moving animated picture), or video.⁴ These memes usually take

¹ See Ryan Faughrer, *Music Piracy is Down but Still Very Much in Play*, LOS ANGELES TIMES (June 28, 2015 7:17 PM), <https://www.latimes.com/business/la-et-ct-state-of-stealing-music-20150620-story.html> (“About a fifth of Internet users around the world continue to regularly access sites offering copyright infringing music”).

² *Compare Motown Record Co., LP, et al. v. DePietro*, 2007 WL 576284 (E.D. Pa. 2007), with *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn 2008).

³ See *APL Microscopic, LLC v. United States*, 144 Fed. Cl. 489 (2019).

⁴ For the sake of brevity of analysis, this article will primarily focus on internet memes that are still images with overlapping text. One reason for this limitation is that these types of memes are the easiest to make and thus the most common. Aishwarya Borgaonkar, *Why Is the Popularity of Memes Increasing Rapidly on Social Media*, PROCAFFENATION (Dec. 18, 2017) <https://www.procaffenation.com/popularity-memes-increasing-rapidly-social-media/>. Also, these types of memes that use a single image only use one visual work. As a result, only one copyrighted work is implicated in the fair use analysis. In contrast, a video may violate many different copyright works, including but not limited to: 1) if any music is used, the sound recording copyright and musical composition copyrights of the music; 2) if the video is not original, then the copyright in the original video; or 3) any copyrighted work displayed within the video are potentially infringed depending on the use. Each copyrighted work that is used would have to be permissible for the entire meme to be noninfringing. Although “memes” can

preexisting content, like a screenshot of a film or television show, and add some form of commentary to appeal to a common situation or observation. As memes grow in popularity, questions of copyright law grow. First, with the increased monetization of meme content, do meme creators have copyright interest in their creations? Second, are the creators of memes infringing upon the copyright of the preexisting content that is incorporated into a new meme? This article aims to answer these questions while explaining how these legal answers will practically affect meme culture on the internet today.

Part II of this article will focus on validity of potential copyright protection in internet memes. It will start by describing the increased monetization surrounding memes and how this monetization calls for greater interest for meme creators to protect their work. It will then describe the merits of individual copyright interests in internet memes.

Part III of this article will focus on how memes have existed without copyright lawsuits from content creators: principally, that internet memes constitute fair use. This section will use an example meme to weigh all four statutory factors of fair use to support the argument that internet memes are highly transformative and do not impact the market of the original copyrighted work.

Part IV of this article will outline how public policy favors copyright protection of memes since copyright protection would not stifle creativity or new meme creations. First, copyright protection of memes would not disrupt the current “meme culture” of sharing memes because social media platforms, the major platform and vehicle for meme creation and sharing, have negated many copyright concerns through their terms of use policies. Next, it will explain how the

take many forms, the single image with text overlapping is the most common and relevant for the scope of this article. These are the types of memes that the analysis will consider unless otherwise noted.

Digital Media Copyright Act's safe harbor rule protects social media platforms from being secondarily liable for potential copyright infringements involving meme appropriation. Finally, it will explain how other aspects of copyright law, like independent creation, the idea/expression dichotomy, and the fair use doctrine, will prevent meme creators from "weaponizing" their copyright interests in their memes.

II. COPYRIGHT INTERESTS IN INTERNET MEMES

a. The Problem of the Monetization of Memes

The popularity of memes on the internet has continued to grow in recent years. In August of 2016, "memes" was the most often searched term on Google, the first time since 2011 that any month's most popular term was not "Jesus."⁵ Now it is almost impossible for someone to scroll through a social media feed without seeing a variety of memes. Even President Donald Trump's twitter account is creating and posting memes.⁶

This popularity has created opportunities for people to monetize internet memes and meme-related content. Some meme creators have tried to profit off popular memes by creating meme-specific themed t-shirts, aprons, books, and other physical merchandise.⁷ This form of merchandising has become more difficult as contemporary memes' popularity is short-lived, and

⁵ Madeline Farber, *The Internet Officially Cares More About Memes Than Jesus*, FORTUNE MEDIA (Oct. 27, 2016), <https://fortune.com/2016/10/27/google-trends-memes-jesus/>.

⁶ Alex Young, *Donald Trump Posts Nickelback Video Meme*, CONSEQUENCE OF SOUND (Oct. 2, 2019), <https://consequenceofsound.net/2019/10/donald-trump-nickelback-meme/>.

⁷ Taylor Lorenz, *Memos are Becoming Harder to Monetize*, THE ATLANTIC (May 31, 2018), <https://www.theatlantic.com/technology/archive/2018/05/memes-are-becoming-harder-to-monetize/561578/>.

its “lifespan” is too short to react and print merchandise before demand dissipates.⁸ In order to expedite the distribution, meme merchandise is no longer being created by those who created the memes. Third-party sites like Redbubble, Spreadshirt, or Zazzle have allowed individuals to copy and upload a meme and have it printed on a variety of custom made products (like t-shirts).⁹ As a result, if internet memes have copyright protection, these new third-party sites and the people who upload the memes to create the custom merchandise would be violating the meme creators’ exclusive rights to “reproduce the copyrighted work in copies or phonorecords,” “to prepare derivative works based upon the copyrighted work,” and “to distribute copies or phonorecords of the copyrighted work to the public by sale...”¹⁰

The rising popularity of memes has increased incentives for more people to create and consume internet memes for their own enjoyment, but more notably created opportunities for people to “make a living from making memes.”¹¹ Large companies, like Gucci, have segments of their marketing teams dedicated to working with meme creators for meme-based advertising campaigns.¹² Meme creators like Sebastian Tribbie Matheson, known by the Instagram username

⁸ *Id.*

⁹ *Id.*

¹⁰ 17 U.S.C. § 106 (1-3) (2020). This type of use would most likely not be fair use. *See infra* Section III (a). It is non-transformative, takes 100% of a creative work, and makes a product in the exact market that meme creators have previously sold their content.

¹¹ 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/>.

¹² *Id.*

@youvegotnomale, gets paid \$2,000 per meme by larger corporations wanting to use his services.¹³

The problem arises when larger meme posting social media pages begin to stealing the creative work of these smaller meme creators. Sebastian Matheson explained how he “hates” watermarking his memes, but he has been forced to because he has found his content “all over the place with no credit, and it’s technically [his] intellectual property.”¹⁴ While many suggest creators watermark the memes they create to protect against meme-theft, Matheson explained that watermarking his memes has not proven to be adequate protection against theft, since people will “Photoshop the watermark out of [his] memes and replace it with their own.”¹⁵

The most notorious of these meme-stealing pages has been the F*ckJerry account. The F*ckJerry account “makes a staggering \$30,000 per sponsored meme post,” and projected itself to make between \$1.5 million to \$3 million in revenue over the twelve-month period between May 2017 to April 2018.¹⁶ The owner of this account has turned its meme page success into a media franchise, comprising “multiple social channels, a clothing line, a card game, a late-night TV show

¹³ *Id.* (“Similarly, the *Financial Times*’ interview with the [meme creator] TheFatJewish claims he gets more than \$6,000 to simply mention a brand in a post and a hell of a lot more to attend their events, all on top of numerous endorsement deals from Seamless to Bud Light.”).

¹⁴ Isabelle Hellyer, *An Interview with @youvegotnomale Who Literally Makes Memes for a Living*, VICE. (Feb. 27, 2017), https://www.vice.com/en_au/article/pgvy8k/an-interview-with-youvegotnomale-who-literally-makes-memes-for-a-living.

