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Y U No Fair Use?

A Critical Analysis of Memes and Fair Use

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Introduction

Humor in the internet era has seen the emergence of memes as key players in virtual entertainment. Most social media sites are punctuated with characters that evoke certain emotions even with a quick glance. Memes ranging from the ‘Socially Awkward Penguin’, the ‘Grumpy Cat’ or ‘Derp and Derpina’ along with various others have become an active part of internet humor. Memes by their nature are works that have been copied from other sources. However, such copying has evidently not been checked by law as yet. To understand the dichotomy of this issue, it is imperative that we understand what internet memes are, what fair

As per common understanding, memes originated with advent of social media, and in a manner of speaking, this is even true. Memes have certainly gained popularity in the age of social media. However, the origin of memes can be traced back to a time before the invention of the internet. In 1976, Richard Dawkins, an evolutionary biologist, coined the term “meme” in his book, “*The*

Selfish Gene". A meme is a unit of cultural meaning, such as an idea or a value, which is passed from one generation to another. It is the cultural counterpart to the unit of physical heredity, the gene.¹

Today, the most popular understanding of memes would be pictures superimposed with text with a humorous undertone, shared endlessly over the internet. It could be just about anything that is voluntarily shared including one-liners, images, audio or video files, etc. Existing memes undergo modifications, sometimes minor, and sometimes so radical that the new versions represent an entirely different idea.² Often, the creator of the original image or drawing over which text is superimposed is not the creator of the meme. A third person takes this original content and modifies it, subsequently making it a meme. From this point on, future authors build on previous works and create numerous varied strands of memes, all ultimately derived from the original meme. The diversity of the internet provides a rich cultural platform for memes to thrive, giving wings to various ideas and promoting the creation of new memes, so much so that 'meme' is now an internet buzzword.³ Frequently, memes cross the boundaries of the virtual world and are found in the physical sphere, with some being sold as merchandise and as software stickers in messaging apps.⁴

Considering that most memes are essentially derived from pre-existing works, it has been contended that memes violate the copyright of the authors of the original work. This issue has been brought to light by the recent instance of Getty Images demanding payment from Get Digital, a small blog, for publishing the 'Socially Awkward Penguin' meme.⁵ The internet population rose in support of Get Digital when the news was made public. There have been murmurs about whether memes would come under the ambit of fair use, if considered a reproduction of the original work. However, despite the omnipresent nature of memes on the

¹ Susan Blackmore, *Evolution and Memes: The human brain as a selective imitation device*, SUSANBLACKMORE.CO.UK <http://www.susanblackmore.co.uk/Articles/cas01.html> (last visited Dec. 20, 2016).

² *Socially Awkward Penguin*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/socially-awkward-penguin> (last visited Dec. 20, 2016).

³ James Gleick, *What Defines a Meme*, SMITHSONIAN.COM <http://www.smithsonianmag.com/arts-culture/what-defines-a-meme-1904778/?no-ist=&page=2> (last visited Dec. 20, 2016).

⁴ Margaret Rouse, *Internet Acronyms and Lingo Glossary*, WHATIS.COM <http://whatis.techtarget.com/definition/Internet-meme> (last visited Dec. 20, 2016).

⁵ Michael Archambault, *Getty Images Forces Blog to Pay \$868 Fee for Using 'Socially Awkward Penguin'* PETAPIXEL (Sept. 5, 2015) <http://petapixel.com/2015/09/05/getty-images-forces-blog-to-pay-868-fee-for-using-socially-awkward-penguin/> (last visited Dec. 20, 2016).

internet, the lack of litigation on the issue of copyright violation by memes has resulted in the question remaining unanswered.

In this paper the authors attempt to address this question by examining the nature of memes, and analyzing the existing law in this light. Part I of the paper discusses memes as artistic works that may be infringing the copyright of works from which they are derived, Part II deals with the existing law pertaining to fair use as a defence to copyright infringement, and Part III is an analysis of various memes in light of the current position of law.

I. Are Memes Infringing Copyrights?

In identifying a copyrightable work, it is important to delineate the category under which the work in question falls. ‘Artistic work’ is defined in Article 2 of the Berne Convention⁶ and Section 2(c) of the Indian Copyright Act, 1957⁷, and includes in its ambit paintings, drawings, diagrams, engravings, photographs, etc. As mentioned earlier, an internet meme uses an existing image and modifies it by adding a humorous message to it. The original image that is used as the background for the meme clearly falls under the ambit of ‘artistic works’, as defined in the Act, be it pictures, like that of Sean Bean as Ned Stark from ‘Game of Thrones’ in the ‘Brace Yourself’ meme, or stills from the TV series ‘Futurama’, or even rage comics like ‘Derp’.

The work must be original for copyright to subsist in it.⁸ Section 13(1) of the Act provides that copyright shall subsist in all ‘original’ artistic works. However, the precise requirements of originality are not provided for in the statute, although a universally acknowledged premise is that for the purpose of copyright, it is the originality of expression that matters and not that of idea. This standard is derived from *University of London Press v. University of Tutorial Press*⁹ which states that the work must originate from the author. It is the originality of expression that is important, and not that of the idea. Therefore, the new expression may be based on an existing idea, and may still be copyrightable. The crucial requirement, however, is that the expression

⁶ Berne Convention for the Protection of Literary and Artistic Works, art. 2, Sept 9, 1886,

⁷ hereinafter “the Act”.

⁸ COPYRIGHT ACT, § 13.

⁹ *University of London Press v. University of Tutorial Press*, (1916) 2 Ch 601.

must not have been copied from an existing work. This standard has been used across the globe and has been upheld in several Indian cases¹⁰ as well.

The copyright in any artistic work is said to be infringed when a third party violates any of the acts mentioned as exclusive rights in Section 14 (c) of the Act.¹¹ For instance, the right of the owner of the copyright to reproduce the work in any material form will be violated if a person, who is not the assignee or licensee of the copyright owner, or does not have any authority from the copyright owner, reproduces the work in any material form without the consent of the copyright owner. If a subsequent work is similar to the copyrighted work, but it can be established that the latter is not copied or reproduced from the former, it will not be considered an infringement. It is to be borne in mind that reproduction in the context of copyright means “*an exact or substantial reproduction of the original matter, physically using that original matter as a model as distinguished from an independent production of the same thing, or producing it from ideas stored in the mind, if those ideas were borrowed from the alleged infringed work.*”¹²

The question to be asked is whether the latter work, (the meme, in the instant case) has been illegally appropriated, by using a substantial or material part of the original copyrighted work or whether an essential element of the artist’s original conception has been copied to a substantial extent. The physical properties of the allegedly infringing copy may well differ, as well as the medium of expression, with certain differences in the artistic detail. However, if the original work has been used as a model or guide for the subsequent work with substantial imitation of the original work, then despite the difference in quality and final outcome of the copy, the subsequent work will be deemed to be an infringing copy.¹³

The safest test for copyright infringement is if a third party, having read or viewed both works, is of the unmistakable impression that the latter is an imitation of the former.¹⁴ Essentially, the infringing copy should be a substantial reproduction of the copyrighted work. Substantiality is a

¹⁰ *Barbara Taylor Bradford v. Sahara Media Entertainment Ltd*, (2004) I.L.R. 1Cal 15; *Syndicate of The Press of The University of Cambridge on Behalf of The Chancellor, Masters and School v. B.D. Bhandari & Anr.*, 2011 (47) P.T.C. 244 (Del); *The Chancellor Masters And Scholars of The University of Oxford v. Narendra Publishing House and Ors.*, 2011 (47) P.T.C. 244 (Del).

¹¹ COPYRIGHT ACT, § 51 cl. (a) (i).

¹² TR SRINIVASA IYENGAR, COMMENTARY ON THE COPYRIGHT ACT 302 (7th ed., Raghbir Singh ed. Universal Law Publishing, 2010). ‘Reproduction’ has not been defined in the Act and this definition is the prevalent understanding.

¹³ *Id.* at 365.