¹⁵ *Id.*

¹⁶ Dhillon, *supra* note 11. After the Jerry Media company’s involvement in the controversial Fyre Festival in 2017, the company has not been as public with their revenue. The most recent data shows it was charging around \$50,000 per sponsored post. Alexandra Sternlicht, *Fyre-Proof: The Sudden Fall and Swift Reemergence of F*ckJerry’s Elliot Tebele*, FORBES MEDIA, LLC, (Oct. 24, 2019), <https://www.forbes.com/sites/alexandrasternlicht/2019/10/24/fyre-proof-the-sudden-fall-and-swift-re-emergence-of-fckjerrys-elliott-tebele/#2091104264e8>.

pilot with MTV as well as his own social media agency called Jerry Media.”¹⁷ It has “accomplished all this by stealing from online creators,” leading to a backlash led by well-known comedians like Megh Wright, John Mulaney, and Amy Schumer.¹⁸ The public backlash resulted in the F*ckJerry account losing a multitude of followers (and revenue since it depends on the account’s followers and reach), leading F*ckJerry to “promise to credit creators in future posts and [to remove] over 250 posts that violated this new policy.”¹⁹ Megh Wright does not believe this new “crediting” policy is enough; she believes “[m]eme creators also deserve to be compensated.”²⁰

The prevalence, and more importantly the financial success, of these meme-stealing pages have highlighted the concerns and questions about what kind of activity is allowed surrounding internet memes. Meme creators want credit and to be compensated for their creative work, and have already expressed their belief that their memes are their intellectual property. While famous comedians like John Mulaney and Amy Schumer can use their social clout to pressure these meme-stealing pages, without legal recourse, the average meme creator is left powerless to protect their creative works from being stolen without compensation or recognition. These questions and wants

¹⁷ *Id.* Jerry Media has even recently started its own tequila line. See Mason Sands, *Why the Controversy Over Jerry Media Will Shape Meme Culture*, FORBES MEDIA LLC (Feb. 7, 2019), <https://www.forbes.com/sites/masonsands/2019/02/07/the-fuckjerry-controversy-will-shape-meme-culture-for-better-or-worse/>.

¹⁸ Sands, *supra* note 17 (“These creators are now demanding credit and compensation.”).

¹⁹ *Id.* (over 250 posts admittedly being stolen equates to roughly over \$7.5 million of revenue the account has made on these stolen memes); See also, Nick Statt, *Fuckjerry founder apologizes for stealing jokes and pledges to get creator permission: A shift in the social media landscape’s content-stealing culture*, THE VERGE. (Feb. 2, 2019), <https://www.theverge.com/2019/2/2/18208446/fuckjerry-elliott-tebele-meme-joke-aggregator-repost-new-policy-change>.

²⁰ *Id.*

of meme creators can be satisfied by establishing the validity legal copyright protections for internet memes.

b. The Validity of Copyright Protection for Internet Memes

Copyright protection for internet memes is important because copyright gives the owner of the copyright several exclusive rights, including the rights “to reproduce,” “to prepare derivative works,” “to distribute copies,” and “to display” the copyrighted work.²¹ These are necessary rights in order for a creator to control and protect their creative work.

It is natural for there to be skepticism about if an internet meme is copyrightable, especially because they can be seen as mere humor, and many forms of jokes have not enjoyed copyright protection and instead comedians are forced to create self-regulating industry norms.²² However, the requirements of copyright are still the same for internet memes as for any other potentially copyrightable work. The Copyright Act of 1976 outlines that “[c]opyright protection subsists...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.”²³ Thus, two elements that are required are fixation and originality. Memes are fixed as internet images,

²¹ 17 U.S.C. § 106 (2020).

²² See, e.g., Dotan Oliar & Chris Jon Sprigman: *Intellectual Property Norms in Stand-Up Comedy*, in MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE 385 (Mario Biagioli et al., 2011); Oliar, Dotan & Chris Jon Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008) (explaining how the comedy community has set up norms that label the appropriation of jokes as “taboo,” where accusations of joke stealing “could impair or destroy a comic's good reputation among his peers”).

²³ 17 U.S.C. § 102 (a) (2020) (emphasis added).

and are original since they are independently created and pass the “extremely low” requisite level of creativity needed for copyright protection.

i. Fixation

The Copyright Act outlines that “[a] work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²⁴ A copy is defined by the 1976 Act as “material objects...in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁵

Whether internet memes are “fixed” is a fairly simple but noteworthy analysis. Courts have found online images to be “fixed” in the meaning of the statute.²⁶ By placing the image on an online server for any meaningful period of time that is more than “transitory,” a meme will be properly “fixed” in a tangible medium.²⁷ Although an intuitive answer to the fixation question, it is one distinction between internet memes and other forms of joke-telling that have not enjoyed

²⁴ 17 U.S.C. § 101 (2020).

²⁵ *Id.*

²⁶ *See APL Microscopic*, 144 Fed. Cl. At 494 (“In the digital context, a photographic image is fixed in a tangible medium of expression, ... when embodied (i.e., stored) in a computer's server (or hard disk, or other storage device). The image stored in the computer is the ‘copy’ of the work for purposes of copyright law.” (citing *Perfect 10 v. Amazon*, 508 F.3d 1146, 1160 (9th Cir. 2007)) (internal quotations omitted).

²⁷ *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F. 3d 121, 130 (“Given that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten...we believe that the copyrighted works here are not “embodied” in the buffers for a period of more than transitory duration, and are therefore not “fixed” in the buffers.”).

copyright protection, like standup comedy where a comedian’s delivery of a joke may change each performance.²⁸

ii. Originality

The Supreme Court has held that “[o]riginal, as the term is used in copyright, means only that the work was *independently created* by the author (as opposed to copied from other works), and that it possesses at least *some minimal degree of creativity*.”²⁹ This holding breaks the originality inquiry into two parts: 1) was the work independently created; and 2) does the work have some minimal degree of creativity.

The first inquiry, if the work was independently created, is more a case-by-case question for litigation. All that is necessary for a work to be “independently created” is for an author to create a work “without copying...from another work.”³⁰ Unlike patent registration, originality in copyrights does not require novelty.³¹ The question if a specific meme creator “independently

²⁸ Oliar, Dotan & Chris Jon Sprigman. *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1789, 1801-02 (2008) (“While writing the joke on a piece of article would suffice [for fixation], the nature of the art sometimes makes this requirement difficult to meet. First, many stand-up acts are not fully scripted, and depend, to a non-trivial degree, on ad-libbing and audience interaction (including responding to hecklers). Comedians often feel the need to change or adapt their material to the particular audience before them, and therefore even when a version of a particular joke is fixed before a show, a comedian may tell the joke differently...Unless the comedian is meticulous in fixing jokes as they change, the fixation requirement may not be met, and the joke would remain unprotected against copying until fixed.”).

²⁹ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01 [A], [B] (1990)) (emphasis added).

³⁰ *Feist*, 499 U.S. at 358-59 (“Presumably, the vast majority of [works] will pass this test.”).

³¹ *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 53 (2d Cir. 1936) (“We are to remember that it makes no difference how far the play was anticipated by work in the public demesne which the plaintiffs did not use. The defendants appear not to recognize this [and

created” their meme will determine if a creator has a copyright interest or if they are infringing upon another creator’s meme. For example, if two poems, both ignorant of each other’s works, create identical poems, neither poem is novel, yet both are original and copyrightable.³²

The more substantive debate over the copyright merits of internet memes surrounds whether memes exhibit the requisite amount of “minimal degree of creativity.” “To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be.”³³ A “multitude of books rest safely under copyright, which show only ordinary skill and diligence in their preparation.”³⁴ In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court held that a realistic etching used as an advertisement for a circus was not precluded from copyright protection.³⁵ Even though it was an etching that was intended to be a realistic depiction of circus acts, the Court focused on the personality of the work, finding that all creative works have “unique” and “irreducible” expressions from their creators.³⁶ For memes, this

erroneously suggest that] like a patented work, a copyrighted work must be not only original, but new.”).

³² *See id* at 54 (“if by some magic a man who had never known it were to compose a new Keats’s Ode on a Grecian Urn, he would be an “author,” and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s. But though a copyright is for this reason less vulnerable than a patent, the owner’s protection is more limited, for just as he is no less an “author” because others have preceded him, so another who follows him, is not tort-feasor unless he pirates his work.”).

³³ *Fiest*, 499 U.S. at 345 (quoting 1 M. Nimmer & D. Nimmer, Copyright §§ 1.08 [C] [1] (1990)).

³⁴ *Alfred Bell v. Catalda*, 191 F. 2d 99, 102 (2d Cir. 1991) (quoting *Henderson v. Tompkins*, 60 F. 758, 764 (D. Mass. 1894)).

³⁵ 188 U.S. 239, 249 (1903).

³⁶ *Id.* at 250 (“The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest

creativity is expressed by the choice of the background image (*i.e.* what copyrighted material would best capture the creator’s expressive vision), where to place the text (*i.e.* above the picture, within the picture like a dialogue, etc.), and what the text states (*i.e.* the phrases the will constitute the joke or commentary). In our example meme produced *infra* in Section III(a), creative decisions were made in choosing the specific scene from an episode of SpongeBob, the expression of the joke, and choosing what and how to label the image.³⁷ All these different decisions lead to unique creative decisions that meet the standard of “some creative spark,” no matter how “crude, humble, or obvious” they initially appear that are unique to each creator.

Meme creators do not have to intend or realize that their creations are subject to copyright protection; they enjoy that legal protection once they fix their original works. A creator does not have to intend to create a copyrighted work. In *Alfred Bell v. Catalda*, an author of mezzotints copied public domain works, but their finished work had slight variations due to artist error.³⁸ The Second Circuit held that due to these slight variations, a new copyright interest was established, even though the author did not intend to create a copyrighted creation.³⁹

grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.”).

³⁷ For example, it could have labeled Patrick and SpongeBob as “using a large quantity” and “using a highly creative work” instead. This would be a different form of the joke invoking more of the fair use factors.

³⁸ 191 F.2d 99 (2d Cir. 1951).

³⁹ *Id.* at 105 (“[E]ven if their substantial departures from the paintings were inadvertent, the copyrights would be valid. A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it.”).

Courts and lawyers should not be the parties responsible for determining artistic merit and what is “creative” outside of the most obvious cases. In fact, Justice Holmes held in his majority opinion in *Bleistein v. Donaldson Lithographing Co.* that:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke...At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge...[A]nd the taste of any public is not to be treated with contempt.⁴⁰

Although critics may not see artistic merit in internet memes worthy of copyright protection, it is worth noting that many modern artforms, like Richard Prince’s appropriation style or Andy Warhol and Jeff Koon’s pop-art style, were originally (and still) met with similar skepticism.⁴¹ It is not in the court’s purview to decide what is “worthy” of copyright protection, only what types of works meet the statutory elements. Since they are fixed and pass the “extremely low” requisite level of creativity, internet memes should enjoy copyright protections in cases of independent creation.

III. INTERNET MEMES ARE NONINFRINGEMENT WORKS

Internet memes, depending on their form, either constitute a “derivate work” or a “compilation” according to the 1976 Copyright Act. A “derivative work” is defined as “a work

⁴⁰188 U.S. 239, 251-52 (1903).

⁴¹ Peter Schjeldahl, *Richard Prince’s Instagrams*, NEW YORKER (Sept. 30, 2014) <https://www.newyorker.com/culture/culture-desk/richard-princes-instagramms>; Lorena Muñoz-Alonso, *Much Contemporary Art is a Sham Says Famous British Critic*, ARTNET NEWS (Dec. 1, 2014); <https://news.artnet.com/exhibitions/much-contemporary-art-is-a-sham-says-famous-british-critic-184912>.

based upon one or more preexisting works,”⁴² while a “compilation” is defined as “a work formed by the collection and assembling of preexisting materials...that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁴³ Most internet memes can be considered “derivative works” because they add commentary or humor to preexisting copyrighted materials to create a new work. Memes that use more than one work, like a meme that juxtaposes images from two different movies, could be categorized as “compilations.”

Either if internet memes are considered “derivative works” or “compilations,” they are creative works that are using other creative materials. Although some internet memes use original

⁴² 17 U.S.C. § 101.

⁴³ *Id.*

or public domain works to build upon,⁴⁴ ⁴⁵ many memes use preexisting copyrighted material (photographs, screenshots of movies or television, illustrations, etc.). When using preexisting copyrighted material, it is important to determine if the memes are infringing on the rights of those copyrighted works. Internet memes cannot be copyrighted if they are infringing on another creative work, because the 1976 Copyright Act prohibited granting copyright protection to works that infringe on another’s copyright interests.⁴⁶

⁴⁴ See example of meme using public domain work *infra* note 45. “Public domain” works are any creative works that do not have valid copyright protection. Although a variety of different factors can cause a work to enter the public domain, expiration of the copyright length is one of the most common. Since works published before the 1976 Copyright Act have a maximum copyright term of 95 years if all formalities were followed, works published prior to 1924 are in the public domain at the time of writing this article. See 17 U.S.C. § 304.



45

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⁴⁶ 17 U.S.C. § 103 (“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”).

In order for a plaintiff “[t]o prove copyright infringement, a plaintiff must demonstrate (1) ownership of the allegedly infringed work and (2) copying of the protected elements of the work by the defendant.”⁴⁷ Assuming the work the meme uses is copyrightable⁴⁸ and not in the public domain, there will be an owner of a valid copyright. For internet memes, the analysis of “copying of the protected elements of the work” is quite simple. Since it is clear that meme creators use other materials to create their work, there will be direct evidence of copying.⁴⁹ In these situations, there is no argument that a meme uses a preexisting copyrighted work. These facts create an easy case for a prima facie showing of copyright infringement.

In order to avoid their actions constituting infringement, the meme creator must rely on an affirmative defense. The two most applicable affirmative defenses to internet memes are 1) an existence of an expressed license⁵⁰ or 2) that the use of the copyrighted material constitutes fair use. Licensing the images used for memes would be impractical, if not impossible, given the swiftness and high volume in which memes are created and distributed. Also, many do not

⁴⁷ *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F. 3d 980, 984 (9th Cir. 2017) (quoting *Pasillas v. McDonald’s Corp.*, 927 F. 2d 440, 442 (9th Cir. 1991)).

⁴⁸ *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). Most memes use images from television shows, films, photographs, or other recent creative works that would most likely have valid copyright protection.

⁴⁹ There is no need to prove copying through circumstantial evidence that “(1) the [meme creator] had access to the copyrighted work prior to the creation of [the meme] and (2) there is substantial similarity of the general ideas and expression between the copyrighted work and the [meme].” *Unicolors*, 853 F. 3d at 984-85.

⁵⁰ *Oracle USA, Inc. v. Rimini Street, Inc.*, 6 F. Supp. 3d 1086, 1093 (D. Nev. 2014) (citing *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir.2000)).

monetize their memes and would not be able to pay licensing fees for the images. Part of the popularity of memes is that “anyone can create memes easily.”⁵¹ Licensing would hinder that ability. Asserting the fair use affirmative defense is the more fitting for the interests of internet memes.

a. Internet Memes and Fair Use⁵²

Although existing prior to 1976, the fair use affirmative defense was finally codified in the 1976 Copyright Act.⁵³ The fair use defense exists to advance copyright’s purpose of “promot[ing] the Progress of Science and useful Arts.”⁵⁴ The defense accomplishes this by allowing “others to build freely upon the ideas and information conveyed by a work.”⁵⁵ Fair use “is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors.”⁵⁶

⁵¹ Borgaonkar, *supra* note 4.

⁵² Fair Use is codified in 17 U.S.C. §107, and it is an American copyright doctrine. The statute is influenced by the intellectual property clause of the Constitution as well as the First Amendment. As a result, this section only analyzes internet meme’s under American copyright law; however, the potential analysis of copyright infringement by internet memes may be different under different international law, namely the European Union’s fair dealing standard. *See* Giacomo Bonetto, *Internet Memes as Derivative Works: Copyright Issues Under EU Law*, 13 J. OF INTELL. PROP. L. & PRAC. 989 (2018).