¹⁴ *R.G. Anand v. Deluxe Films*, A.I.R. 1978 S.C. 1613.

question of fact. When considering this question, the value and importance of the part that is copied must be considered as well as its quantity.¹⁵

In *Hindustan Pencil Pvt. Ltd. v. Universal Trading Company*¹⁶, the Court held that even if there are slight changes in the alleged artistic but copied work, if it is absolutely clear that the essential features of the original artistic work have been copied, the person copying the work is liable for infringement of copyright.

In an internet meme, one is essentially using someone else's work for his purpose, without the permission of the owner of the copyright of the original work. This would, in most circumstances, be a clear case of infringement. In the case of memes however, this may not entirely be accurate. The purpose of creating memes varies. Nevertheless, only those memes that are created for the purpose of fair dealing may be included in the ambit of the Fair Use clause¹⁷ of the Copyright Act.

II. Is Fair Use the Defence?

The question of fair use arises only if the work in question is an infringing work. Once infringement has been proved, one must proceed to ascertain if the work that was copied was done in furtherance of 'fair dealing'.¹⁸ The Berne Convention allows the signatories to provide for exceptions to the exclusive right of reproduction.¹⁹ Accordingly, Section 52 of the Act details the various exceptions to infringement. The language of the provision²⁰ indicates that the list provided is exhaustive, and those actions that do not fall under any of these exceptions would not be considered fair use. The determination of fair use depends on the facts of each case. One of the earliest cases that dealt with the doctrine of fair use was *Folsom et al. v. Marsh et al.*²¹ wherein the Court laid down three important factors to be considered while looking into the question of fair use:

(1) The nature and object of the selection made

¹⁵ LAL, COMMENTARY ON THE COPYRIGHT ACT 1957 383 (4th edn., Ajay Sahni ed. Delhi Law House 2009).

¹⁶ *Hindustan Pencil Pvt. Ltd. v. Universal Trading Company*, (1999) 19 P.T.C. 379.

¹⁷ COPYRIGHT ACT, § 52.

¹⁸ IYENGAR, *supra* 12 at 395; *Howkes and sons (London) Ltd. v. Paramount Film Service Ltd.*, (1934) Ch. 593.

¹⁹ Berne Convention. *supra* 6, art. 9 cl.2.,

²⁰ §52(1) – “The following acts shall not constitute an infringement of copyright, namely-”.

²¹ *Folsom et al. v. Marsh et al.* 9 F Cas. 342, 1841 U.S.

- (2) The quantity and value of the materials used
- (3) The degree in which the use may prejudice the sale, diminish the profit or supersede the objects of the original work.

The US legal jurisprudence sheds some light as to the fair use of memes. The US Copyright Act²² enumerates those acts which shall be constituted as not infringing copyright. This provision, unlike its Indian counterpart, is inclusive in nature. Apart from detailing the exceptions, the provision also specifies a four-factor test to be used as a yardstick while considering the defence of fair use:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.

These factors are subjective in nature; the degree of application changes on a case to case basis. The first factor i.e. purpose and character of the use, envisages the use of the work in a transformative manner. The challenge here is determining what may be classified as transformative, and the degree of such transformation. Put differently, the question is whether there has been a value addition which alters the original work in a significant measure.²³ The nature of the copyrighted work is also an important factor in determining the fair use. If the work is in the nature of an unpublished manuscript, then the scope of fair use is limited; however, if it is a published work, then the scope of fair use is wider as the author has already exhausted his right to control the first public appearance of his expression. The third factor of substantiality of the work reproduced is dependent on the quantity as well as the quality of reproduction. Usually, reproduction of minor portions is excused as fair use, however if the reproduced portion forms the “heart” of the work i.e. the crux of the work, it would not be covered under the ambit of fair use. The fourth factor dictates that if the copy of the work deprives the copyright owner of

²² The U.S. Copyright Act, 17 U.S.C § 107 (1976).

²³ *The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House*, (2009) 39 PTC 642.

income from a market or undermines his entry into a potential market, the fair use exception would not come into play.²⁴

These factors have been used extensively in the US to determine the fairness of reproduction of a particular work. However, while it is important to weigh each factor and decide whether the doctrine applies in relation to the merits of the case, it is pertinent to note that all factors may not be taken into equal consideration. In *Harper and Row v. Nation Enterprises*²⁵ the extent of the fair use doctrine was tested. In this case, Former U.S. President Henry Ford had contracted to publish his memoir in the “Time” magazine. The “Nation” magazine acquired this manuscript from an unauthorized source and published 300-400 words verbatim from the five hundred page memoir. As a result of this, “Time” withdrew from the contract. The U.S. Supreme Court held that the article was not a “fair use” as sanctioned by the fair use provisions in § 17 U.S.C. 107 as the passage comprised the heart of the memoir. The Court emphasised on the potential market of the copyrighted work and based its decision on the gravity of the fourth factor. Justice Brennan’s dissent in this judgement is also well noted, where he has criticised the majority for conferring monopoly over historical facts and not merely on the exception, cautioning that this method would “*prove counterproductive to the very end of granting copyright protection*”.

The ratio in *Harper & Row* was modified in *Campbell v. Accuff–Rose Music*²⁶ where the Supreme Court held that all four factors to test fair use were to be used together and no undue preference should be given to any one factor in isolation. The Court introduced the concept of ‘transformative work’ and specifically stated in relation to the first factor, that “*the central inquiry is to see if the work merely supersedes and supplants the original work or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message i.e. to what extent the new work is transformative.*”

In *The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House*,²⁷ the Delhi High Court elaborated on the four-factor test for fair use and emphasised that the factors cannot be used in isolation but have to be used collectively and holistically to assess

²⁴ Rich Stim, *Measuring Fair Use: The Four Factors*, STANFORD UNIVERSITY LIBRARY <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited Dec. 20, 2016).

²⁵ *Harper and Row v. Nation Enterprises*, 471 U.S. 539 (1985).

²⁶ *Campbell v. Accuff–Rose Music*, 510 U.S. 569 (1994).

²⁷ *Narendra Publishing*, *supra* 23.

whether the doctrine of fair use would apply. Further, the Court added that the fourth factor should not be limited to assessing the damage caused to the copyright holder in the market but should also evaluate the adverse impact on the potential markets.

Despite the strict confines of the fair use clause in India, Courts have, through judicial ingenuity, extended the ambit of the clause by adopting the four-factor test and devising their own criteria as to what would constitute fair use. This has been done to necessitate promotion of creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information.²⁸ In fact, the Hon'ble Supreme Court of India in *R.G. Anand v. Deluxe Films*²⁹ propounded a principle similar to the transformative work principle, before the doctrine developed in the US. It stated that “*Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.*”

In adopting the four-factor test and extending the ambit of the fair use provision, the Division Bench of the Delhi High Court in the *Narendra Publishing House Case*³⁰ went so far as to say that the doctrine of fair use legitimizes reproduction of copyrightable work and allows for proliferation of creativity. It stated that the provisions of Section 52 the Act are merely broad heads and one must therefore resort to principles developed by Courts to identify fair use.³¹ It stated, “*Coupled with a limited copyright term, (the doctrine of fair use) guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain.*”

In *Civic Chandran v. Ammini Amma*³² the Court allowed the defence of fair use for a counter drama that contained parts of the original drama. The counter drama was written as a parody of the original with the aim of critiquing the ideas portrayed in the former. The court drew a distinction between ‘fair dealing’ and reproduction and said that in some circumstances,

²⁸ *Narendra Publishing, supra* 23.

²⁹ *R.G. Anand, supra* 14.

³⁰ *Narendra Publishing, supra* 23.

³¹ *Id.*

³² *Chandran v. Ammini Amma*, (1996) P.T.C. 670 (Ker.).

reproduction of extracts or quotations may be permitted but no clear rules can be laid down in this regard. To aid Courts in deciding such matters, three considerations were laid down:

- (1) The quantum and value of the matter taken in relation to the comments or criticism;
- (2) The purpose for which it is taken; and
- (3) The likelihood of competition between the two works.