⁵³ 17 U.S.C. § 107. (“the 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..., scholarship, or research, is not an infringement of copyright.”).

⁵⁴ U.S. Const. art. I, § 8, cl. 8; *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 US. 569, 575 (1994).

⁵⁵ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

⁵⁶ *Kienitz v. Sconnie Nation LLC*, 766 F. 3d 756, 759 (7th Cir. 2014).

The “ultimate test” of fair use is whether the progress of human thought “would be better served by allowing the use than preventing it.”⁵⁷ In analyzing the fair use defense, courts balance the four factors outlined in the 1976 Copyright Act:

- (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) 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.⁵⁸

The fair use doctrine “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁵⁹ Instead the statute “employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the illustrative and not limitative function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.”⁶⁰ Courts should not weigh “the four statutory factors...in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”⁶¹ There are no “bright-line rules,” but instead the statute “calls for case-by-case analysis.”⁶²

⁵⁷ *Cariou v. Prince*, 714 F. 3d 694, 705 (2d Cir. 2013) (internal quotation marks omitted).

⁵⁸ 17 U.S.C. § 107.

⁵⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)) (internal punctuation omitted).

⁶⁰ *Campbell*, 510 U.S. at 577-78; *See* 17 U.S.C. § 107 (“the 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.”).

⁶¹ *Campbell*, 510 U.S. at 578.

⁶² *Id.* at 577; *See also* *Harper & Row v. Nation*, 471 U.S. 539, 560 (1985).

Because of memes' transformative use of the original material and their lack of effect upon the market for the original work, a court, after balancing the fair use factors, would find that internet memes are a fair use. In that spirit of a case-by-case analysis, this article will use the following example/sample meme while attempting to predict how the fair use factors would apply more broadly to other internet memes:



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i. Purpose and Character of the Use

The first fair use factor to consider is the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁶³ Many

⁶³ 17 U.S.C. § 107.

courts have considered this first factor to be “[t]he heart of the fair use inquiry.”⁶⁴ To determine if the “purpose and character of the use” weighs in favor of fair use, Courts must ask:

whether the new work merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message [...] ... in other words, whether and to what extent the new work is transformative.... [T]ransformative works ... lie at the heart of the fair use doctrine’s guarantee of breathing space....⁶⁵

In *Campbell*, the Supreme Court held that 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.”⁶⁶ The secondary creator’s intent or lack of intent to be transformative is not an issue, but rather “whether a [transformative] character may reasonably be perceived.”⁶⁷ This test means that

⁶⁴ *Blanch v. Koons*, 467 F. 3d 244, 251 (2d Cir. 2006); *See also Campbell*, 510 U.S. at 579; *Cariou*, 714 F. 3d at 705.

⁶⁵ *Campbell*, 510 U.S. at 579; *See also Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F. 3d 132, 142 (2d Cir. 1998) (“If the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”) (internal quotation marks omitted); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (for a use to be fair, it “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original”).

⁶⁶ *Campbell*, 510 U.S. at 578-79 (emphasis added) (noting “nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research...are generally conducted for profit”) (internal quotation marks omitted); *Am. Geophysical Union v. Texaco Inc.*, 60 F. 3d 913, 922 (2d Cir. 1994) (“The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work.”).

⁶⁷ *Campbell*, 510 U.S. at 582; *See also Cariou*, 714 F. 3d at 707 (“the fact that [defendant did not defend his use as transformative] is not dispositive. What is critical is 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.”); *Dr. Seuss v. Penguin Books*, 109 F.3d 1394 (9th Cir. 1997) (labeling a work a “parody” does not make it a parody or transformative).

meme creators do not have to intend their memes to be “transformative.” Instead, the test is if a reasonable observer can perceive this use as transformative.

In *Campbell*, the Supreme Court found transformative use since 2 Live Crew’s sample of the song “Oh, Pretty Woman” by Roy Orbison and William Dees “was clearly intended to ridicule the white-bread original” and “remind[] us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers...have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses.”⁶⁸ Extending the Court’s reasoning in *Campbell*, memes that take content meant for a wholesome or innocent audience (like children’s cartoons, family television shows, newspaper comic strips, etc.) and use them to make more adult-oriented jokes would be commenting upon the nature of the original work and thus transformative. Using the example meme above, if the commentary added was not an attempt at copyright humor but instead a joke using curse words or sexual innuendos, then that commentary would reasonably be perceived as commenting on the naiveté or innocent nature of the original cartoon.

Even though “many types of fair use, such as satire and parody, invariably comment on an original work and/or popular culture...[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative.”⁶⁹ A secondary work “may constitute a fair use even if it serves some purpose other than those (criticism, comment, news

⁶⁸ *Campbell*, 510 U.S. at 582.

⁶⁹ *Cariou*, 714 F. 3d at 706 (“[Defendant’s] work could be transformative even without commenting on [plaintiff’s] work or on culture, and even without [defendant’s] state intention to do so.”). *But see Dr. Seuss*, 109 F.3d at 1394 (where court rejected fair use defense where defendant satirized multiple Dr. Seuss short stories to critique the outcome of the O.J. Simpson trial).

reporting, teaching, scholarship, and research) identified in the preamble to the statute.⁷⁰ What is more important is that the new work “must alter the original with new expression, meaning, or message.”⁷¹

In *Cariou*, the Second Circuit considered if the work of an appropriation artist, Richard Prince, “manifest[ed] an entirely different aesthetic from [original] photographs” when minimum alterations were made to plaintiff’s original photographs.⁷² In one of the works, the Court noted that “Prince did little more than paint blue lozenges over the subject’s eyes and mouth, and paste a picture of a guitar over the subject’s body.”⁷³ Where the original photographs were “serene and deliberately composed portraits and landscape photographs depict[ing] the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works, on the other hand, [were] hectic and provocative.”⁷⁴ These small additions, along with the different scale and media used,⁷⁵ were sufficient for the court to find that the new works had “a different character and gave the “photographs a new expression... [that was] distinct from [the original]” when looking at the artwork and photographs side-by-side.⁷⁶ The court noted, however, that “any cosmetic changes to

⁷⁰ *Cariou*, 714 F. 3d at 706; *See also Campbell*, 510 U.S. at 577; *Harper & Row*, 471 US. At 561.

⁷¹ *Cariou*, 714 F. 3d at 706 (quoting *Campbell*, 510 U.S. at 579) (internal quotation marks omitted).

⁷² *Cariou*, 714 F. 3d at 706.

⁷³ *Id.* at 701.

⁷⁴ *Id.* at 706.

⁷⁵ Prince’s works were enlarged and tinted when compared to Cariou’s originals. Cariou published his photographs in a book, while Prince’s work “comprise inkjet printing and acrylic paint, as well as pasted-on elements.” *Id.* at 706. The smallest of Prince’s works was “approximately ten times as large as each page” of the book Cariou published. *Id.*

⁷⁶ *Id.* at 707-08.

the photographs would [not] necessarily constitute fair use... a derivative work that merely presents the same material but in a new form, such as a book of synopses of television shows, is not transformative.”⁷⁷ Prince’s artwork was not presenting the same material in a different manner, but instead “added something new and presented images with a fundamentally different aesthetic.”⁷⁸

Memes are strikingly similar to Prince’s appropriation art. Internet memes do not simply “present the same material but in a new form,” they inherently “add something new” with their added commentary or joke punch line. Some meme creators add minimal graphics or colors to their memes that are eerily similar to the additions Prince made in his artwork.⁷⁹ Even with the memes that do not add graphics but merely add commentary or jokes to a picture or screenshot, a

⁷⁷ *Id.* at 708; *See Castle Rock*, 150 F. 3d at 143; *Twin Peaks Prods., Inc. v. Publications Intern., Ltd.*, 966 F. 2d 1366, 1378 (2d Cir. 1993).

⁷⁸ *Cariou*, 714 F. 3d at 708.