While the test laid down in this case essentially mirrors the four-factor test, the case primarily deals with parodies as fair use, and memes, by nature are not parodies. Memes do not comment, review or criticise the original work. They merely build on an existing work and modify it to give a new expression. Therefore, memes cannot be considered parodies and a different yardstick would be used to measure the applicability of the fair use doctrine with regard to memes than the one laid down in the instant case. The four factor test is used for analysing fair use of memes.

The most recent development in the Indian judiciary in the domain of fair use has been in the DU Photocopying Case³³. The ambit of Section 52(1) (a) has been greatly widened, thus lowering the threshold which an infringing work needs to fulfil to come under the protection of fair use.

III. Fair Use to the Rescue

Having established that memes are, for the most part, infringing upon copyright of the original works, it would be fair to say that any use of memes would entail a license fee, or a penalty in case of unlicensed use. However, it may be contended that internet memes can be used freely as long as they meet the requirements of the doctrine of fair use.

Memes can be broadly divided into four categories, namely, cinematographic stills, rage comic memes, personal photographs and original works. As mentioned earlier, memes are inherently infringing in nature. However the manner in which this infringement occurs varies from category to category. Some of these categories are protected under the fair use doctrine, while the others do not meet the prerequisites. To understand how the fair use doctrine comes to the rescue of the memes, one needs to understand each category of memes and apply the four fold test of fair use on them. Those memes that are able to fulfil this prerequisite will be protected by fair use.

³³ *The Chancellor, Masters & Scholars of the University of Oxford and Ors. Vs. Rameshwari Photocopy Services and Ors.* 2016 (68) PTC 386 (Del)

In the case of cinematographic stills, one part of the entire end product is taken out of context and used merely on face value. The still is then superimposed with text of a particular nature to convey a distinctive idea. For instance, in the “Shut Up and Take My Money” meme³⁴, the still is taken from the TV series ‘Futurama’. In this meme, the text interplays with the background picture of Fry, a character from Futurama, holding out a wad of cash. This particular meme is used in the context of an object which is expensive and attractive. Another illustration of this category would be the “Brace Yourself” meme, picturing Ned Stark from ‘Game of Thrones’ holding a sword along with the words “Brace Yourself” on the upper portion of the meme. The lower part has a line that usually conveys the expected, usually exaggerated, event.³⁵ In the Indian context, the Alok Nath, “Sanskari” meme, used as a still from a video of the Indian actor Alok Nath, made to add emphasis satirically on the ‘culture’ of India.

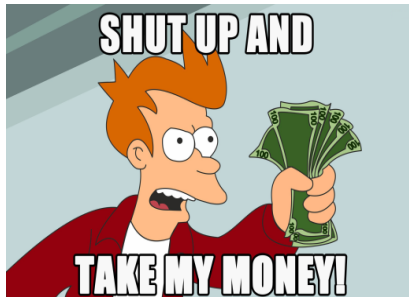


Fig 1³⁶



Fig 2³⁷



Fig 3³⁸

Another category of memes is the ‘rage comics’ memes. Rage comics or rage faces are a series of web-comics usually created using a simple drawing software like the popular MS Paint. The comics depict stories of human experiences and end with a satirical punch line.³⁹ The rage comic memes are used to depict a large variety of human emotions and each emotion has led to the creation of a specific meme. A few illustrations of rage comic memes are the “Y U NO Guy”⁴⁰, the “Forever Alone Guy”⁴¹. These memes are shared repeatedly, usually with various

³⁴ Ref. Fig. 1

³⁵ Ref Fig 2

³⁶ MAKE A MEME, Shut Up & Take My Money, <https://2982-presscdn-29-70-pagely.netdna-ssl.com/wp-content/uploads/2015/04/Shut-up-and-take-my-money.jpg> (last visited Dec. 20, 2016).

³⁷ MAKE A MEME, Brace Yourself <http://media.makeameme.org/created/brace-yourself-meme.jpg> (last visited Dec. 20, 2016).