⁷⁹ Compare

with



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A fair use alteration of one of Patrick Cariou’s photographs, by Richard Prince

reasonable observer would discern that the meme has “added something new” and has “presented images with a fundamentally different aesthetic” when compared side-by-side with the original. In our example meme, the purpose and character of the use is distinct from the original’s purpose and character.⁸⁰ As a result of new additions and different aesthetics, a meme comprises a different “character” serves an entirely different “purpose” than the original source material. Internet memes are therefore transformative and compels the first factor weighing in favor of a finding of fair use.

ii. Nature of the Copyrighted Work

The next statutory factor, the “nature of the copyrighted work,” “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”⁸¹ Courts consider “(1) whether the work is expressive or creative, ... with a greater leeway being allowed to a claim ... where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope...[for] unpublished works being considerably narrower.”⁸² For example, fictional short stories are closer to the core of intended copyright protection than factual works;⁸³ a soon-to-be-published memoir is closer to the core of intended copyright protection than

⁸⁰ The original’s purpose and character was to whimsically illustrate how a circle drawn in the sand can stop a violent sea creature from attacking Squidward again within the context of a longer animated television show, while the meme’s purpose is to make light of, and possibly critique, how fair use can help a person avoid copyright infringement even if they take a large quantity of an original work, as long as their use was “transformative.”

⁸¹ *Campbell*, 510 U.S. at 586.

⁸² *Cariou*, 714 F.3d at 709-10 (quoting *Blanch*, 467 F.3d at 256); *See also Harper & Row v. Nation*, 471 U.S. 539 (1985).

⁸³ *See Stewart*, 495 U.S. at 237–38.

a published speech;⁸⁴ and motion pictures are closer to the core of intended copyright protection than news broadcasts.⁸⁵

The subject matter that memes typically use are generally published and creative works (like published photographs or still images from movies, television, or comics). For example, our sample meme is a screenshot of an episode of the Nickelodeon series *SpongeBob SquarePants*, a published and creative work. In fact, many memes are made using published content, like images from movies, that courts have considered highly creative.⁸⁶ But similar to the commercial nature of the secondary work, this factor “may be of limited usefulness where the creative work of art is being used for a transformative purpose.”⁸⁷ As a result, the second factor may weigh against internet memes constituting fair use, but it is not determinative or detrimental to the overall fair use analysis.⁸⁸

iii. Amounts and Substantiality of the Portion Used

The third factor is the “amount and substantiality of the portion used in relation to *the copyrighted work as a whole*.”⁸⁹ This factor is reviewed “with reference to the copyrighted work,

⁸⁴ See *Harper & Row*, 471 U.S., at 563–64.

⁸⁵ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455, n. 40 (1984).

⁸⁶ *Id.*

⁸⁷ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006); See also *Campbell*, 510 U.S. at 586 (stating that the second factor is not “likely to help much in separating the fair use sheep from the infringing goats” in cases involving transformative copying of “publicly known, expressive works”).

⁸⁸ *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (where the court held that factor two is not dispositive, and in fact unhelpful in transformative use cases).

⁸⁹ 17 U.S.C. § 107 (emphasis added).

not the [secondary] work.”⁹⁰ It does not matter how much of the original work makes up the meme, instead it only matters how much of the original the meme creator took.

Courts must examine the quantitative and qualitative aspects of the portion of the copyrighted material taken.⁹¹ This factor will vary depending on what type of material an internet meme uses. For example, in the case of our sample meme, the quantitative amount taken is rather small, a screenshot of the frame that is shown less than one second of an almost twelve-minute episode. However, in the cases where memes are made using photographs, a large portion (if not all) of the original work is taken. Because a non-trivial number of memes are created using photographs, the following analysis will assume that all, or nearly all, of the original copyrighted work was taken.

The Supreme Court in *Campbell* held that “the extent of permissible copyright varies with the purpose and character of the use.”⁹² The question courts must ask is “whether the quantity and value of the materials used[] are reasonable in relation to the purpose of the copying.”⁹³ In fact, there are many cases where courts have found fair use when the secondary use took all of the original copyrighted work but the use was transformative.⁹⁴

⁹⁰ *Bill Graham Archives*, 448 F. 3d at 613; *See also* *New Era Publications Intern., ApS v. Carol Pub. Group*, 904 F.2d 152, 159 (2d Cir. 1990).

⁹¹ *Campbell*, 510 U.S. at 586.

⁹² *Id.* at 586-87; *See also Sony*, 464 U.S. at 449-50 (reproduction of entire work “does not have its ordinary effect of militating against a finding of fair use” as to home videotaping of television programs); *Harper & Row*, 471 U.S. at 564 (“[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech” but not in a scoop of a soon-to-be-published memoir).

⁹³ *Carioiu*, 714 F.3d at 710 (quoting *Blanch*, 467 F. 3d at 257) (quotation marks omitted).

⁹⁴ *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007) (even though one hundred percent of work taken, court found the use to be transformative because images were being used for search

In *Cariou*, the Second Circuit noted that some of the art pierces “did not alter the source photograph very much at all,” while in others “the entire source photograph [was] used but [was] also heavily obscured and altered to the point that [the] original is barely recognizable.”⁹⁵ The Court declined to determine the third factor, but instead focused on whether the amount taken would have detrimental effects upon the market for the original work.⁹⁶ Even though Prince took nearly 100% of *Cariou*’s photographs, the court took notice that other “courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.”⁹⁷ In the context of transformative works, the circumstances involving whether a proper amount or too much was taken often tend to be addressed instead by the fourth factor, “by revealing the degree to which [the transformative work] may serve as a market substitute for the original or potentially licensed derivatives.”⁹⁸

iv. Effect of the Use Upon the Potential Market

indexing, not their original expressive purpose); See also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (where court found use of thumbnail sized photographs for archival and historical purposes in anthology were fair use because they were not used for the original expressive purpose, the court held that “such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.”);

⁹⁵ *Cariou*, 714 F. 3d at 710.

⁹⁶ *Id.*

⁹⁷ *Bill Graham Archives*, 448 F.3d at 613.

⁹⁸ *Campbell*, 510 U.S. at 587; See also *Authors Guild*, 755 F.3d at 98-99 (where a group of colleges scanned one hundred percent of books in their libraries to make a searchable database, the court found the use was transformative since it provides a different function than original rather than being used as a substitute as well as providing a different market than the original. Making copies of the full works was “necessary” in order to enable the search functions); *Bill Graham Archives*, 448 F.3d at 613 (“[T]he third-factor inquiry must take into account that the extent of permissible copying varies with the purpose and character of the use.”).

The fourth factor, the effect of the secondary use upon the potential market for the original copyrighted work, usually works in conjunction with the first factor as the two most important factors in cases of a “transformative use.”⁹⁹ The courts consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market for the original.”¹⁰⁰

Even if a creator commercializes their memes, there is “[n]o “presumption” or inference of market harm... [in] a case involving something beyond mere duplication for commercial purposes...when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”¹⁰¹ For example, a song parody like the one in the *Campbell* case would not operate as a market substitute the same way a pure cover of the same song would. The “market harm” courts are concerned about for the fourth factor is “market substitution,” not if a commentary or criticism in a transformative use hurts the prestige or credibility of the original.¹⁰²

The question of “market substitution” is quite simple. Do internet memes replace (not suppress) the demand for the original material they use; or as an alternative, are internet memes an

⁹⁹ *See Leibovitz v. Paramount Pictures*, 137 F. 3d 109 (2d Cir. 1998).

¹⁰⁰ Nimmer § 13.05 [A] [4], p. 13-102.61 (footnote omitted).

¹⁰¹ *Campbell*, 510 U.S. at 591.

¹⁰² *See id.* at 591-92 (“We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”); *See also Fisher v. Dees*, 794 F. 2d 432, 438 (9th Cir. 1986) (the role of the courts is to distinguish between “[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.”).

otherwise licensable market? The latter question is simple since memes have existed without creators getting permission or licenses from copyright owners of the original content that is used. It is not sufficient for original copyright content owners to state that they have chosen not to license this type of market for proof of a licensing market, or any works of criticism or negative commentary would never develop.¹⁰³

With the question of licensing market relatively straightforward, the only lingering question is if internet memes act as a market substitute for the original copyright work that was used. In cases like the sample meme where a screenshot of a television show or movie is taken, no reasonable person would be able to claim that a still photograph acts as a substitute for a moving picture. If this were the case, audiences would stop to look at the free movie posters outside a movie theater and never pay to enter and see the full feature.

The more complicated question is if memes that use photographs or still pieces of art act as “market substitutes” when the only difference is the added commentary or punch line. As discussed above, the less of the original that is discernible in the secondary work, the less likely the secondary work would act as a market substitute.¹⁰⁴ The more graphics a meme adds, there will naturally be fewer concerns that it is a market substitute. The “worst case scenario” for a meme is to take 100% of a photograph and only add some form of joke or commentary.

¹⁰³ *Campbell*, 510 U.S. at 592 (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”).

¹⁰⁴ *See Cariou*, 714 F.3d at 710 (where some pieces used “the entire source photograph” but were “also heavily obscured and altered to the point that [the] original is barely recognizable...”).

For these situations there are two cases that are persuasive. The Second Circuit in *Cariou* found that the appropriation art of Richard Prince had “key differences...[when] compared to the photographs they incorporate.”¹⁰⁵ Even when Prince’s secondary works were “aesthetically similar” to the original, the court found that the markets for the appropriation art were different than the market for the realistic photographs.¹⁰⁶ The court emphasized that an alleged infringer only “usurp[s] the market for copyrighted works, including the derivative market, where the infringer’s target audience and the nature of the infringing content is the same as the original.”¹⁰⁷ Prince’s audience “is very different” from the original’s audience, and “there is no evidence that Prince’s work ever touched—much less usurped—either the primary or derivative market” for the original.¹⁰⁸ The original photographer never had the intention to create derivative works or develop a licensing market for uses similar to Prince’s use.¹⁰⁹ In fact, the original photographer only sold four individual prints from his book, and all four were to personal acquaintances.¹¹⁰

The second case, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, also addressed a new art form.¹¹¹ In the case, pop-artist Andy Warhol used plaintiff’s photograph of musician Prince to create an image for a magazine, a market where plaintiff licenses her

¹⁰⁵ *Id.* at 711.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 709; *see also Castle Rock*, 150 F. 3d at 145 (where a book of trivia about the television show *Seinfeld* usurped the show's market because the trivia book “substitute[d] for a derivative market that a television program copyright owner ... would in general develop or license others to develop.”).

¹⁰⁸ *Cariou*, 714 F. 3d at 709.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 382 F. Supp. 3d 312 (S.D.N.Y. 2019).

photograph.¹¹² The Southern District of New York rejected the argument that Andy Warhol’s print acted as a “market substitute[] for her photograph” because Warhol’s unique aesthetic has its own market.¹¹³ The court rejected the idea that “a magazine or record company would license a transformative Warhol work in lieu of a realistic Goldsmith photograph...Put simply, the licensing market for Warhol prints is for “Warhols.” This market is distinct from the licensing market for photographs like Goldsmith’s...”¹¹⁴

Much like how works by Andy Warhol have his own market and fans, internet memes have a distinct market.¹¹⁵ The market that “consumes” memes mocking political figures is distinct from the market “consuming” realistic still photographs of the same political figures. Much like appropriation art and pop-art, internet memes have developed into their own form of visual communication, with their own distinct creators, fans, and detractors.

v. Balancing the Factors

On balance, the argument that a standard internet meme constitutes fair use is compelling. Since memes usually take creative works, factor 2 will usually weigh against fair use. In cases of memes created using photographs, factor 3 will also weigh against a finding of fair use since all of the original work was taken. In cases like the sample meme, where the meme uses a screenshot of a film or television show, the third factor weighs in favor of fair use since a relatively small portion of the original work was taken.

¹¹² *Id.* at 330.

¹¹³ *Id.* at 330-31.

¹¹⁴ *Id.* at 331.

¹¹⁵ *See* Borgaonkar, *supra* note 4.

However, courts have found a secondary use to be fair use, even when factors 2 and 3 weigh against fair use when that secondary use is highly “transformative” and has little effect upon the potential market for the original copyrighted work. Memes parody, comment, and criticize often upon the original source material, and the commentary does not have to constitute “erudite language” to have “value or entitlement to protection.”¹¹⁶ Internet memes’ whimsical or vulgar nature does not affect the analysis. The conclusion is clear: this form of media takes a protected work but “adds something new” and “transforms” that work into a completely different use. Due to its unique transformative use and form, it has also created its own market that is distinct and separate from the market of the original copyrighted work. Because of memes’ transformative use of the original material and their lack of effect upon the market for the original work, a court, after balancing the fair use factors, would find that internet memes are a fair use.

IV. PUBLIC POLICY FAVORS COPYRIGHT INTERESTS IN INTERNET MEMES

Since the Constitution states the purpose of Intellectual Property Law is to “promote the progress of science and the useful arts,”¹¹⁷ it is important to consider the impact that copyright protections of internet memes would have on further creative input of meme creators. Although the Copyright Act exists “to stimulate artistic creativity for the general public good,”¹¹⁸ the law must be wary that “an overzealous monopolist [that] can use his copyright to stamp out the very

¹¹⁶ *Threshold Media Corp. v. Relativiy Media, LLC*, 166 F. Supp. 3d 1011, 1022 (C.D. Cal. 2013) (where comments like “sick,” “better,” and “worse” by filmmakers about songs in their documentary constituted commentary and criticism favoring fair use); *see also Campbell*, 510 U.S. at 582 (“[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.” (footnote omitted)).

¹¹⁷ U.S. Const. art. I, § 8, cl. 8.

¹¹⁸ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

creativity that the Act seeks to ignite.”¹¹⁹ There are three major parties to consider when weighing the public policy of the impact of copyrights in internet memes: 1) the consumers of “meme culture”; 2) social media platforms; and 3) meme creators.

a. Protecting “Meme Culture” with Social Media Platforms’ Terms of Service

The first consideration for the effect of a copyright interest in internet memes is the impact it will have on how memes are viewed and enjoyed. Since “[t]he Copyright Act exists to stimulate artistic creativity for the general public good,”¹²⁰ creating copyright protection for a work that will result in a chilling of creativity would be counter to the Act’s purpose. Since “meme culture” is reliant upon the sharing and dissemination of new memes among the public,¹²¹ an initial critique may claim that a clear copyright interest in memes will bring about an abundance of lawsuits when memes are shared without payment to the original creator. It is a pertinent concern since part of the popularity of memes is their ability to be shared and enjoyed freely among the internet public. This concern would be legitimate if it were not for social media platforms, where most memes are shared, having terms of service that procure licenses from content creators to allow the sharing of memes. By posting memes on social media platforms like Instagram or Reddit, meme creators (knowingly or not) give specific licenses for their content to be redistributed within that platform. As a result, meme consumers will still be able to share memes with each other through the legitimate channels that the online platforms provide. What copyright will prohibit is the kind of

¹¹⁹ *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*, 709 F. 3d 1273, 1277-78 (9th Cir. 2013) (citing *Stewart*, 495 U.S. at 236).

¹²⁰ *Mattel, Inc. v. MGA Entertainment, Inc.*, 705 F. 3d 1108, 1111 (9th Cir. 2013) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. at 156) (internal quotation marks omitted).