³⁸ DFILES, Alok Nath <http://www.dfiles.me/alok-nath-sanskari.html> (last visited Dec. 20, 2016).

³⁹ Rage Comics, KNOW YOUR MEME, <http://knowyourmeme.com/memes/rage-comics> (last visited Dec. 20, 2016).

⁴⁰ Ref. Fig. 4

⁴¹ Ref. Fig. 5

modifications to the punch line, but each conforming to the idea of their particular emotion. For instance, the “Y U NO Guy” meme has a drawing of a frustrated face with extended arms. The text that accompanies the drawing signifies an obvious action that has not been taken. Similarly, the “Forever Alone Guy” is a drawing of an ugly face that has tears running down its ugly cheeks, superimposed with text that is used to express loneliness and disappointment with life.

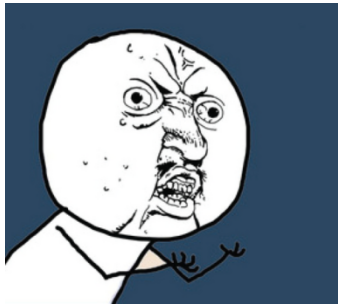


Fig 4⁴²



Fig 5⁴³

The third category is the genre of photographs of people that made memes in an image macro series⁴⁴. The pictures depict one emotion and are superimposed with text that may vary, but the essence of the meme remains similar. For example, in the “Bad Luck Brian” meme,⁴⁵ there is the high-school yearbook picture of a teenage boy wearing a plaid sweater vest and braces, with texts that depict embarrassing situations. “Good Guy Greg” meme⁴⁶ has a photograph of a person smiling at the camera with a marijuana cigarette in his mouth. The text in this meme shows attributes of uncommon generosity and kindness. A subcategory in this genre is that of photographs of pet animals. The internet is flooded with cute looking animals and there is a special emphasis on cats⁴⁷. This category too has a background picture superimposed with text. However, these memes do not have a fixed nature of text that go along with them.

⁴² JEAN GREY PHOENIX, Y U No, <https://jeangreyphoenix.files.wordpress.com/2014/12/yuno.png> (last visited Dec. 20, 2016).

⁴³ VIGNETTE 1, Forever Alone Face, http://vignette1.wikia.nocookie.net/funnypic/images/3/3c/Forever_alone_face.png/revision/latest?cb=20110524062214 (last visited Dec. 20, 2016).

⁴⁴ An Image Macro is a broad term used to describe captioned images that typically consist of a picture and a witty message or a catchphrase.

⁴⁵ Ref. Fig. 6.

⁴⁶ Ref. Fig. 7.

⁴⁷ Ref. Fig. 8.

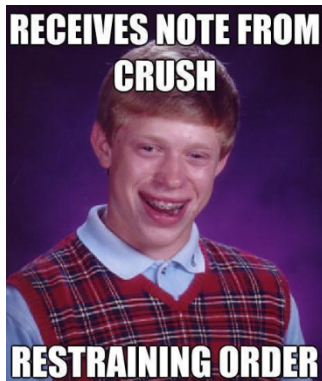


Fig 6⁴⁸



Fig 7⁴⁹



Fig 8⁵⁰

The last category of memes is memes that were created with the sole intent of being a meme. The nature of such a meme can best be described with an illustration. The “Nyan cat” meme⁵¹ falls under this category. It is an 8-bit animation depicting a cat with the body of a cherry pop tart flying through outer space while leaving a trail of the rainbow colour. It is difficult to use such memes in any other context apart from that envisioned by the creator. Further it is difficult to change the nature of such a meme to have a truly transformative work. Thus the creator of such a meme is in a more authoritative position regarding his right. ‘Adarsh Balak’ memes⁵² are composed of, old cartoons to teach manners to children, the text of the same is being recently changed to suit the popular context, in the form of popular reference, such as ‘YOLO’. This meme is widely used in in India.

⁴⁸ WEAR E-NATIVE, Bad Luck Brian, <http://wearenative.in/wp-content/uploads/2014/07/badluckbrian4.jpg> (last visited Dec. 20, 2016).