¹²¹ *See Sands, supra* note 17 (discussing issues of “weaponized” copyright interests).

activity that meme creators are already concerned about: others taking and using their memes without credit or compensation. Four of the most popular social media platforms (Reddit, Twitter, Instagram, and Facebook) have already outlined user agreements or terms of service that provide that protection while still allowing permissible sharing of memes.

i. Reddit

Reddit, a popular site for sharing internet memes, outlines in its “User Agreement” that by creating with or submitting content to its service, the user grants Reddit “a worldwide, royalty-free, perpetual, irrevocable, non-exclusive, transferable, and sublicensable license to use, copy, modify, adapt, prepare derivative works from, distribute, perform, and display [the content] ... in all media formats and channels now known or later developed.”¹²² This license “includes the right for [Reddit] to make [the content] available for syndication, broadcast, distribution, or publication by other companies, organizations, or individuals who partner with Reddit...you [the user] irrevocably waive any claims and assertions of moral rights or attribution with respect to [the content].”¹²³ Although a user gives a broad license to Reddit and its partners to use their content in a variety of ways, other users cannot copy, distribute, display, or otherwise use another user’s content “[e]xcept as permitted through the Services or as otherwise permitted by [Reddit] in writing.”¹²⁴ As a result, this user agreement allows otherwise copyrighted materials posted on

¹²² REDDIT USER AGREEMENT, <https://www.redditinc.com/policies/user-agreement> (last visited Dec. 19, 2019).

¹²³ *Id.*

¹²⁴ *Id.* (“your license does not include the right to...license, sell, transfer, assign, distribute, host, or otherwise, commercially exploit the Services or Content...modify, prepare derivative works of, disassemble, decompile, or reverse engineer any part of the Services or Content...or...access the Services or Content in order to build a similar or competitive website, product, or service...”).

Reddit to be shared by other users within the functions of the site,¹²⁵ but it prohibits users from taking others' copyrighted materials for their own personal gain.

ii. Twitter

Another platform where memes are shared is Twitter. Although a user on Twitter “retain[s] the] rights” to the content they “submit, post or display on or through the Services,” a user still agrees to give Twitter “a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute...in any and all media or distribution methods (now known or later developed).”¹²⁶ Much like Reddit, Twitter also makes the user agree to “to make Content submitted to or through the Services available...for syndication, broadcast, distribution, or publication...subject to our terms and conditions for such use.”¹²⁷ Again, this language only allows content to be shared (*i.e.* displayed and distributed) by using the Twitter software features. A user only has “license to use the software provided to [them] as part of the Services.”¹²⁸ Only Twitter and its partner organizations are given licenses to reuse material posted by Twitter users. This means that while

¹²⁵ On Reddit, users can “share” any meme by copying the meme’s link, “crossposting,” or embedding the image.

¹²⁶ TWITTER TERMS OF SERVICE, <https://twitter.com/en/tos> (last visited Dec. 19, 2019).

¹²⁷ *Id.* (“[s]uch additional uses by Twitter, or other companies, organizations or individuals, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.”).

¹²⁸ *Id.*

Twitter users can use functions like “re-tweeting” a different user’s post, they cannot copy content from another user and post it as their own.¹²⁹

The Southern District of New York reaffirmed this interpretation of Twitter’s Terms of Service in *Agence France Presse v. Morel*.¹³⁰ In *Morel*, the court denied a motion for declaratory judgment that a defendant did not infringe upon plaintiff’s copyrighted photographs that he had posted on Twitter.¹³¹ The defendant argued that once a photograph was posted to Twitter, the user gives a general license for anyone to reuse the photograph; however, the court held that “Twitter’s terms grant a license to use content only to Twitter and its partners.”¹³²

iii. Instagram

Instagram’s Terms of Use makes it clear that Instagram “[does] not claim ownership of [the user’s] content, but [the user] grant[s Instagram] a license to use it.”¹³³ The license begins “when [users] share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service,” and the user grants Instagram “a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute,

¹²⁹ *Id.* (“[i]f you want to reproduce, modify, create derivative works, distribute, sell, transfer, publicly display, publicly perform, transmit, or otherwise use the Services or Content on the Services, you must use the interfaces and instructions we provide...”).

¹³⁰ 769 F. Supp. 2d 295 (S.D.N.Y. 2011).

¹³¹ *Id.* at 298.

¹³² *Id.* at 303 (“[m]oreover, the provision that Twitter ‘encourage[s] and permit[s] broad re-use of Content’ does not clearly confer a right on other users to re-use copyrighted postings.”).

¹³³ INSTAGRAM TERMS OF USE, <https://help.instagram.com/581066165581870> (last visited on Dec. 19, 2019) (“Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service.”).

modify, fun, copy, publicly perform or display, translate, and create derivative work of your content...”¹³⁴ A user “can end this license anytime by deleting [their] content or account.”¹³⁵

There are two distinctions Instagram makes from Twitter and Reddit. First, Instagram’s agreement “does not give rights to any third parties,”¹³⁶ meaning Instagram’s business partners do not receive a license to use the content, and Instagram cannot sub-license the content to others. Second, Instagram explicitly states a way for a user to end the license agreement; namely to delete the content or account from the service. The similarity between the platforms is that Instagram allows the sharing of copyrighted materials through its Service’s functions, but *does not* authorize users to take copyrighted materials and post them on their own account.¹³⁷

iv. Facebook

Finally, Facebook makes it similarly clear that the user “own[s] the intellectual property rights (things like copyright or trademarks) in any such content that [the user] create[s] and share[s] on Facebook and the other Facebook Company Products...Nothing in these Terms takes away the rights [the user has] to [their] own content.”¹³⁸ Facebook describes the reason for its license is

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See INSTAGRAM COMMUNITY GUIDELINES, https://help.instagram.com/477434105621119?helpref=page_content (last visited Dec. 19, 2019) (“Share only photos and videos that you’ve taken or have the right to share...you own the content you post on Instagram...don’t post anything you’ve copied or collected...that you don’t have the right to post.”).

¹³⁸ Facebook Terms of Service, <https://www.facebook.com/terms.php> (last visited Dec. 19, 2019).

“solely for the purposes of providing and improving our Products and services.”¹³⁹ Specifically, the user, when they “share, post, or upload content that is covered by intellectual property rights,” the user grants Facebook “a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content.”¹⁴⁰ Facebook, the owner of Instagram, also gives the user the ability to end the licensing agreement by deleting the content “from [Facebook’s] systems.”¹⁴¹ In addition, Facebook can only “store, copy, and share” the content with others on the Facebook service “consistent with [the user’s] settings,” meaning by restricting who can see their content, a user can restrict who Facebook allows access to the content.¹⁴² Similar to the other social media platforms, Facebook and its users can only use content within the scope of the platform’s function (*i.e.* re-sharing a post or sending a post as a direct Facebook message to a friend would not violate any copyrights interests of the original post’s content).¹⁴³

These terms of use create the same practical landscape: by posting content on a content sharing platform, the creator of the content gives certain licenses to ensure that their content is shared within the purposes and designs of the platform. The terms do not place the content in the public domain, free for anyone to take and reuse how they wish.¹⁴⁴ To the contrary, many of these

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.* (“You may not use our Products to do or share anything...[t]hat infringes or violates someone else’s rights, including their intellectual property rights.”).

¹⁴⁴ *See Morel*, 769 F. Supp. 2d at 303.

terms explicitly state how the creator retains their ownership interest in their content.¹⁴⁵ Other users are still not allowed to take a creator's content without permission.¹⁴⁶

b. The DMCA Protects Social Media Platforms from Secondary Liability

The second potentially affected parties in internet meme's copyright merits are the social media platforms where many memes are shared. These platforms would potentially be secondarily liable for facilitating the display and distribution of an infringing work if a user stole a copyrighted meme from a different meme creator.¹⁴⁷ However, these concerns already exist for these platforms when users upload potentially infringing materials that are not memes.¹⁴⁸ The concern of secondary liability is reduced by the Digital Millennium Copyright Act (DMCA) of 1998,¹⁴⁹ which provides for a safe harbor for online service providers (OSP) that meet certain requirements. These social media platforms qualify as OSPs according to the statutory definition since they are entities "offering the transmission, routing, or providing of connections for digital online communications,

¹⁴⁵ See, e.g., TWITTER TERMS OF SERVICE, <https://twitter.com/en/tos> (last visited Dec. 19, 2019) ("You retain your rights to any Content you submit, post or display on or through the Services.").

¹⁴⁶ See, e.g., Facebook Terms of Service, <https://www.facebook.com/terms.php> (last visited Dec. 19, 2019) ("You may not use our Products to do or share anything...[t]hat infringes or violates someone else's rights, including their intellectual property rights.").

¹⁴⁷ Once primary infringement has been found, other parties can be found "secondarily liable." There are two main types of secondary liability: contributory liability and vicarious liability. See *Fonovisa v. Cherry Auction*, 76 F. 3d 259 (9th Cir. 1996). The two main elements of vicarious liability are control and profit. *Id.* at 262 (discussing *Shapiro, Bernstein and Co. v. H.L. Green Co.*, 316 F. 2d 304 (2d Cir.1963)). The two main elements of contributory liability are material contribution and knowledge, or more simply to "knowingly contribute." *Fonovisa*, 76 F. 3d at 264.

¹⁴⁸ For example, if a user posts copyrighted photographs, music, or videos that they do not have permission to distribute and display, then that user is potentially infringing the copyright owner's rights by using the social media platform.

¹⁴⁹ Codified in relevant part in 17 U.S.C. § 512.

between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.”¹⁵⁰ The platforms have implanted all the statutorily required measures, including “adopt[ing] and reasonably implement[ing], and inform[ing] subscribers...of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers”¹⁵¹ These “DMCA takedown procedures” are also outlined in each social media platform’s terms of service or policies.¹⁵² These measures that are already in place by the social media platforms will allow them to handle any possible increase in copyright infringement claims against them or against the other users on their service, as well as protecting the social media platforms from secondary liability of the alleged copyright infringement. As a result, these platforms will not feel any potential negative impacts from memes having clear copyright protection.

c. Copyright Law Will Help Protect and Promote New Meme Creators

The last policy concern that must be considered is how copyright protection will affect the creation of new memes. Here, there are three aspects of copyright law that will protect and promote

¹⁵⁰ 17 U.S.C. § 512 (k)(1) (2020).

¹⁵¹ 17 U.S.C. § 512 (i)(1)(A) (2020).

¹⁵² See TWITTER COPYRIGHT POLICY, <https://help.twitter.com/en/rules-and-policies/copyright-policy> (last visited Nov. 25, 2019); INSTAGRAM REPORTING COPYRIGHT INFRINGEMENTS, <https://help.instagram.com/454951664593304> (last visited Nov. 25, 2019); FACEBOOK REPORTING A VIOLATION OR INFRINGEMENT OF YOUR RIGHTS, <https://www.facebook.com/help/contact/634636770043106> (last visited Nov. 25, 2019); REDDIT DMCA REPORT FORM, https://reddit.zendesk.com/hc/en-us/requests/new?ticket_form_id=73465 (last visited Nov. 25, 2019).

new meme creators: 1) independent creation; 2) the idea/expression dichotomy; and 3) the fair use doctrine.

i. Independent Creation

A meme creator will not be liable for infringing on another meme as long as they “independently create” their new meme. Two different meme creators can produce identical memes and have their own respective copyright interests in their work; however, neither creator would be infringing on the other’s copyright if they created their own meme independently and without knowledge of the other creator’s meme.¹⁵³

Also, since memes are considered either “compilations” or “derivative” works, the copyright protection “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”¹⁵⁴ This rule means that meme creators only have a copyright interest in the content they add, like the jokes, commentary, or other graphic changes. They do not have an exclusive right to make memes using the copyrighted image they selected, meaning other meme creators can use the same copyrighted image in their own memes.

ii. Idea/Expression Dichotomy

¹⁵³ See *Sheldon v. Metro-Goldwyn Pictures*, 81 F. 2d at 54 (2d Cir. 1936) (“if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an “author,” and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s”).

¹⁵⁴ 17 U.S.C. § 103 (2020).

Another protection for new meme creators is the idea/expression dichotomy. Copyright protection in a work does not extend “to any idea, procedure, process...concept, [or] principle.”¹⁵⁵ This requirement has prevented many other forms of jokes from enjoying copyright protection.¹⁵⁶ Where there are only a few limited ways to express the same idea or joke, “copyright’s merger doctrine would limit the author’s ability to obtain protection.”¹⁵⁷ This aspect of copyright law would prevent a meme creator from gaining a copyright interest (and monopoly) in the idea of making a joke about a current event in pop culture or using a particularly funny image to make into a meme. Instead, the meme creator would only have a copyright interest in their specific expression. In practice, this rule would limit a meme creator’s copyright interests to merely protecting their memes from being copied exactly and exploited by others. However, exact copying and exploitation is the main concern meme creators want copyright protection for, and the narrow scope of this protection fits both what meme creators want to protect as well as promotes creation of new memes from other creators.

iii. Fair Use Doctrine

¹⁵⁵ 17 U.S.C. §102 (2020); *See also* Nichols v. Universal, 45 F. 2d 119 (2d Cir. 1930).

¹⁵⁶ Oliar, Dotan & Chris Jon Sprigman. *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1789, 1802-03 (2008) (“Often it is the idea conveyed by a joke that causes the audience to laugh. Since the same idea may be communicated by different expressions, comedians can in most instances lawfully appropriate the idea animating a joke simply by telling it in different words.”).

¹⁵⁷ *Id.* at fn. 40 (“Relatedly, copyright’s scenes a faire doctrine would limit protection in instances where a particular mode of expression is conventionally used in employing a particular comedic idea--for example, in the form of the “knock-knock” joke.”).

If meme creators build off of existing memes or “transform” a meme into a new meaning, the new creator can rely on the fair use defense.¹⁵⁸ This doctrine allows for the creation of “meta-memes,” or “memes about memes.”¹⁵⁹ This sub-category of meme creation that enjoys the same fair use protection as the original internet memes. The transformative nature and different purpose would result in a similar fair use analysis described in Section III(a) of this article.

V. CONCLUSION

With the ever increasing popularity and prevalence of internet memes, the ability to monetize meme creation has become a lucrative business. Unfortunately, this prevalence of

¹⁵⁸ See *Sony*, 464 U.S. at 479 (Blackmun, J., dissenting) (“The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.”).

¹⁵⁹ An example of a “meta-meme”:



monetization opportunities has led to a similar prevalence in “meme-stealing” pages. These “meme-stealing” pages have taken the creative work of meme creators without compensation or permission.

The problem that has arisen now is that meme creators lack the practical, and more importantly legal, ability to protect their creative work. The questions of if internet memes enjoy copyright protection have left many meme creators powerless as they see their creative works exploited for thousands of dollars by larger “content-stealing” pages, with only notorious and powerful creators having any power to pressure these pages to change their behavior. Copyright protection for internet memes can solve this issue. Memes already meet the requirements for copyright protection. They are fixed works with the requisite modicum of creativity that the creators independently create. No special legislation is needed, only recognition of rights that should already exist. The fair use doctrine already protects meme creators from copyright lawsuits due to the transformative nature and lack of market harm their memes cause.

In addition to helping meme creators have a legal and cognizable way to protect their creative works, copyright protection for memes will not have any negative effects upon the market for memes, the social media platforms where memes are shared, or new meme creators. Social media platforms, like Instagram or Twitter, have procured licenses through their terms of service that allow other users of the service to share memes with other users within the functions of the service as well as implementing DMCA notice and takedown procedures to protect themselves against copyright infringement claims of secondary liability. Other copyright doctrines like independent creation, the idea/expression dichotomy, and the fair use doctrine will help prevent meme creators from “weaponizing” their copyright interests in their memes.

Either the courts or the U.S. Copyright Office need to clarify that internet memes are subject to copyright so meme creators can begin to make cognizable claims and demands against those who take their creative work improperly.