⁴⁹ MEME CDN, Good Guy Greg, http://img.memecdn.com/good-guy-greg-borrows-money_o_2050269.jpg (last visited Dec. 20, 2016).

⁵⁰ BRO STRICK, Cat Memes, <http://brostrick-prod.s3.amazonaws.com/wp-content/uploads/2015/10/05085907/cat-memes-3.png> (last visited Dec. 20, 2016).

⁵¹ Ref. Fig. 9.

⁵² Ref Fig 10.



Fig 9⁵³

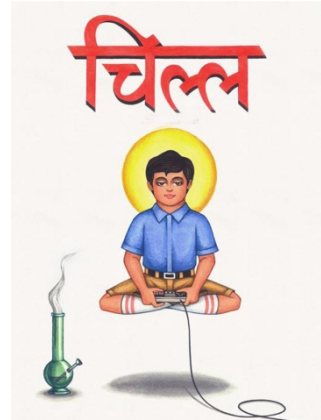


Fig 10⁵⁴

Having elaborated on the categories of memes, it is now appropriate to analyse them in light of the four-factor test that has been adopted by the Court in the *Narendra Publishing House Case*.

The first factor is the purpose of the copied work including whether such use is of a commercial nature or is for non-profit educational purposes. Most of the categories of memes fulfil these criteria, as the use of memes is not motivated by any economic gain; rather, they are adopted merely with recreational intent. Memes have no relation to the original purpose of the photograph and are completely transformative in their use. Further from the manner of reproduction and sharing, it is evident that there exists no other motive but a personal one, that of communicating humorous anecdotes with the world.

However the purpose of copying memes that are made for the sole intent of being memes cannot be outside the realm of what was envisioned by the author, such reproduction is not transformative in nature. Further, the use of memes of such a category is difficult without having the same impact as the author had envisioned. The copying of such memes has the same purpose as the original meme and thus they do not meet this requirement.

The second factor is the nature of copyrighted work. All categories of memes meet this condition. Since the memes have already been published, the author has already exhausted his

⁵³ DAILY TECH, Nyan Cat, http://images.dailytech.com/nimage/Nyan_Cat_Wide.jpg (last visited Dec. 20 2016).

⁵⁴ India times, 'Adarsh Balak' Is A Wicked and Hilarious Take On The Ideal Boy Poster <http://www.indiatimes.com/news/weird/this-indian-designer-took-a-wicked-take-on-the-ideal-boy-posters-with-adarsh-balak-228480.html> (last visited Dec. 20, 2016).

right to control the first public appearance of his expression. Thus the ambit of fair use is not as limited as it would have been in case of an unpublished manuscript in the four fold test for memes.

The third factor is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Substantiality of the part reproduced is a subjective analysis, which varies according to the category of memes. In some cases, the entire meme consists of a picture has been taken from a different source, such as personal photographs or rage comics; in others, like cinematographic stills, only one still from a fairly long cinematographic film is adopted. In every case however, it is the text that adds value to the meme. Without the text, the meme would be merely a picture. Since the value addition happens only with the text, despite there being a large portion that is reproduced the third factor is satisfied. Further the meme does not affect the “heart” of the work, since it is taken out of context and does not appropriate the essence of what the author is attempting to portray. It is merely a photograph or animation taken out of context from a varied range of numerous other interrelated works of the author.

However memes that are made for the sole intent of being memes reproduce the entire content without much change. Unlike in other categories where the main value addition is done by the accompanying text, these memes are complete in themselves and copying any aspect would lead to infringement.

The fourth and arguably the most important factor is the effect of use upon the potential market for or value of the copyrighted work. Memes as such have no adverse effect on the potential market of the original works. Each meme is unique and does not eat into the domain of another meme, let alone the original work. They are primarily created solely for recreational use and no commercial gain is intended. Access to memes is not restricted by any economic transaction. The target audience of the original works and the memes are usually different. In the case of cinematographic stills for instance, the memes are created for use and dissemination in social media, whereas a TV show or a film has a different audience. The creation or existence of a meme rarely affects the viewership of the show on which it is based. Such a meme is taken out of context with no reference to the story or background of the cinematographic work.

There have been instances, like with the Futurama memes, where the producers have harnessed social media via memes to promote their show. This is a clear commercial use of memes. However one needs to understand that fair use is a defence to copyright infringement and in this case, no infringement has occurred as the owner of the copyright has himself modified his product to make a meme. Fair use does not come into play in such a situation as there is no infringement in the first place.

Original works are the exception to this factor. They are targeted at the audience that regularly accesses memes. Sharing or modifying such memes would take away from the potential market that the author wished to tap while creating the meme. The market in which the two would operate is the same. Thus the fourth factor is not fulfilled with respect to this category of memes.

Consequently from the analysis above, it may be concluded that using the four-factor test, the first three categories of memes would be protected by the fair use doctrine, but the last category would not fall under this ambit. However, as already mentioned, the application of this test would differ on a case to case basis, depending on the facts of that case.

The question of copyright infringement by a meme recently came to the forefront when Getty Images ordered Get Digital, a small blog, to pay \$868 for copyright violation, for publishing the ‘Socially Awkward Penguin’ meme⁵⁵ in its blog.⁵⁶ The widely popular meme contains an image of a penguin walking awkwardly, reproduced from the photograph taken by nature photographer George F. Mobley. The meme however is modified, and includes a blue background and text that portrays a cringe worthy social setting. The issue was not taken to court, but had this been the case, it is fairly safe to conclude that the meme would be classified as fair use, using the four-factor test discussed above. The analysis is simple. The purpose of the photograph was clearly to depict a penguin in its natural habitat, whereas the objective of the meme is to depict an awkwardly humorous situation. The nature of the copyrighted work was clearly that of a published photograph, which makes the ambit of the fair use umbrella wider. On the question of substantiality of the part reproduced, it is only the silhouette of the penguin that was taken, and material modifications were made to the picture so as to create a distinct meme. The addition of

⁵⁵ Ref. Fig. 11.

⁵⁶ Michael Archambault, *Getty Images Forces Blog to Pay \$868 Fee for Using ‘Socially Awkward Penguin’* PETAPIXEL (Sept. 5, 2015) <http://petapixel.com/2015/09/05/getty-images-forces-blog-to-pay-868-fee-for-using-socially-awkward-penguin/> (last visited Dec. 20, 2016).

text moreover further enhances the uniqueness of the work and creates a stark distinction between the original and the meme. As to the effect on the potential market of the original image, there can be no adverse effect as the two operate in completely different domains; the original in the domain of nature photography and the meme in the arena of social media humour. Further the Socially awkward Penguin meme has seen numerous changes within the domain of memes itself, with the ‘Socially Awesome Penguin’ emerging as the successful variant of the awkward penguin. These modified versions of the original meme too fall under the protection of fair use for the same reasons as stated above.

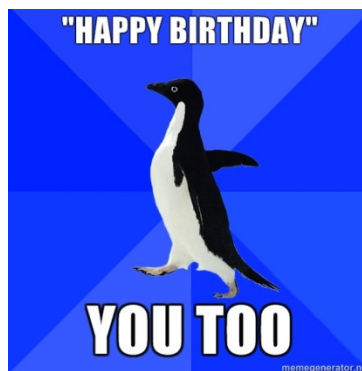


Fig 11⁵⁷

Conclusion

Use of memes could be considered a gross infringement of copyright of several thousand authors, but for the doctrine of fair use. The use of this doctrine requires a case to case analysis of facts; no blanket protection can be granted. The issue regarding fair use of memes has not been subjected to litigation. If and when such an eventuality occurs, it is safe to assume that the Court would evaluate the issues in a manner similar to the discussion in this paper.

⁵⁷STREET COUCH, Socially Awkward Penguin, <http://streetcouch.com/wp-content/uploads/2010/12/Socially-Awkward-Penguin-18.jpg> (last visited Dec. 20, 2016).